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Comments

CONSENT IN TORT ACTIONS—One of the most fundamental principles of the common law is that no interest is invaded and no liability created unless the invasion be without the consent of the party whose right is invaded.¹ In other words, interests are protected only against unpermitted invasions. Another common principle of the law is, that a person taking part in an illegal act cannot ask a court to aid him to get compensation for any harm done to him by acts which are necessary to carry out the common illegal or immoral purpose of the parties.² This applies to actions of tort where the plaintiff seeks recovery for harm done to him by another participant in an illegal act in which both participants have entered by agreement.

However, in some American state and federal courts, there are three exceptions to these common principles. Two of these exceptions are not universally accepted in this country, while concerning the third, the cases are unanimous. Where there are statutes making intercourse with a female child below a certain age a crime irrespective of her consent, or which raise the age of consent in crimes affecting female honor, all cases in the American courts on the point have agreed that the perpetrator of such a crime is civilly liable to his victim notwithstanding her actual consent.³ This is because it is "the policy of the law to protect the person of the girl of immature years and discretion against the lusts of men. . . . She is incapable of giving consent to illicit intercourse. . . . It is as though she had no mind on the subject. . . . She is declared by law to be a victim."⁴ In other words, there is no defense of consent allowed here because of the inability of the girls to give such. This inability is determined by analogy to the criminal statutes which set the age of consent, and which are conclusive upon the legal inability to consent in cases involving statutory rape. If a person be of the class whose mental capacities are sufficient to appreciate certain matters, but who are incapable of understanding or appreciating the consequences of the invasion and must therefore be protected against the immaturity or deficiency of their judgment, the person's willingness to consent, no matter how

1. Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace* (1929) 24 COL. L. REV. 819.

2. Hall v. Corcoran, 107 Mass. 251 (1871); also cases cited in Hunter v. Wheate, 289 Fed. 604 (App. D. C. 1923).

3. Gaither v. Meacham, 214 Ala. 343, 108 So. 2 (1926); Reutkemeier v. Nolte, 179 Iowa 342, 161 N. W. 290 (1917); Herman v. Turner, 117 Kan. 733, 232 Pac. 864 (1925); Bishop v. Liston, 112 Neb. 559, 199 N. W. 825 (1924); Boyles v. Blankenhorn, 168 App. Div. 388, 153 N. Y. Supp. 466 (3d Dep't. 1915); Colly v. Thomas, 99 Misc. 158, 163 N. Y. Supp. 432 (Sup. Ct. 1917); Priboth v. Haveron, 41 Okla. 692, 139 Pac. 973 (1914); Watson v. Taylor, 35 Okla. 768, 131 Pac. 922 (1913); Hough v. Iderhoff, 69 Ore. 568, 139 Pac. 931 (1914); Huempfner v. Bailly, 36 S. D. 533, 156 N. W. 78 (1916); Altman v. Echerman, 132 S. W. 523 (Tex. Civ. App. 1910).

4. Gaither v. Meacham, 214 Ala. 343, 108 So. 2 (1926).

clearly expressed, is not such consent which acts to preclude liability.⁵ The statutes making consent of girls under certain ages to intercourse inoperative, automatically place them legally within this category.

The second exception to the two fundamental rules of common law set out in the first paragraph of this discussion is sometimes applied where the parties voluntarily enter into mutual combat.⁶ The majority of the cases in this country have clearly held that consent in such cases is no defense to civil liability,⁷ although a more logical minority of states have held⁸ or indicated by dicta⁹ that in such circumstances, the general principle of *violenti non fit injuria*¹⁰ must be followed. Even where the majority view has been given effect, however, there must be some breach of the peace to allow recovery regardless of consent.¹¹

To understand the reasons for the application of the two different rules in case of combat involving breach of the peace where civil action is brought, it is necessary briefly to review the history behind this split of authority. The first case in which appeared the proposition that consent to a combat involving breach of the peace was no defense to a civil action by the loser for damages, was the English case of *Matthew v. Ollerton*,¹² an English semi-criminal trespass action, where the point was discussed merely as dictum.¹³ The basis for this dictum was that the Crown in 1683 had a theoretical interest in all trespass cases, for not only were damages awarded in the successful trespass action, but a fine was levied by the Crown for the breach of the King's peace. The case of *Boulter v. Clarke*,¹⁴ an English decision handed down in 1747, was based upon the dictum in *Matthew v.*

5. *Barker v. Washburn*, 200 N. Y. 280, 93 N. E. 958 (1911); *Robalina v. Armstrong*, 15 Barb. 247 (N. Y. 1852); and see *Commonwealth v. Nickerson*, 87 Mass. 518 (1863); RESTATEMENT, TORTS (1934) §§ 74, 76.

