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Statutory Covenants for Title in Missouri

The Missouri statute providing that the use of the words, "grant, bargain and sell", in a fee simple conveyance shall be construed as imposing on the grantor certain covenants of title, is not only interesting in respect to its history, but, as it stands at present, it appears to be different in scope from any statute on the subject in any other jurisdiction. Furthermore, this statute has been construed by the Missouri Supreme Court so that the final joint product of the legislative and the judicial branches of the state is surprising.

Under the feudal system, the usual mode of conveying a present freehold interest in land was by feoffment. Such feoffment was usually attended by an implied warranty.¹ This warranty is said to have arisen from the obligation of the feudal lord to protect the holding of his tenant and was in the nature of a "covenant real" in that for its breach the courts awarded to the warrantee a judgment against the original warrantor, or his heirs, for lands of equal value to those which the warrantee had lost.² In 1536 the Statute of Uses was passed and following this there came into general use methods of conveying real estate which operated under this statute, and conveyance by feoffment with its attendant implied warranty fell into disuse. In a fee simple conveyance operating under the Statute of Uses there was no implied warranty of title nor were there any other implied covenants of any sort.³ If the title of the grantor proved defective the grantee or his assignees might have no remedy against the grantor. Hence there gradually grew up the custom of inserting personal covenants in such conveyances, for the purpose of giving a remedy against the grantor in case of defect or failure in

1. Williams, Real Property, 23 ed. 39, 647; Rawle, Covenants for Title, 5 ed. secs. 2 and 3.

2. Rawle, Covenants for Title, 5 ed. sec. 2; Reeves, Real Property, sec. 1149; Tiffany, Real Property, 449; *Dickson v. Desire's Admr.* (1856) 23 Mo. 150 at 151.

3. 15 C. J. 1212.

title.⁴ These covenants, doubtless, were at first expressed in various ways but eventually there developed six reasonably definite covenants, which were frequently used, and which are known as covenants for title. These several forms of covenants may be either general or special; that is, they may bind the covenantor as to any paramount right which may exist or be asserted against the covenantee, his heirs or assigns; or they may bind the covenantor only as to such paramount rights as are the result of his own acts or at least bind him as to less than all possible paramount rights which may be outstanding.⁵

The six covenants above referred to are the covenants of (1) seisin, (2) right to convey, (3) against incumbrances, (4) for further assurance, (5) for quiet enjoyment, (6) and of warranty.⁶

Since covenants for title are mere contracts the parties may invent new forms or materially modify the old forms by the use of appropriate language. Yet these six covenants for title are the ones commonly used and their construction and legal effect has become fairly well settled. In this country sometimes all of these covenants are inserted in a deed, though as to scope and effect there is little difference between the first two and little difference between the last two. At present, it seems, only the second, third, fourth and fifth are commonly used in England.⁷

4. Rawle, *Covenants for Title*, 5 ed. sec. 13.

5. Rawle in his *Covenants for Title*, 5 ed. sec. 126, in speaking of the covenants of warranty says, "Like all other covenants for title, it is either general, that is, extending to the claims of all persons whomsoever, or limited, that is, restricted to the acts of the grantor and those claiming under him." Perhaps the term "limited" would be better than the term "special". A special or limited covenant, however, ought to include any covenant which does not protect from all outstanding paramount rights. This is the meaning given to the term by the Supreme Court of Missouri. See *Miller v. Bayless* (1906) 194 Mo. 630, 92 S. W. 482, where the covenant was that the grantor would warrant against all claims of himself or those under whom he claims and the covenant was held to be special.

6. See 15 C. J. 1230; Reeves, *Real Property*, sec. 1143.

7. See Williams, *Real Property*, 23 ed. 666. It seems that the cove-

The old common law rule, that in conveyances operating under the Statute of Uses there were no implied covenants, remains the law today where not changed by statute; but it is now applicable to all modern deeds, being no longer limited to those operating under the Statute of Uses. While the law as to sale of chattels was at first similar, subsequently this was changed by judicial decision so that now where personal property is sold, without any provision concerning warranties, there is an implied warranty of title.⁸ There is even more reason why one who sells land without qualification and conveys the same should be held to guarantee his right to convey it, but any such change in the law as to conveyances of real property will have to come by way of legislation.

England has long had a carefully drafted statute which provides that in every conveyance of real estate for a valuable consideration, certain covenants shall be implied unless restrained by the language of such conveyance.⁹ Under this statute, the grantee and his heirs and assigns have the benefit of adequate covenants for title where the conveyance does not contain express covenants of title or language showing an intent not to make any covenants of title. Similar statutes are not common in this country but statutes having a much more limited application are found in some states.¹⁰ Most of the latter are undoubtedly due to the influence of the English Act of 6 Anne c. 35, sec. 30.¹¹ This sec-

nant of warranty, which has become the most important covenant of title in the United States, never was used in England. The covenant of quiet enjoyment was the most important covenant in England. See Rawle, *Covenants for Title*, 5 ed. sec. 110.

8. See Williston on Sales, secs. 218-220. The Uniform Sales Act contains a section which enacts the common law in this respect. The difference between the law as to sales of personality and sales of realty is discussed in *Dickson v. Desire's Admr.* (1856) 23 Mo. 151 at 159-162.

9. See L. R. 17 Statutes 115-206. (44 & 45 Vict. Ch. 41, sec. 7.)

10. See Code of Ark. (1916) sec. 823; Code of Ala. (1907) sec. 3421; Code of Del. sec. 3198 (1915); Idaho St. sec. 5384 (1919); Ill. St. sec. 2239 (1913); Jones & Addington Rev. L. of Nev. sec. 1063 (1912); Code N. D. sec. 5521 (1913); Tex. Civ. St. sec. 1112 (1914).

11. For a discussion of this act see Rawle, *Covenants for Title*, 5 ed. secs. 282, 283.

tion was part of a recording act passed for Yorkshire alone. It provided that the words "grant, bargain and sell" used in a deed of bargain and sale which limited an estate in fee simple, should import special covenants of seisin, quiet enjoyment and further assurance unless restrained by language contained therein. The scope of this statute was quite limited because it was restricted to deeds of bargain and sale conveying fees simple, and further, because it provided for the implication of special covenants only. A few years later a similar act was passed in the colony of Pennsylvania but because of an attempt to shorten and simplify the language, it lacked the clarity and precision of the English statute.¹² The Pennsylvania act for some reason omitted the special covenant of further assurance.¹³ Furthermore, the language in which the covenant of seisin was expressed was such as to require judicial construction to settle whether it was simply a special covenant of seisin or, whether both a special covenant of seisin and a covenant against incumbrance were intended.¹⁴ Similar litigation has occurred where this act has been copied by

12. This act was passed in Pennsylvania in 1715. The act provided: All deeds to be recorded in pursuance of this act, whereby any estate of inheritance in fee simple shall hereafter be limited to the grantee and his heirs, the words *grant, bargain and sell*, shall be adjudged an express covenant to the grantee, his heirs and in fee simple, freed from incumbrances done or suffered from the grantor (.), as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed, and that the grantee, his heirs, executors, administrators, and assigns, may in any action assign breaches, as if such covenants were expressly asserted.