6. Bohlen, *loc. cit. supra* note 1.

7. *Thomas v. Riley*, 114 Ill. App. 520 (1904); *Adams v. Waggoner*, 33 Ind. 531 (1870); *Lund v. Tyler*, 115 Iowa 236, 88 N. W. 333 (1901); *McNeil v. Mullin*, 70 Kan. 634, 79 Pac. 168 (1905); *Crotton v. Glidden*, 84 Me. 589, 24 Atl. 1008 (1892); *Morris v. Miller*, 83 Neb. 218, 119 N. W. 458 (1908); *Stout v. Wren*, 1 Hawks 420 (N. C. 1821); *Bell v. Hansley*, 48 N. C. 131 (1855); *Lewis v. Fountain*, 168 N. C. 277, 84 S. E. 278 (1915); *Barholt v. Wright*, 45 Ohio St. 177, 12 N. E. 185 (1887); *Colby v. McClendon*, 85 Okla. 293, 206 Pac. 207 (1922); *Teolis v. Moscatelli*, 44 R. I. 494, 118 Atl. 161 (1923); *Willey v. Carpenter*, 64 Vt. 212, 23 Atl. 630 (1891); *Shay v. Thompson*, 59 Wis. 540, 18 N. W. 473 (1884).

8. *Galbraith v. Fleming*, 60 Mich. 403, 27 N. W. 581 (1886); *White v. Whittal*, 113 Mich. 493, 71 N. W. 1118 (1897); *Lykins v. Hamrick*, 144 Ky. 80, 137 S. W. 852 (1911); *McNeil v. Choate*, 197 Ky. 682, 247 S. W. 955 (1923).

9. *Hunter v. Wheate*, 289 Fed. 604 (App. D. C. 1923) (This case is based on an illegal operation, but grounds are equally applicable to consent to a breach of the peace.); *Wright v. Starr*, 42 Nev. 441, 179 Pac. 877 (1919); *Spead v. Tomlinson*, 73 N. H. 46, 59 Atl. 376 (1904).

10. Freely translated, this phrase means "no legal injury from one's own violence."

11. Bohlen, *supra* note 1, at 823.

12. *Comberboch* 218 (1693), 90 Reprint 438 (1908).

13. POLLOCK, TORTS (12th ed. 1923) 160.

14. Only in *Buller's Nisi Prius*, 16.

Ollerton. However, the fact that a point connected with the former case was overlooked by Parker, C. B., in the *Boulter* case, formed a basis for the erroneous position that has descended to us through a long line of decisions, as the majority view. One year after the dictum in *Matthew v. Ollerton*, the Statute of 5 and 6 William and Mary eliminated the Crown's theoretical interest in the trespass cases by abolishing the fine which had been theretofore levied. Hence, whatever reason there may have been for the "slender foundation"¹⁵ of the *Matthew* case, was disposed of soon afterwards. The *Boulter* case is the only case in which this position has been reached by any court in the British Empire. All dicta in the Empire regard the question as open, and lean toward the American minority view.¹⁶

Since the decision of *Stout v. Wren*,¹⁷ the first American case expressing the majority opinion, every American majority case has either cited and relied directly on one of these two English cases,¹⁸ or else has cited American cases which have cited the two English cases.¹⁹ Although the dictum in the *Matthew* case was apparently based on the correct reasoning because of the fact that the Crown was interested in trespass proceedings, and because consent was no defense in proceedings punitive in nature in which the Crown was a plaintiff, American courts of the majority view have consistently failed to recognize the faulty logic of their view, brought about by the passage of the Statute 5 and 6 William and Mary, as shown above. After all, *Matthew v. Ollerton* is the ultimate authority of the majority viewpoint.²⁰