13. This type of statute in this country usually provides a special covenant of seisin and a special covenant of quiet enjoyment as was the case in the early Pennsylvania statute. See statutes referred in note 10.

14. In *Gratz v. Ewalt* (1809) 2 Binn. 98, it was held that the language in the statute "that the grantee was seised of an indefeasible estate in fee simple, freed from incumbrances done or suffered from the grantor" must be read together and that therefore was to be construed as a covenant against the acts of the covenantor only. In other words, the statute was construed to contain only a special covenant of seisin instead of a general covenant of seisin and a special covenant against incumbrances. This construction was strongly commended by Chancellor Kent, who believed

other states.¹⁵ In 1804 what was probably intended to be a copy of the Pennsylvania statute was adopted in the Territory of Indiana.¹⁶ At that time the area now within Missouri was a part of the Territory of Indiana so this act applied to Missouri and remained among its statutes until 1825. The act of 1804 was ineffective for the reason that it contained an error of such a nature that the Supreme Court of Missouri declared the act could have no effect whatever.¹⁷ In the revision of 1825 was included a new section in which the error above referred to, was corrected.¹⁸ This new act was probably drafted after reference to both the English statute and the Pennsylvania statute. It differed from the English statute in that it applied to all conveyances in fee simple, instead of being limited to those made by deeds of bargain and sale; it made the covenants of seisin and of further assurance general instead of special; it omitted the special cove-

the implication of a general covenant of seisin would be dangerous. See 4 Kent's Comm. 474.

15. The decision of *Gratz v. Ewalt*, *supra*, has been followed quite generally. See *Roebuck v. Dupuy* (1840) 2 Ala. 541; *Clanch v. Allen* (1847) 12 Ala. 164; *Winston v. Vaughan* (1860) 22 Ark. 72; *Prettyman v. Wilkey* (1857) 19 Ill. 234.

16. See Laws of La. 1804, p. 101, sec. 2 for this statute.

17. This act was undoubtedly copied from the Pennsylvania statute. It included the section above quoted in note 12, except that it read, "That all deeds to be recorded pursuant to this law, whereby any estate of inheritance, in fee simple, shall hereafter be limited to the grantor, and his heirs, the words, grant, bargain and sell, etc." In *Carter v. Soulard* (1825) 1 Mo. 576 it was held that the word "grantor" in the section rendered the entire section meaningless.

18. R. S. 1825, p. 217. The section reads as follows: "That all deeds whereby any estate of inheritance in fee simple, is or shall be limited to the bargainee or grantee, and his heirs, the words, "grant, bargain and sell", shall amount to, and be construed and adjudged to be, express covenants to the bargainee or grantee, his heirs and assigns, for the bargainer or grantor for himself, his heirs, executors, and administrators, that the bargainer or grantor was, at the time of the execution of such deed, seised of an indefeasible estate in fee simple, in and to the lands, tenements and hereditaments, thereby granted, bargained and sold; and that

nant of quiet enjoyment; and it added a special covenant against incumbrances. In substance, the act of 1825 has remained in force ever since with one important amendment. About 1879 the act was amended as to make almost general, the statutory covenant against incumbrances.¹⁹

The special covenant against incumbrances was probably inserted in this act of 1825, because those who drafted it erroneously believed the English act and the Pennsylvania act both contained such a covenant. This was not true for the language in each of these statutes concerning incumbrances was part of the special covenant of seisin.²⁰ The covenant for further assurance may

the same was then free from incumbrances, done or suffered from the bargainor or grantor, his heirs, and assigns, *and all claiming under him*; and also for further assurance thereof to be made by the bargainor, his heirs and assigns; unless the same shall be restrained and limited by express and particular words, contained in such deed, and the bargainee or grantee, his heirs, executors, administrators, and assigns, respectively, shall and may in any action to be brought, assign breaches thereupon, as they might do in case such covenants were expressly inserted in such deed."

19. In the Revised Statutes of 1879 (sec. 675) the clause "and all claiming under him" following the special covenant against incumbrances was changed to "and all under whom he claims". After this amendment the covenant covered all incumbrances done or suffered by any one in the chain of title preceding the coverantee but not as to paramount incumbrances not so done and suffered. Thus the covenant would not protect against a right of way acquired by prescription before the first one in the chain of title acquired his title. Properly speaking, the statutory covenant against incumbrances is a special covenant and not a general one. The writer has been unable to find any act of the legislature authorizing this amendment. Authority was given to the Committee of Revisors to correct errors. One cannot help but wonder whether they did not make this very material change in the language of the statute under the impression that the words "and all claiming under him" were so printed because of an error and therefore ought to read "and all under whom he claims". In fact, one wonders whether some of the changes made in the act of 1825 itself were not due to a misunderstanding of the language and the intended scope of the English and the Pennsylvania statutes.

20. The Supreme Court in *Clore v. Graham* (1876) 64 Mo. 249, was laboring under such an error and a like misunderstanding on the part of

have been inserted because such a covenant appeared in the English act, though it had been omitted from the Pennsylvania statute. But one wonders why the only covenant on which the assignee of the covenantee could have a remedy in the majority of cases as the law then stood, viz, the covenant of quiet enjoyment, was omitted, though this covenant was found both in the English statute and in the Pennsylvania statute. The result of the omission of this important covenant was to make the act as passed lopsided.²¹ Had a general covenant of quiet enjoyment been inserted, the act would have been a fairly comprehensive one for in case of total or partial failure of title the covenantee would have had a remedy on the general covenant of seisin, but if he got possession of the land then he or his assignees would have had a remedy on the covenant of quiet enjoyment, if their enjoyment had been disturbed by one having a paramount right. But as the act stood a grantee of the covenantee seemingly could

the legislature is therefore not improbable. For cases construing the language like that in the Pennsylvania statute see notes 14 and 15.

In the very carefully worded English act the covenant of seisin read: "seised of an indefeasible estate in fee simple, free from all incumbrances" The last clause was necessary to make the covenant of seisin cover cases where there happened to be an outstanding paramount incumbrance which did not constitute a breach of the ordinary covenant of seisin.

21. The covenant of quiet enjoyment has sometimes been called in England the "sweeping covenant" and its scope is even broader than that of our covenant of warranty. See Rawle, *Covenants for Title*, 5 ed. secs. 91 and 114.

While the covenants in the English statute were limited to the acts of the grantor, that is, were special, they would permit a remedy either to the covenantee or to his assignees if there proved to be any defect in title due to such acts. The covenantee could have a remedy on the covenant of seisin if he failed to get possession of all or part of the land while the covenant of quiet enjoyment would run with the land for the benefit of assignees if possession should subsequently be disturbed by any one having a paramount right due to the act of the grantor. The Missouri statute failed to provide anything to take the place of this covenant of quiet enjoyment, a defect which the courts have since corrected as hereafter explained.

have no remedy on any statutory covenant therein provided except in the rare cases where he could enforce the covenant for further assurance. As will appear hereafter, the Supreme Court of Missouri later extended the general covenant of seisin in such a manner as to make it cover most of the ground that would have been covered by a general covenant of quiet enjoyment, though it would seem probable that those who drafted and passed the act could have had no such intention.