However, those of the American cases citing the English cases as authority, or referring to cases citing them, that have sought to analyze the situation have attempted to justify the decisions on the basis of "public policy."²¹ Cooley is one of the leading proponents of this view of the public policy basis, and gives one of the most widely known defences of the majority doctrine in his work on Torts.²² He writes that the state is a co-party, in reality, with the plaintiff in the civil action, and that the fear of civil liability will act as a deterrent to the commission of breaches of the peace. The first of these reasons has been discussed in the preced-

15. POLLOCK, *loc. cit. supra* note 13.

16. Hawkins, J., in *Reg. v. Coney*, 15 Cox C. C. 46 (1882); Ball, L. C., in *Hegarty v. Shine*, [1878] 4 Ir. 288; Middleton, J., in *Slattery v. Haley* [1923] 3 D. L. R. 156, and list of text writers cited therein.

17. 1 Hawks 420 (N. C. 1821).

18. *Adams v. Waggoner*, 33 Ind. 431 (1870); *Grotton v. Glidden*, 84 Me. 589, 24 Atl. 1008 (1892); 1 Hawks 420 (N. C. 1821); *Barholt v. Wright*, 45 Ohio St. 177, 12 N. E. 185 (1887); *Willey v. Carpenter*, 64 Vt. 212, 23 Atl. 630 (1892).

19. *Thomas v. Riley*, 114 Ill. App. 520 (1904); *Lund v. Tyler*, 115 Iowa 236, 88 N. W. 333 (1901); *McNeil v. Mullins*, 70 Kan. 634, 79 Pac. 168 (1905); *Jones v. Gale*, 22 Mo. App. 637 (1886); *Morris v. Miller*, 83 Neb. 218, 119 N. W. 458 (1909); *Colby v. McClendon*, 85 Okla. 293, 206 Pac. 207 (1922); *Shay v. Thompson*, 59 Wis. 540, 18 N. W. 473 (1884).

20. Bohlen, *loc. cit. supra* note 1; Note (1925) 73 U. OF PA. L. REV. 74.

21. *Stout v. Wren*, 1 Hawks 420 (N. C. 1821); *Shay v. Thompson*, 59 Wis. 540, 18 N. W. 473 (1884); COOLEY, LAW OF TORTS (3d ed. 1906) 282.

22. COOLEY, *loc. cit. supra* note 22.

ing paragraph, and its fallacy pointed out. As to the other, no public policy, except that mentioned in these cases and by Cooley, has suggested that our police system and criminal law is inadequate to keep down breaches of the peace, and that the state would be aided by imposing civil liability where there would be no such liability were it not for the crime, because of the consent of the injured party. But many of the breaches not punished actively by the state are excused because of their triviality, and it would seem strange to create a new liability for acts not serious enough to prosecute actively by regular criminal prosecution. Professor Bohlen²³ contends that it would probably be better public policy to deny recovery, for allowing such recovery would seem to reward one of the parties indulging in the illegal act. Also, the hope of getting damages might very possibly encourage fights. Several courts have said that the law puts no premium on fighting, so no relief will be granted if one of the contestants should come out second best. If recovery is allowed, however, is it true that parties voluntarily engaging in combat, where it is almost certain that hot blood and passion exist, will be deterred because of civil liability, when fear of the criminal law fails to stop him? This hardly seems likely.

A few jurisdictions have denied this exception²⁴ to the general rule and have held that consent, even to a breach of the peace, prevents liability, either for bodily harm or offensive contacts involved therein. The minority jurisdictions base their decisions on the legal maxim as stated before, *volenti non fit injuria*, and that the law should leave those engaging in illegal or immoral acts where it finds them.²⁵ Also, as several courts state, neither of the parties can complain of that act to which he has consented.²⁶

The question is still an open one in Missouri. No supreme court decisions have been handed down covering the point, and only two cases are reported from the courts of appeals: *Jones v. Gale*²⁷ applied the majority view; and later, *Mitchell v. United Railways Co.*,²⁸ accepted the minority view.

The third situation in which courts have hesitated about recognizing the general tort principle of consent as a defense is that in which the plaintiffs either consent to or solicit, and undergo, illegal abortions. These cases²⁹ are based on the proposition that, in spite of the heavy penalties that the surgeon might suffer both from criminal prosecution and the disrepute in which he might find himself in the medical profession, such criminal malpractice is widely prevalent; and that the difficulty of exposing such malpractice is very great—indeed, almost impossible to check—

23. Bohlen, *loc cit. supra* note 1.

24. See cases cited *supra*, notes 8 and 9.

25. *Supra* note 21; Note (1919) 27 MICH. L. REV. 717.

26. BISHOP, NON-CONTRACT LAW (1889) 76, and cases cited therein; SALMOND, TORTS (6th ed. 1923) 55, and cases cited therein.

27. 22 Mo. App. 637 (1886).

28. 125 Mo. App. 1, 102 S. W. 661 (1907).

29. *Milliken v. Heddesheimer*, 110 Ohio St. 381, 144 N. E. 264 (1924); *Miller v. Bayer*, 94 Wis. 123, 68 N. W. 869 (1896).

because those undergoing such operations realize the social stigma attached to them, and are themselves afraid of disclosure. These jurisdictions feel that giving a right of action to those upon whom the operations are performed would be an added incentive for disclosure. As against this possible gain in the public's interest in the execution of justice, however, must be considered the possibility, and perhaps probability, that allowing such a cause of action would be placing in the hands of unscrupulous persons a tool to promote the use of blackmail and extortion, even though the circumstances surrounding the operation made it legal. The doctors might be influenced to pay, not from fear of any recovery by the plaintiff, but because of the stigma that would attach to his name because of the mere filing of the action. The purpose of the abortion statute is not to protect persons who are unable to appreciate the consequences of their consent, but to protect the social interest in bringing children into the world. In the cases of intercourse with girls under the age of consent, we must remember that the law is seeking to protect young and inexperienced girls as a group—those who are incapable of appreciating the effects of their actions. In view of this difference of aim in the two types of actions, certain of the majority jurisdictions in the mutual combat cases have not as yet extended their doctrine to cases where criminal abortions have been performed.³⁰

Viewing these three situations where a majority of American jurisdictions have refused to apply the general rule of consent as a defense in tort actions, it would seem that the first exception is justifiable, but there is very little basis either in logic or in social policy for the last two discussed. Although it is true that a majority of the cases involving the point have refused consent as a defense in these instances, the text and law review writers feel that there is very little justification for these two exceptions. The question of consent as a defense in civil actions arising from mutual combat and abortion has been definitely settled in comparatively few states, and those that have not yet committed themselves would do well to give notice to the arguments of the minority.³¹

GEORGE W. WISE

CONVENANTS FOR TITLE AS PROTECTION TO REMOTE GRANTEES—Purchasers of real estate demand adequate protection against defective titles. The lawyer must strive to satisfy this demand for his client. It is the purpose of this comment to examine the existing law applicable to covenants for title in its more important phases.

In describing these covenants for title there is no need to go beyond the time of the enactment of the Statute of Uses in 1535. From that time forth it became

30. *Goldnamer v. O'Brien*, 98 Ky. 569, 33 S. W. 831 (1896). See (1924) 31 A. L. R. 983; Note (1928) 27 MICH. L. REV. 717; Note (1924) 73 U. OF PA. L. REV. 74.

31. For a full treatment of these problems, see RESTATEMENT, TORTS, COMMENTARIES (Tent. Draft, 1925) §§ 74, 75, 76.

settled law that no such covenants would be implied in land conveyances, but they must be inserted in the conveyancing instrument or the grantee and his heirs and assigns, in the absence of fraud or deceit, would not have a remedy against the grantor if there proved to be a failure or a defect of title.¹ So the habit of inserting personal covenants in conveyances arose. These covenants doubtless were expressed in many ways at first, but eventually there developed five reasonably definite covenants which were frequently used, and which came to be known as covenants for title. They were seisin, right to convey, against encumbrances, for further assurance, and quiet enjoyment.² In the United States a sixth covenant, the covenant of modern warranty, was developed.³ It was in scope and effect similar "to the covenant for quiet enjoyment and practically superseded it."⁴