The Missouri statute²² in its present form is as follows:

"The words 'grant, bargain and sell', in all conveyances in which any estate of inheritance in fee simple is limited, shall, unless restrained by expressed terms contained in such conveyances, be construed to be the following expressed covenants on the part of the grantor, for himself and his heirs to the grantee, his heirs and assigns: First, that the grantor was, at the time of the execution of such conveyance, seised of an indefeasible estate, in fee simple, in the real estate thereby granted; second, that such real estate was, at the time of the execution of such conveyance, free from encumbrances done or suffered by the grantor or any person *under whom he claims*; third, for further assurances of such real estate to be made by the grantor and his heirs to the grantee and his heirs and assigns; and may be sued upon in the same manner as if such covenants were expressly inserted in the conveyance."²³

For convenience the construction and effect of this statute will be considered under three divisions: first, the construction and effect of the statutory covenants as covenants for title; second, the effect of the clause of the statute, "unless restrained by expressed language contained in such conveyances"; third, the effect, if any, of these statutory covenants on after acquired title.

22. R. S. 1919, sec. 2180.

23. The words in italics are the only substantial change in the meaning of the statute. The act was so amended in 1879. See note 19 *supra*. There have been other changes in the language of the statute but little change in the substance. The chief change in the wording was made in 1835. See R. S. 1835, sec. 7, p. 129.

I.

THE STATUTORY COVENANTS AS COVENANTS FOR TITLE.

It is plain that the Missouri statute passed in 1825 (modified as heretofore indicated) was of limited application. In the first place, it applied only to deeds using the words, "grant, bargain and sell", which limited fees simple, and contained no restraining language. Presumably if any two of the three chief words in this clause should be used, while the instrument would be effective as a conveyance, the grantor would not be bound by any statutory covenants.²⁴ But since the custom of using this particular group of words in conveyances of real estate has been almost universal for centuries,²⁵ one not cognizant of the statute in question is almost certain to use these words, and if he does, he will be bound by the statutory covenants unless their effect is "restrained by expressed terms" contained in the conveyance. In the second place, as the law apparently stood when the act was passed in 1825, the statute contained but one covenant capable of running with the land—that for further assurance—and it is relatively unimportant. The covenant for quiet enjoyment, which in England has been called the "sweeping covenant", seems to have been omitted intentionally, nor was its American cousin, the covenant of warranty,²⁶ inserted in its stead. Apparently the intent was to have no covenant, except that for further assurance, capable of running with the land. In the third place, of the two important covenants in the statute, that against incumbrances was expressly limited to acts of the covenantor, the scope of this

24. It has been so held in other states which have similar statutes. See *Wheeler v. County of Wayne* (1890) 132 Ill. 599, 24 N. E. 625; *Gee v. Pharr* (1843) 5 Ala. 586.

25. "The words, 'grant, bargain and sell' constitute the ordinary formula for the conveyance of real estate and are generally employed mechanically in writing conveyances." Goode, J., In *Miller v. Bayless* (1903) 101 Mo. App. 487, 491.

26. See Rawle, *Covenants for Title*, 5 ed. sec. 91.

covenant not being increased by amendment of the statute until many years later.²⁷

Under the statute of 1825, a right of action on the general covenant of seisin and a right of action on the special covenant against incumbrances would accrue, if at all, as soon as the deed was delivered, and the statute of limitations would start to run against such causes of action immediately. Only the privilege of having some further conveyance from the covenantor in order to perfect the title might pass with the land if conveyed by the covenantee. As is pointed out above, the covenant of quiet enjoyment, which would have run with the land and been available to such assignee was apparently omitted intentionally. However, the Supreme Court of Missouri has since succeeded in making the covenants of seisin and against incumbrances almost completely fill the gap left by the omission of the covenant for quiet enjoyment.²⁸

By the weight of authority in 1825, the covenant of seisin²⁹ and the covenant against incumbrances³⁰ were held to be covenants *in praesenti*, and therefore broken, if at all, as soon as made, and, on breach of either covenant, it merged into the cause of action for damages which immediately accrued to the covenantee. Only the covenantee or one to whom he had assigned his chose in action as such could sue. In 1813, in *Kingdon v. Nottle*,³¹ an English court had held that want of seisin of the covenantor was a sort of continuing breach of the covenant of

27. See note 19, *supra*, for the amendment of 1879.

28. The gap would be completely filled were it not for the fact that the present statutory covenant against incumbrances is limited. It covers only incumbrances suffered by the grantor and those under whom he claims. For a discussion of the scope of an express covenant somewhat similarly limited see *Miller v. Bayless* (1906) 194 Mo. 630, 92 S. W. 482

29. This is still the weight of authority in this country. See collection of cases in Rawle, *Covenants for Title*, 5 ed. sec. 205; 125 Am. St. Rep. 447-450.

30. See collection of cases in Rawle, *Covenants for Title*, 5 ed. sec. 212; 15 C. J. 1247.

31. (1813) 1 M. & S. 355; (1815) 4 M. & S. 53. See also *King v. Jones* (1814) 5 Taunt. 418.

seisin, and that the right of action should pass to and vest in the party who had succeeded to and held the land when a substantial breach occurred, that is, when substantial damages were suffered. This idea of a continuing breach was probably invented in order to get around the rule that a chose in action was not assignable, thus giving the heirs or assigns of the land the benefit of the covenant. The court considered this to be the intent of the parties as indicated by the language used. Later, strange to say, it was held that the statute of limitations begins to run as soon as the deed containing the covenant is delivered, though no substantial damages had yet been suffered.³² Perhaps one can fairly say the parties intend such a covenant to run in so far as they are able to make it run where they make such covenant binding on the heirs and assigns of both parties.

The question whether the statutory covenant of seisin in Missouri runs with the land first came before the Supreme Court of Missouri twenty-two years after the passage of the act of 1825. The court then said that the covenants of seisin and against incumbrances, "are, by the rules of common law, personal covenants, and are broken, if broken at all, the moment they are made. From their very nature they are incapable of further violation." Accordingly it was decided that the statutory covenant of seisin did not run with the land.³³ In the course of its opinion the court noticed *Kingdon v. Nottle* and its doctrine was disapproved.

32. *Spoor v. Green* (1874) L. R. 9 Exch. 99. In this case it was held the cause of action was barred by the statute of limitations, though substantial damages were not suffered by the plaintiff until more than the statutory period after the delivery of the deed containing the covenant. It seems therefore that the fact there is only a technical breach for which only nominal damages can be recovered does not prevent the running of the statute of limitations. In Missouri the courts have from the first held that the statute of limitations will not begin to run until substantial damages accrue. In other words, no cause of action arises till that time. If the covenant is held to run with the land certainly this is better than the English view. If the covenant is one of indemnity then there should be no right of action till indemnity can be claimed. Nevertheless, courts in Missouri still speak of a technical breach for which they say nominal damages may be recovered.