Today, the construction and effect of these covenants has been fairly well settled. But the great difficulty presented by the use of these covenants is whether or not they are to be considered as "running with the land" so as to give the ultimate purchaser who suffers the real damage a right to sue on them. This involves the further question of whether or not the covenant has ceased to be a promise that runs with the land and has become a cause of action, which would not be assignable under the common law.⁵

Thus, it is necessary to know the general scope of each covenant as it exists today in order to understand if and when it is considered as breached.⁶ The covenant for seisin is understood as covenanting that one has title to the land, and it is technically breached, if at all, upon delivery of the deed. The covenant for the right to convey is understood as covenanting that one has a right to convey the

1. MO. REV. STAT. (1929) § 3020, provides that where the words, "grant, bargain and sell" are used in a land conveyance they imply, as though inserted in the deed, the covenants of seisin, against incumbrances, and for further assurance. For a general discussion of the implications of this statute, see Simonton, *Statutory Covenants for Title in Missouri* (1923) 28 U. OF MO. BULL. L. SER. 3.

2. RAWLE, COVENANTS FOR TITLE (5th ed. 1887) § 13, points out that before the Statute of Uses some of these covenants were implied in conveyances. 15 C. J. 1212. This rule of not implying covenants for title may be contrasted with the law applicable to the sale of chattels which implies a warranty of title. WILLISTON, SALES (2d ed. 1924) § 218. The reason probably is that real property law is not as flexible as the law of sales, and in the sale of chattels there is less opportunity to investigate the status of title. Many writers, though, use the law of sales as a foundation for their contention that for the protection of land purchasers there should be an implied warranty of title.

3. RAWLE, COVENANTS FOR TITLE (5th ed. 1887) §§ 110-112.

4. Simonton, *Observations on Covenants for Title* (1928) 34 W. VA. L. Q. 257, 258; (1929) 64 A. L. R. 1479.

5. *Lewis v. Ridge*, Cro. Eliz. 863 (1601), holding that a covenant against encumbrances was broken on delivery of the deed and became a cause of action and not assignable. *Lucy v. Levinston*, 2 Lev. 26 (1671). POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1909) 226, explains why choses in action at common law were not assignable on the ground that the primitive law could not conceive of a transfer of the right apart from the transfer of the thing.

6. For the general scope of the covenants for title, see 7 R. C. L. 1130 ff.; 2 TIFFANY, REAL PROPERTY (2d ed. 1920) §§ 449-454.

land, and it is technically breached, if at all, upon delivery of the deed. The covenant against encumbrances is understood as covenanting that there are no outstanding encumbrances on the land, and it is technically breached, if at all, upon delivery of the deed. The covenant for further assurance is understood as covenanting that one will perform all further necessary acts to perfect the grantee's title should defects appear, and it is breached, if at all, by failure of the warrantor to perform these promised acts. The covenant for quiet enjoyment is understood as covenanting that no one with a better right to possession will interfere with the grantee's possession, and it is breached, if at all, by eviction. The covenant for warranty is understood as covenanting that one will warrant and defend against all lawful claims of third persons, and it is breached, if ever, by the warrantor failing to so defend.

Thus it can be seen that the latter three covenants, of warranty, quiet enjoyment, and for further assurance are not broken even technically until the time the actual and substantial damage occurs. As to these covenants the one who suffers the substantial damage can sue the warrantor. But the question of whether or not the one who has suffered actual, substantial damage, and who is not in privity of contract with the warrantor, can recover the warrantor on the covenants of seisin, right to convey and against encumbrances is a battle ground of conflict. The weight of authority in the United States, as it is often stated, is that the covenants of seisin, right to convey, and against encumbrances are covenants *in praesenti* and are broken immediately upon delivery of the deed and become a mere right of action and not assignable.⁷ Obviously under this general rule these covenants protect only the original parties to the deed by their privity of contract. Yet the avowed purpose of these covenants is to protect all purchasers of land who suffer actual damage as a result of some defect of title.⁸ The very language of the usual covenant—"A and his heirs and assigns warrants to B, his heirs and assigns," clearly shows that to be the warrantor's intent. So we find that the courts of many states have avoided this general rule by one of various methods. Assuming that the warrantor had some interest in the land, we find that some courts have taken over the English rule as expressed in *King v. Nottle*,⁹ which gave forth the doctrine