This decision seems sound: first, because the statutory covenants of seisin and against incumbrances are stated in the form of covenants *in praesenti*, and therefore, the decision was and still is in accord with the weight of authority; second, because the covenants are found in a statute which is in derogation of the common law and therefore to be strictly construed; third, because the court here was construing a statute, that is, determining the meaning intended by the legislature, while in *Kingdon v. Nottle* the English court based its decision on the intent of the parties to the covenants as shown by their own language. But the language of the statutory covenants is that of the legislature and cannot be taken as expressing the intent of the parties. Instead, it expresses the obligation imposed on the grantor by the law regardless of his intent. Some years later the same question arose a second time³⁴ and the supreme court reversed its former decision and purported to follow the doctrine of *Kingdon v. Nottle* and similar authorities. The statutory covenant of seisin was held to be a covenant which runs with the land and is enforceable by the covenantee's successor in title who owns the land at the time substantial damages are suffered.³⁵ Unlike the English court, it was held that no action can be maintained on the covenant until substantial damages have been suffered and that the statute of limitations does not run until such damages have accrued.³⁶ In the latter respect the decision is to be commended.

33. *Collier v. Gamble* (1846) 10 Mo. 467. To the same effect is *Chauvin v. Wagner* (1853) 18 Mo. 532.

34. *Dickson v. Desire's Admr.* (1856) 23 Mo. 151.

35. This case has been uniformly followed. The effect of the decision is to make the statutory covenant of seisin, a covenant of indemnity which will run with the land until a right to demand indemnity arises. If the covenantee fails to get possession of the land because of a paramount title the breach is complete at once, but if he gets possession then the covenant runs until he or his assigns suffer substantial damages. *Chambers, Admr. v. Smith's Admr.* (1856) 23 Mo. 174; *State v. Tittman* (1896) 134 Mo. 162, 35 S. W. 579; *White v. Stevens* (1883) 13 Mo. App. 240.

36. See cases cited in notes 34 and 35, *supra*.

The court throughout the opinion treated the statutory covenant of seisin as if it were the language of the covenantor, thus to the fullest extent carrying out the direction in the statute that "The words shall be construed to be the following expressed covenants on the part of the grantor" The same may be said of all subsequent cases dealing with these statutory covenants. The court said that the intent of the legislature was that this covenant should run with the land. This intent of the legislature was not determined by explaining the origin and history of the statute and considering the effect of the fact that a covenant of quiet enjoyment had apparently been deliberately omitted from the statute, from which an intent contrary to that found by the court might well have been inferred. Instead, a minority view as to the nature of an express covenant of seisin was approved by the court and from this the conclusion was reached, that, since the court approved this view, the legislature necessarily intended it.³⁷ All this is water which has long since passed under the bridge, but there seems little doubt that the legislature had no such intent. In other states where there are statutes providing for the implication of certain covenants from the use of similar words, such statutes have been always strictly construed.³⁸

Subsequently it was held that the special statutory covenant against incumbrances also runs with the land³⁹ and after the amendment of 1879, which made this covenant almost general in scope, the two statutory covenants covered almost all the territory which would have been covered by a general statutory covenant of warranty or of quiet enjoyment. The covenant of warranty or of quiet enjoyment is generally held to be broken if the grantee fails to get possession because the possession is in one

37. Among the cases cited by the court all but one of the American cases were decided after the act in question was passed. It is therefore probable that no member of the legislature has ever heard of the doctrine of *Kingdon v. Nottle*.

38. See Rawle, *Covenants for Title*, 5 ed. 285.

39. *Winnington v. Pennock* (1889) 36 Mo. App. 688; *Eau Claire Lumber Co. v. Anderson* (1883) 13 Mo. App. 429.

having paramount title.⁴⁰ If, however, the covenantee secures possession of the property then he cannot sue for breach of these covenants until his possession has been disturbed by one having a paramount right, for these covenants are covenants of indemnity, and damage must be suffered before a remedy may be had. Under the Missouri statutory covenant of seisin, recovery can be had if the possession is in one with paramount title at the time the deed containing the covenant is delivered; but if possession is secured by the covenantee then the covenant is treated as a covenant running with the land and no action will lie for substantial damage until substantial damage has been suffered. In fact it is doubtful whether there is even a technical breach of this covenant before substantial damage has accrued.⁴¹ But if enjoyment is disturbed by one having a paramount right less than seisin no action would lie on the covenant of seisin⁴² though action could be maintained on an express covenant of warranty or of quiet enjoyment in such a case.⁴³ Hence the statutory covenant against incumbrances fills this gap except as to incumbrances which are not suffered by the covenantor or those under whom he claims. So completely do these two statutory covenants now take the place of a general covenant of warranty that in the opinions of the Missouri courts the statutory covenant of seisin is often loosely and inaccurately called a covenant of warranty, and frequently it does not appear from the facts stated in a case whether the covenant under consideration is statutory or express.⁴⁴

Chancellor Kent doubtless would have called a statute con-

40. See Rawle, *Covenants for Title*, 5 ed. 139.

41. See *Murphy v. Price* (1871) 48 Mo. 247; *Cockrell v. Proctor* (1877) 65 Mo. 41; *Blevins v. Smith* (1890) 104 Mo. 583, 16 S. W. 213.

42. *Kellogg v. Malin* (1872) 50 Mo. 496; *Blondeau v. Sheridan* (1884) 81 Mo. 545.

43. See Rawle, *Covenants for Title*, 5 ed. 114.

44. See *Jones v. Whitsett* (1883) 79 Mo. 188; *Diggs v. Henson* (1913) 181 Mo. App. 34, 163 S. W. 565; *Jeffords v. Dreisbach* (1912) 168 Mo. App. 576, 153 S. W. 274; *Staed v. Rossier* (1911) 157 Mo. App. 300, 137 S. W. 901.

strued as is the one under consideration, "a trap for the unwary",⁴⁵ and in a sense this is true. The act provides that a certain group of words which "constitute the ordinary formula for the conveyance of real estate and are generally employed mechanically in writing conveyances"⁴⁶ if used, shall be construed as express covenants of title made by the grantor. The words in themselves do not indicate an intent to make any covenants, and the group evidently was chosen because it was so universally found in deeds and therefore would catch the unwary. One who knows the law can easily avoid the effect of the statute, either by using appropriate "restraining words", or by refraining from the use of the complete magic formula. Likewise one who knows the law can easily avoid the implied warranty of title in sales of personal property by the use of appropriate language, though he will often omit the use of such language for fear of the effect which it might have on the consummation of the particular transaction. But one who knows the effect of the Missouri statute will often allow himself to be bound by these statutory covenants for similar reasons. But is such a statute to be condemned because it entraps the ignorant? It is submitted this depends on whether as a matter of policy one who sells and conveys real property ought to be held to warrant the title as in the case of sales of personal property. There seems to be no good reason why a man should be permitted to represent that he owns land by purporting to convey fee simple title thereto, and escape liability merely because he has not expressly covenanted that he has good title. Historically, this has not been the law as to real property but originally there was no implied warranty of title on sale of personalty. As to personalty the law was gradually changed by judicial decision and perhaps a like change would have taken place in real property law, were it not for the reluctance of courts to change the law as to realty by judicial decision. A proper legislative change is therefore to be com-

45. See his comment on the construction of the Pennsylvania statute in 4 Kent Comm. 474, 12 ed.

46. See note 25, *supra*.

mended, but such law ought to be made to apply to all conveyances of real property for a valuable consideration, and ought not to be limited to conveyances in fee simple which contain the words, "grant, bargain and sell". Such a statute has long existed in England.⁴⁷ It may therefore be urged that the Missouri statute construed as above stated, is not objectionable as to the results reached, whatever one may think of the manner in which such results were originally attained by the courts. If any change be made an act patterned after the English statute ought to be passed.

II.

WHEN RESTRAINED BY EXPRESSED LANGUAGE

The statute under consideration provides that, "the words 'grant, bargain and sell', in all conveyances in which any estate of inheritance in fee simple is limited, shall, *unless restrained by expressed terms contained in such conveyances, be construed* to be the following expressed covenants" (Italics supplied). When will the statutory covenants be "restrained by expressed terms"? If there were language in the conveyance stating the grantor was to be bound by no covenants for title, then certainly there could be no statutory covenants for title. The same might be true if this were the necessary implication from the language used in the conveyance. Also if the conveyance contained full express covenants for title it would seem to follow that there could be no statutory covenants, whether the express covenants were general or limited, for if limited, it could not be plausibly argued that the general statutory covenants would prevail contrary to the express intent of the parties as shown by these express covenants in the deed.⁴⁸ But suppose the conveyance uses the magic words, "grant, bargain and sell", and then contains one express covenant for title. For example, suppose the express covenant is either a general or a special covenant against incumbrances, or a general or special covenant of warranty. Should

47. See note 9, *supra*.

48. As will hereafter appear this probably is not at present the law of the state though it ought to be.

such express covenant for title be considered as restraining all the statutory covenants?

At common law the general rule is that the various covenants for title are independent covenants, therefore an express general covenant of one kind is not restrained by a subsequent express special covenant of another.⁴⁹ Thus a special covenant of warranty will not restrain a general covenant of seisin or against incumbrances, but it will restrain a preceding general covenant of warranty. In other words, one covenant for title will restrain a preceding one only where the two are irreconcilable, as where they are both covenants of warranty, or both covenants of seisin. It must be noted that in these cases the parties have, through their own negligence placed inconsistent express covenants in the deed, and thus given rise to a difficulty which the courts have to decide. Naturally the tendency was to construe the covenants most strongly against the grantor. Courts have to do the best they can in such cases and the grantor should not complain of the result. But *statutory* covenants ought not to be construed most strongly against the grantor, for they derogate from the common law.⁵⁰ Nor in dealing with inconsistent covenants should a statutory covenant be considered as indicating the intent of the grantor for the reason that it does not indicate his intent.

Coming back to the statutory covenants it is clear that the special covenant against incumbrances in the act of 1825 did not restrain the preceding statutory covenant of seisin because these covenants are fixed by the legislature and both must stand, if possible.⁵¹ In case the words, "grant, bargain and sell" are used, and an express covenant for title follows, should we treat the case as if all the covenants were the express covenants of the grantor, or should we consider that the express covenant is "expressed language" restraining all statutory covenants? It would be quite

49. Rawle, *Covenants for Title*, 5 ed. 287 ff.

50. This was stated as the law in *Miller v. Bayless* (1905) 194 Mo. 630, 638, 92 S. W. 482.

51. This seems quite obvious yet the point was seriously considered and decided in *Alexander v. Schreiber* (1847) 10 Mo. 460.

possible to hold that since the express covenant has been inserted, the grantor has clearly indicated his intent to be bound by no other covenants, and that this intent is shown by express language in the conveyance. As a rule, if but one express covenant is inserted, it is the covenant of warranty and if there are more covenants this covenant will be found among them. Admitting the interpretation of the statutory covenants of seisin and against incumbrances as shown in the preceding portions of this paper may be desirable as to result there reached, it does not follow that the language of the statute ought to be so stretched as to make these statutory covenants the "expressed covenants" of the parties to the extent of determining the intent of the grantor, as if they had actually been inserted by him. They do not indicate his intent. They are imposed on him regardless of his intent. Hence if his intent is clearly expressed, as it certainly is where he inserts an express covenant of warranty, it would seem this intent ought to be respected, unless the statute prohibits it, or unless there is some other very strong reason to the contrary.

The grantor usually does not know the law nor can he be said to be negligent, as may be said in the case where the inconsistent covenants are express. If he inserts a special covenant of seisin following the words "grant, bargain and sell", certainly he ought not have imputed to him the intent to make both a general covenant of seisin and a special covenant of seisin. But if we apply the rules which have been laid down in cases where the inconsistent covenants were express covenants, this is the result.⁵² In the law of sales of personal property we find the doctrine well established that, if there is an express warranty, this will exclude all implied warranties of the same or of a similar kind.⁵³ Applying this

52. One ignorant of the effect of the use of the words, "grant, bargain and sell" would doubtless, if he intended to make but one covenant, insert that covenant. The deed, then, would seem clear on its face. Yet according to the decisions the grantor has manifested utterly inconsistent intents by inserting inconsistent covenants, and the court is therefore obliged to determine his meaning. This meaning when determined is most certainly far from the real intent of the grantor.

53. See 35 Cyc. 392.

somewhat imperfect analogy we ought to come to the conclusion that the intent here would be to exclude all other covenants of title.⁵⁴ Probably no one would doubt that this was the grantor's real intent. But the courts have seen fit to hold otherwise and not only do they make a deed which is apparently innocent on its face, a thing which seems to bristle with ambiguities, but in some cases they eventually conclude, as will be shown below, that the parties did not intend anything at all by language in a deed, which, on its face, looks just like a valid and effective express covenant for title and would be such were it not for the words "grant, bargain and sell", preceding the covenant.

The courts have thus far assumed that the statutory covenants must be treated in all respects as if they were express covenants for title inserted in the conveyance by the grantor. The law has been stated as follows:⁵⁵

"It is unquestionably the law of this state, . . . that general covenants in a deed of conveyance, whether they be expressed on the face of the deed or raised by implication by the use of the words, 'grant, bargain and sell', are not restricted in their operation by special covenants, *unless the different covenants are so irreconcilable that they cannot all have their full force*, or unless the limited covenant refers to or is connected with the general covenants in such a manner as to show the intention of the grantor was to restrain the full force and effect of the general covenant."⁵⁶

54. In sales of personal property the warranties thus excluded are implied warranties while here they would be the statutory warranties implied from the use of "grant, bargain and sell". The reasoning would apply to both cases though in the latter the result would be reached by holding the express warranty is sufficient "restraining language" within the meaning of the statute.