7. RAWLE, COVENANTS FOR TITLE (5th ed. 1887) § 205, states that the strong current of American authority is to the effect that the first three covenants of seisin, right to convey, and against encumbrances are covenants *in praesenti*, and, if broken at all, their breach occurs at the moment of their creation. There arises a mere right of action which is not assignable under the older common law, while the other covenants are prospective in character. In 7 R. C. L. 1112, it is said: ". . . the covenants of seisin and right to convey are almost uniformly regarded as personal; although many courts hold to a contrary rule and regard the covenant of seisin as one running with the land. A like conflict of authority is found in regard to the covenant against incumbrances."

8. *Geiszler v. De Graaf*, 16 N. Y. 339, 59 N. E. 993 (1901), surveys this situation and says, "Thus the right of action on covenants, *originally intended for the benefit of the inheritance in all subsequent hands* (italics the writer's), is denied . . . to the purchaser of the land, although the party really injured."

9. 4 M. & S. 53 (1815), where in an action brought for covenants for seisin and right to convey the court said: ". . . for so long as the defendant has not a

of continuing breach, the effect of which is that although the covenants of seisin, right to convey, and against encumbrances are technically breached on delivery of the deed, yet it is a continuing breach that lasts until the substantial damage is suffered. Obviously this doctrine is but a fiction to enable the one who has suffered the substantial damage to have a right of action against the warrantor, but the result is good. Still other state courts, as Massachusetts in *Clark v. Swift*,¹⁰ said that although these three covenants were broken on delivery of the deed, yet the assignee could sue in the name of the assignor if there had been an express assignment of the chose. Enlarging upon this Massachusetts doctrine, many courts relaxed from the old rule still more and allowed the assignee of a chose in action to sue in the name of the assignor upon the deed, on the theory that the delivery of the deed was an implied assignment of the chose in action.¹¹ Then the last vestiges of the old rule were swept aside by many of these courts, including the Missouri court, by allowing the assignee of the chose in action to sue in his own name, on the theory that the covenant was one of indemnity which ran with the land, and that the chose also ran with the land.¹² A few states reach this result by statute.¹³

Thus, in summary, we find that in all states the one who suffers the actual damage is able to bring an action on the covenants of warranty, quiet enjoyment, and for further assurance, where the warrantor had some interest in the land warranted, and that in a great many states (though still called a minority) he is also able to sue for breaches of the covenants of seisin, against encumbrances, and right to convey, regardless of the lack of privity of contract.

Yet we have the further problem of whether or not this person, who has suffered the damage, is protected when the covenantor has no interest in or title to the land. At first the courts unanimously declared that since there was no land to which the covenant may attach, it had no land with which to run and thus only

good title, there is a continuing breach; and it is not like a covenant to do an act of solitary performance, which, not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing toties quoties, as the exigency of the case may require. However, according to the letter, there was a breach in the testator's lifetime; but according to the spirit, the substantial breach is in the time of the devisee, for she has thereby lost the fruit of the covenant in not being able to dispose of the estate." *King v. Jones and Rowland, Ex'rs*, 5 Taunt. 418 (1814).

10. 3 Metc. 390 (Mass.) 1841). It is to be noticed that this case came from a combined court of law and equity, for, as yet, assignments of choses in Massachusetts were not enforceable at law. *Mitchell v. Warner*, 5 Conn. 497 (1825).

11. *Cole and Wife v. Kimball*, 52 Vt. 639 (1880).

12. *Coleman v. Lucksinger*, 224 Mo. 1, 123 S. W. 441 (1909). And we find an excellent survey of the authorities expressed in *Geiszler v. De Graaf*, 166 N. Y. 339 (1901): "In England the law became so uncertain in this respect, as the result of conflicting decisions (*Kingdon v. Nottle*, 1 M. & S. 355; S. C. 4, M. & S. 53; *Spoor v. Green*, L. R. [9 Ex.] 99), that the controversy was set at rest by the enactment of a statute which provided that the covenants should run with the land unless otherwise restricted in the conveyance. (44 & 45 Vict. ch. 41 § 7.) The same result has been accomplished in most of our sister states either by judicial decision or by statute, where the covenant against incumbrances runs with the land."