55. *Miller v. Bayless, supra*, at pages 639-40.

56. The italics are supplied. There is doubt whether the language in italics has any place in the statement of the rule of law in question, for the decisions strongly indicate that the fact that an express covenant may be entirely inconsistent with the statutory covenants is immaterial. It will not limit the statutory covenants.

The common law doctrine as to the effect of a special covenant for title on preceding general covenants, is at best, none too satisfactory, but it originated in cases where the difficulty was due to the negligence of the parties in inserting inconsistent express covenants. Frequently two express covenants merely overlapped. Moreover, where a special covenant against incumbrances followed a general covenant of seisin, if the two were held to exist side by side there might be many cases of existing incumbrances which would not constitute a breach of either covenant. If a special covenant of warranty followed a general covenant of seisin at common law there might be many situations where recovery could not be had on either covenant. Thus if the covenantee got possession of the land and there was an outstanding title, while he could sue on the covenant of seisin, yet if he conveyed the land to another, or if he failed to discover the outstanding right or did not try to enforce it until after his action was barred by statute of limitations, then no recovery could be had unless there was also a breach of the special covenant of warranty. Thus the covenantor might escape liability in many cases and his special covenant would thus result in some advantage to him. The two covenants are not wholly inconsistent.⁵⁷

But as soon as the covenants of seisin and against incumbrances are held to be covenants running with the land the situation is changed. In a jurisdiction where it is so held, if there are general covenants of seisin and against incumbrances followed by a special covenant of warranty, the latter must either be held to restrain the two general covenants, or it must be held superfluous and of no effect at all. The covenant of warranty has become entirely inconsistent with the other two covenants, because since they run with the land they now include the covenant of warranty.⁵⁸

57. This is because the covenant of seisin is not broken by the mere existence of many sorts of incumbrances and it does not run with the land.

58. The common law rules arose before the doctrine of *Kingdon v.*

The cases which have been held to establish the doctrine that the statutory covenants for title must be treated as if they were express covenants of the grantor, when considering the question as to whether they are restrained by express covenants, are *Alexander v. Schrieber*⁵⁹ and *Shelton v. Pease*.⁶⁰ Both were decided before the statutory covenants of seisin and against incumbrances were held to be covenants running with the land. These cases were followed by *Walker v. Dever*,⁶¹ where there was an express general covenant of warranty. Recovery was allowed on this covenant. At that time the statutory covenant against incumbrances was special, so what the court held was that this special statutory covenant did not restrain the express covenant of warranty following it, a point which seems obvious. The court did say that the two covenants were perfectly consistent with each other. That statement seems clearly erroneous. The express covenant of warranty was inconsistent with the special statutory covenant. In *Tracy v. Grefert*,⁶² the St. Louis Court of Appeals had under consideration a conveyance which used the magic words followed by an express special covenant of warranty and recovery was allowed on the statutory covenant

Nottle was announced. In Missouri, as has been indicated above, the doctrine of this case has been applied to the statutory covenants of seisin and against incumbrances. The two thus taken together are in effect equal to one general covenant of warranty, except for a tiny gap due to the fact that the statutory covenant against incumbrances is not quite general in form. It is obvious that an express covenant of warranty, following the words, "grant, bargain and sell", is absolutely irreconcilable with the statutory covenants of seisin and against incumbrances and must either restrain them completely or have no effect whatever, unless as a mere matter of pleading.

59. (1847) 10 Mo. 460.

60. (1847) 10 Mo. 473. At the time of this decision the statutory covenants of seisin and against incumbrances did not run with the land hence there was not entire inconsistency.

61. (1883) 79 Mo. 664. At the time of this decision the law was well established, that the statutory covenants run with the land.

62. (1893) 54 Mo. App. 562.

of seisin. The court in the course of its opinion, said:

"It may be granted that the two covenants refer to the same subject, i. e., title to the lot in question, *and that the special warranty was superfluous*, because the assurance therein contained was fully covered by the undertakings in the prior statutory covenant; yet it does not follow that for these reasons the two covenants are inconsistent

Their relation to each other is similar to that of the whole and some of its parts; the statutory covenant of seisin was an assurance of title as against the grantor and all others; the special warranty ran against the grantor and some others, i. e., those claiming under him".⁶³

The court thus concludes the covenants are not sufficiently inconsistent even though it admits they are so inconsistent that the express special covenant of warranty is entirely superfluous. What is inconsistency if these covenants are not inconsistent? The express covenant of the grantor was thus wiped out entirely so that there could be no possible case when it could have any effect on the substantial rights of the parties. This decision has been followed by appellate courts⁶⁴ and has not

63. Italics supplied. The result of the court's argument is that two covenants for title are not so inconsistent as to restrain each other unless they both have precisely the same scope. In other words, they are not sufficiently inconsistent unless they are in effect identical.

64. *Coleman v. Clark* (1899) 80 Mo. App. 339; *Wright v. Beram* (1915) 190 Mo. App. 336, 177 S. W. 324. In the latter case it was held that a deed containing the words, "grant, bargain and sell" followed by an express covenant of special warranty, was a general warranty deed, and that a vendor bound by contract to give a general warranty deed had fully complied with his duty by making this deed. The court recognizes the fact that the statutory covenants of seisin and against incumbrances are equivalent to a general covenant of warranty. It further holds that the special covenant of warranty is a mere superfluity. As has been pointed out before since the statutory covenant against incumbrances is special the decision of the court that the deed was a warranty deed is not quite correct. For example, suppose A and B own adjoining land, and that B has an easement appurtenant over A's land. C disseises A and B and holds until he acquires title under the statute of limitations, but B insists on the exercise of his right of easement during the adverse

been disapproved by the Missouri Supreme Court.⁶⁵ In *Miller v. Bayless*,⁶⁶ the special covenant read: "*It is expressly understood in this conveyance and in the covenants herein*, that the grantors will warrant and defend the title to the premises conveyed against the lawful claims of themselves, their heirs and those through whom they claim." Because of the words in italics it was held that the grantors refused to bind themselves by the statutory covenants. The court stated this judgment was not in conflict with *Tracy v. Grefert*. If not, and if that case is the law then express covenants cannot restrain the effect of the statutory covenants implied from the use of the words, "grant, bargain and sell", unless there is in addition some sort of express language which refers to the statutory covenants in such a manner as to show the grantor intended to restrain their effect. Admitting for the sake of argument that the statutory covenants are to be treated as if express, the courts above have not even applied the old common law rule correctly for by common law a special covenant of warranty did restrain a preceding general covenant of warranty, and the two statutory covenants are in effect a general covenant of warranty. The character and effect of the covenants of seisin and against incumbrances have been completely changed so that a special covenant of warranty is inconsistent with them in every respect so that the case in fact falls within the common law rules and the special covenant should control even if we regard the statutory covenants as the express covenants of the grantor. It is submitted that no grantor who inserts a sweeping covenant of special warranty intends to make a general warranty deed. He puts in just the covenants he intends to insert and no others. It is submitted that such language is restrain-

holding by C. C then deeds the land he has thus acquired by a deed such as that in the above case. The grantee of C would have no remedy on the covenants of the deed, yet there would be an incumbrance on the land, i. e., an easement of way across it.

65. Perhaps it was approved in *Miller v. Bayless, supra*. See page 639.

66. See note 50.

ing language which ought to be held to do away with the statutory covenants entirely.

In other jurisdictions where there are statutes under which covenants are implied from the use of the words, "grant, bargain and sell", it has been held that the insertion of one or more express covenants does away with all statutory covenants, because the statute was not intended to apply to cases where express covenants are inserted, but only to cases where there are no express covenants.⁶⁷ The reasoning of the Illinois Supreme Court⁶⁸ on this point as expressed in the following language is difficult to answer :

"This statutory provision does not create this covenant against the intention of the parties. But only, where they intend that this statutory covenant shall operate and have effect, for the legislature has provided that these words shall not have this effect if they are limited by express words in the deed. It would seem to be clear that the employment of any language from which it appears the parties intended that these words should not have such an effect, would be sufficient to do away with this statutory covenant. The question then recurs whether that intention is manifested by the insertion of the covenant of general warranty in this deed.

"At common law these words had no technical meaning attached to them. They have never been held to imply a covenant of any kind unless it were under statutory enactment, although they have always been employed in the granting clause in conveyances. Notwithstanding the general rules of construction requiring that the language of a deed must be construed most strongly against the grantor, it is

67. *Douglass v. Lewis* (1888) 131 U. S. 75, 33 L. Ed. 53. In this case the court had under consideration a statute copied from that of Missouri. *Finley v. Steele* (1859) 23 Ill. 54; *Weems v. McCaughan* (1847) 15 Miss. 422; *contra*, *Brown v. Tomlinson* (1850) 2 Greene (Ia.) 525; *Polack v. Mattson* (1918) 22 Idaho 727; *Funk v. Veneida* (1824) 11 S. & R. 109 (Pa.).

68. *Finley v. Steele*, *supra*, at page 56-7.

believed not to be applicable to this case, as it is a rule of equal force that all statutes in derogation of the common law must be construed strictly. Then when the legislature has invested these words with an operation which they did not possess at common law, that operation should not be extended by liberal intendment, beyond the obvious intention of the law makers, and if there is a doubt whether the present case by the employment of the general covenant is embraced within its provisions, it should not be held as controlling the rights of the parties. There is scarcely a court before which this act has come for construction that has not characterized it as a provision of dangerous tendency, calculated to entrap the ignorant and unwary into liability which they never intended to incur. The words to any mind, but that of a person belonging to the legal profession, never could convey the idea that they imposed the liability of a covenant of any description. They have no such meaning according to their general use, and only acquire it by force of the statute. This is also a sufficient reason to disincline courts to extend their operation beyond the cases clearly indicated by the enactment

“If the grantor were to write out this statutory covenant in a deed and also insert a covenant of general warranty, it would present a very different question, as then it would by that act appear to be his intention that both covenants should be operative. In such a case the court would have to give effect to each, so far as it was not limited by the other.”

So far as the writer has been able to discover our courts which alone hold the contrary have never discussed matters suggested above, but have treated the case as if the grantor had in fact written the statutory covenants into the deed. But it is submitted that the courts of appeals in Missouri seem to have gone much further. Since *Dickson v. Desire's Admr.*^{68a} the statutory covenants of seisin and against incumbrances have been so changed that they are covenants of indemnity like the covenant

68a. (1856) 23 Mo. 151.

of warranty and any application of so-called common law rules must take this change into consideration. The Missouri courts seem to have blindly followed the old common law rule that an express covenant of warranty will not restrain preceding express covenants of seisin or against incumbrances (assuming the statutory covenants of seisin and against incumbrances are to be treated as express covenants) disregarding the fact that the only reason for this rule was that the conflicting covenants were not entirely inconsistent and that each could still have some effect but where both covenants were of warranty the rule was that the subsequent one controlled because the two were entirely inconsistent. Since the present statutory covenants of seisin and against incumbrances are admittedly equal to a general covenant of warranty, the special covenant of warranty should restrain the statutory covenants. This accounts for the difficulty of the court in *Tracy v. Grefert* and the cases following it resulting in the decision that the special express covenant of the parties is superfluous yet not inconsistent with the statutory covenants. It is submitted the result reached by this decision and those following it cannot be justified.

III.

EFFECT OF STATUTORY COVENANTS ON AFTER ACQUIRED TITLE

Where one executes and delivers a deed by which he purports to convey land he does not own, or purports to convey a larger interest than he owns, and subsequently acquires title to such land, such after acquired title inures to the benefit of the grantee, particularly if the deed in question contains a general covenant of warranty. In a majority of jurisdictions it is held that actual title passes to the grantee of the prior deed,⁶⁹ though just how the prior deed can have such effect is difficult to see. As a result such prior grantee may prevail over a subsequent bona

69. See Rawle, *Covenants for Title*, 5 ed., sec. 248; 21 C. J. 1087.

fide purchaser without notice.⁷⁰ According to some courts the actual title does not pass to the prior grantee, but the grantor is estopped to deny his title and of course this estoppel would extend to the grantor's heirs, devisees and his assignees⁷¹ (except those who take bona fide and for value). This estoppel is based on the intent of the grantor as shown by his deed, the intent usually appearing in the recitals in such deed. This view seems to be perfectly well founded and preferable to the view that actual title passes but decisions to this effect are greatly in the minority. Some states have established the majority view either in whole or in part by statute. There is such a statute in Missouri. We are here concerned chiefly with this statute, since (though limited in scope) it happens that it will cover nearly all cases that will arise involving deeds containing statutory covenants for title.⁷² The recitals on which estoppel by deed is usually based are most frequently found in certain of the covenants for title. It is quite evident, however, that there may be recitals in other portions which clearly indicate the intent of the grantor and which ought to be equally effective, if it should happen that the grantor did not own the interest such recitals indicate he purported to convey. Either because the courts have become so accustomed to finding the necessary recitals in certain covenants for title, or because of the effect of an erroneous notion that the covenant of warranty has some connection with the old common law warranty referred to in the beginning of this paper, some courts seem to

70. In the absence of recording acts this would be the logical result of the doctrine, and there are a considerable number of authorities in accord. See 21 C. J. 1088, note 86. In this country at present the question almost always arises in connection with the recording acts. Since the prior deed, if recorded, is not within the chain of title and therefore not likely to be discovered by one searching the records, the question which then arises is whether such record is binding on a subsequent bona fide purchaser from the grantor. On this there is a conflict of authority. See Rawle, *Covenants for Title*, 5 ed., sec. 259, for a discussion.