13. See 15 C. J. 1258, n. 81a and 81b.

those in privity of contract could be protected.¹⁴ But the effect of such a rule was to put the wrongdoer in a better position if he had no title than if he had some title. This condition could not be tolerated long and the courts set to work to find a way to hold him liable in either event. Their first step was to hold that the covenant for title would run if the covenantee got actual possession of the land.¹⁵ There is some authority to the effect that constructive possession of the land is sufficient to carry the covenants even though neither the grantor nor the covenantee ever had possession.¹⁶ Yet a wide enough range of protection was not afforded, and other courts began using a loose doctrine of estoppel to deny to the covenantor the defense that his interest in the land was insufficient to carry the covenants.¹⁷ Estoppel, here, as in nearly all such cases where it is loosely applied, is only a means to an end, and, like a fiction, is a temporary thing which abides only until the courts work out a more direct theory to obtain the desired result. Some courts have already taken a further step by holding that, as choses in action are now assignable in their state, a grant of a supposed interest in land with covenants for title will be held an assignment of the chose.¹⁸ In a Missouri case,¹⁹ decided in 1919, the supreme court held that the Statute of Limitations had run against a cause of action based on a breach of all the covenants of title. In that case the court specifically said that the new Statutes of Limitations of 1919, applying to the covenants of seisin and warranty, were not to be applied here as the facts of the case arose before the passage of the statute. The decision, therefore, is based on the common law. The facts showed that the plaintiff had never been in possession of the land, nor had the covenantor ever had possession of the land or any title to it. The court must have assumed that the cause of action passed by mere privity of deeds, or else there would have been no question presented as to the Statute of Limitations. This must be so even though some of the language in the case seemed to infer that some title or possession to the land must pass for the warranties to attach and pass.²⁰ The language is probably only a carry over from early Missouri cases²¹

14. *Noke v. Awder*, Cro. Eliz. 373 (1595); *Andrew v. Pearce*, 1 B. & P. (N. R.) 158 (1805); 7 R. C. L. 1105.

15. *Beddoe's Ex'r v. Wadsworth*, 21 Wend. 120 (N. Y. 1839).

16. *Solberg v. Robinson*, 34 S. D. 55, 147 N. W. 87 (1914).

17. See *Rundell, Covenants for Title in Wisconsin* (1923) 2 WIS. L. REV. 65, for an excellent discussion of the use of estoppel particularly with reference to quitclaim deeds. *Allen v. Kennedy*, 91 Mo. 324, 331, 2 S. W. 142 (1886): "... it passes by virtue of the privity of estate created by the successive deeds, each grantee being estopped by his own deed from denying that he has conveyed an estate to which the covenant would attach."

18. *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. 142 (1886); *Coleman v. Lucksinger*, 224 Mo. 1, 123 S. W. 441 (1909); *Clarke v. Priest*, 18 Misc. Rep. 501, 42 N. Y. Supp. 766 (Sup. Ct. 1896); *Kimball v. Bryant*, 25 Minn. 496 (1879): "... he intends to pass all his right to sue for the breach, so far as the grantee sustains injury by reason of it."

19. *McGrew v. Elkins*, 225 Mo. App. 368, 36 S. W. (2d) 424 (1931).

20. A covenant of seisin, in *McGrew v. Elkins*, 225 Mo. App. 368, 3 S. W. (2d) 424 (1931), "is a covenant *in praesenti*, and is broken the moment of its creation, provided the title of the covenantor is totally defective, and he has no estate or

which dealt with situations where there was in fact either some title or possession that passed, although the courts stressed the fact by way of dictum that some title or possession was necessary to pass to carry these covenants. Especially must this be true as the case of *Coleman v. Lucksinger*²² has never been overruled, and it specifically held that no title or possession was necessary to a remote grantee's suit. These courts have kept in mind those whom the covenants for title are designated to secure, and have worked out a satisfactory remedy in that respect.