71. See 21 C. J. 1088-90; Tiffany, *Real Property*, 2 ed., pp. 2118-19.

72. If the after acquired title be less than a fee simple the case probably will not fall within the scope of the statute.

regard certain covenants for title as essential to passing the after acquired title. Thus, while logically the doctrine of estoppel by deed ought to depend on the recitals in the deed showing the intent of the grantor, yet many courts seem to consider that there can be no estoppel by deed unless the deed contains a covenant of warranty,⁷³ though in some states a covenant of seisin⁷⁴ and in others a covenant for further assurance⁷⁵ is sufficient.

As heretofore stated there is a statute in Missouri, though it only partially covers the field. It reads as follows:⁷⁶

“Where a grantor, by the terms of his deed, undertakes to convey to the grantee an indefeasible estate in fee simple absolute, and shall not at the time of such conveyance, have the legal title to the estate sought to be conveyed, but shall afterwards acquire it, the legal estate subsequently acquired by him shall immediately pass to the grantee; and such conveyance shall be as effective as though such legal estate had been in the grantor at the time of the conveyance.”

The scope of this statute is limited to deeds which purport to convey an indefeasible estate in the fee simple. Hence, deeds purporting to convey a lesser estate will be subject to the common law rules as to estoppel by deed. Furthermore, it would seem from the language of the statute, that its scope is also limited to cases in which the grantor subsequently acquires an indefeasible estate in fee simple. So, if he subsequently acquires a legal estate in the land less than a fee simple, such lesser estate could not pass under the provisions of this statute.⁷⁷ The grantor's

73. In nearly all states a deed containing covenants of warranty or of quiet enjoyment will have this effect. See Tiffany, *Real Property*, 2 ed., p. 2126.

74. Rawle, *Covenants for Title*, 5 ed., sec. 252.

75. Rawle, *Covenants for Title*, 5 ed., sec. 252. *Contra*, *Chauvin v. Wagner* (1853) 18 Mo. 531.

76. R. S. 1919, sec. 2266. This statute has been in force without substantial change since 1825. See R. S. 1825, p. 217, sec. 6.

77. By the language of the statute where the grantor undertakes to convey an indefeasible estate in fee simple and shall not have such estate, “but shall afterwards acquire it,” etc. Hence if the deed should purport to

intent to convey a fee simple absolute will usually appear most clearly from the covenants for title in the deed, such as the covenants of indefeasible seisin, of right to convey, of quiet enjoyment, or of warranty, but such intent may well be evidenced with equal clarity by language contained in other parts of the deed.⁷⁸ In cases arising under the above statute the question ought to be in each case whether the conveyance indicates the intent of the grantor to convey an indefeasible estate in fee simple. If so the statute ought to apply and pass after acquired title. Covenants for title in the deed ought not be essential. This seems to be the plain meaning of the language of the statute. This was the construction placed upon the statute in the first case which arose under it.⁷⁹ In this case the deed involved purported to convey a fee simple absolute, but did not contain covenants for title. The court said:⁸⁰ "Our statute is silent about any warranty; where the deed purports to convey a fee simple absolute, whether with or without warranty, the subsequently acquired legal title will pass."

As yet there seem to be no decisions contrary to this decision, but there is language in some of the subsequent opinions which tends to indicate a belief that a warranty of title is essential to pass an after acquired title.⁸¹ Such a construction has apparently

convey such an estate and the grantor should subsequently acquire a lesser legal estate, such as a life estate, this lesser estate could not pass to the prior grantee under the statute, but at common law this life estate or other lesser estate would pass by estoppel. See *Tiffany, Real Property*, 2 ed., p. 2119.

78. There are a considerable number of authorities to this effect. See *Tiffany, Real Property*, 2 ed., p. 2118, note 5, for collection.

79. *Evans v. Labaddie* (1847) 10 Mo. 425; *Gibson v. Chouteau* (1867) 39 Mo. 536, l. c. 568, *dictum*.

80. *Evans v. Labaddie, supra*, 430.

81. "The doctrine of inurement, whether under the statute or at common law, is raised upon the covenants of title contained in the deed, under which it operates." *Brawford v. Wolfe* (1890) 103 Mo. 391, 397, 15 S. W. 426. See also *Reese v. Smith* (1849) 12 Mo. 224; *Johnson v. Johnson* (1902) 170 Mo. 34, 70 S. W. 241. In *Bogy v. Shoab* (1850) 13 Mo. 258 the court avoided the effect of the statute by construing a deed

been placed on a similar Illinois statute.⁸² This idea that a warranty of title is essential to pass after acquired title is probably a remnant of an erroneous notion that the covenant of warranty in this respect has an effect similar to that of the old warranty of title which accompanied a feoffment. The notion seems to persist, though without any foundation whatever.

What effect, if any should the use of the words "grant, bargain and sell" have on after acquired title? Should they have the same effect as if the grantor had inserted similar express covenants for title? It seems to be settled that deeds containing these words without express covenants will operate to pass after acquired title,⁸³ though some of the cases to this effect fail to mention the above statute and treat the matter as if it fell within the common law rules. If this statute applies to every case in which it appears from the deed that the grantor intended to convey an indefeasible fee simple then if these words are to be taken as express covenants of the grantor they would certainly clearly indicate the necessary intent, for since a deed with statutory covenants amounts to a warranty deed in effect, such deed could be treated as if it contained an express warranty. It is submitted, however, that the use of these words does not indicate the intent to make any covenants for title. Hence, the covenants ought not be considered as if they were express covenants of the grantor. The words "grant, bargain and sell" ought to be given merely their common law meaning as bearing on the grantor's intent.

apparently purporting to convey a fee simple, as a quitclaim deed because it contained a special covenant of warranty.

82. *Whitson v. Grosvenor* (1897) 170 Ill. 271; *Way v. Roth* (1895) 159 Ill. 162, 42 N. E. 321; *Owen v. Village of Brookport* (1904) 208 Ill. 35, 69 N. E. 952.

83. *Cockrill v. Bane* (1887) 94 Mo. 444; *Boyd v. Haseltine* (1892) 110 Mo. 203, 19 S. W. 822; *Fordyce v. Rapp* (1895) 131 Mo. 354, 33 S. W. 57; *Graham v. Finnerty* (1921) 232 S. W. 129; *Seaman v. Seaman* (1915) 181 S. W. 22. Mr. Rawle in his *Covenants for Title* states that in Missouri the statutory covenants do not operate to pass after acquired title. Two of the cases he cites contain only *dicta*, the deeds involved being held to be quit claim deeds and hence could not so operate. The other

But no doubt the Missouri courts will continue here as in other situations to regard the statutory covenants just as if they had been knowingly inserted in the conveyance by the grantor. In such case the words ought to operate to pass after acquired title under the statute. A deed containing these words without any qualification is in fact a warranty deed.⁸⁴

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case is *Chawin v. Wagner* (1853) 18 Mo. 531. This decision was at a time when the covenant of seisin was held to be a covenant *in praesenti* and broken as soon as made. What the court really holds is that a deed containing a covenant of seisin or of further assurance, whether express or statutory, will not be sufficient to create estoppel.

84. See note 64.