Although a great many of the courts have worked out a theory which will give protection to the one suffering the actual loss, yet some of these courts have failed to preserve this recognition when dealing with the further problem of the Statute of Limitations. Even in England it was forgotten that it was the substantial sufferer who was to be protected, and the courts there said that the statute ran from the time of the technical breach,²³ a holding which tended to nullify for all practical purposes their first forward step of allowing the substantial sufferer to recover.²⁴ For often the statutory time has elapsed before the substantial damage is suffered,

possession whatever in the land, and in such cases the covenants of seisin between the parties are personal and collateral to the land. If, however, any estate passes by the conveyance, or the covenantee takes actual possession of the land, such estate or possession will be sufficient to carry the covenants, and such covenants will run with the land; and in such case the covenants would be substantially breached when the covenantee was deprived of the estate conveyed, or when he was ousted from actual possession of the land by the holder of the paramount title. . . . the covenantors having no estate, title or possession of the land conveyed, the covenantee received absolutely nothing by his purchase, and the covenant of seisin was breached technically and substantially on that day, and the statute of limitations commenced to run from that time."

21. *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. 142 (1886): "It [seisin] is rather a covenant of indemnity, and it has often been held that it runs with the land, to the extent that if the covenantee takes any estate, however defeasible, or if possession accompanies the deed, though no title pass, yet, in either event, this covenant runs with the land, and inures to the subsequent grantee upon whom the loss falls. . . . 'It is not, however, to be supposed, because we do not now lay down a broader rule than is required by the case before us, that we hold, by implication, the covenants would not pass if the immediate covenantee should convey before taking possession. . . . We should be inclined to say that although the covenant of warranty is attached to the land, and for that reason is said, in the books, to pass to the assignee, yet this certainly does not mean that it is attached to a paramount title, nor does it mean that it is attached to an imperfect title, or to possession, and only passes with that; but it means, simply, that it passes by virtue of the privity of estate created by the successive deeds, each grantor being estopped by his own deed from denying that he has conveyed an estate to which the covenant would attach.'"

22. *Coleman v. Lucksinger*, 224 Mo. 1, 123 S. W. 441 (1909).

23. *Turner v. Moon*, [1901] 2 Chan. 825, 829; *Spoor v. Green*, L. R. 9 Ex. 99 (1874).

24. *Brooks v. Mohl*, 104 Minn. 404, 116 N. W. 931 (1908), states that one reason for not having the statutes of limitations run from the time of the technical breach and not from time of substantial damage is that plaintiff's cause of action might be barred before he would know of its existence. See also, *In re Hanlin's Estate*, 133 Wis. 140, 113 N. W. 411 (1907).

and before the grantee knows of the defect or failure of title. Nevertheless, in the United States the weight of authority is said to follow the English decisions, and is to the effect that the Statute of Limitations begins to run from the time of the technical breach.²⁵ But there is authority to the contrary and the tendency is in that direction.²⁶ Various methods of reasoning are used by this growing minority to make the Statute of Limitations run from the time the actual damage is suffered. One of them is presented by the *Hanlin* case,²⁷ which states: "While the rule is . . . freely conceded that the statute of limitations commences to run only from the time the cause of action accrues, there is often a controversy as to when that time arrives. The unfailing test is, in the absence of some statute to the contrary, whether the party asserting the claim can successfully maintain an action to enforce it. . . . the cause of action for the recovery of substantial damages . . . is so far distinct from the right to recover nominal damages as to be grounded on a separate breach happening at the time the damages are actually suffered." To enforce this reasoning, the case pointed out that the one damaged could not bring suit "until the person entitled to the benefit of the covenant . . . is actually damaged." Of course this allowance of two suits, one for the technical breach, and one for the substantial breach, is open to criticism as allowing two causes of action on the same breach, but the fundamental idea of properly protecting the actual sufferer is sound and is steadily being worked out by the courts.²⁸

Section 861 of the Missouri Revised Statutes 1929 provides that, as to the covenant of seisin, the Statute of Limitations is to be taken to have run ten years after the cause of action accrues. But this only begs the question. The same section also provides that actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years after there shall have been a final decision against the title of the covenantor in such deed. But the Missouri courts in the past have made what might be deemed a distinction between the situation where some title, interest, or possession to the land warranted, passed by the conveyance, and the situation where no title, interest, or possession passed. In the former situation, the court of appeals in *White v. Stephens*²⁹ held that, where there was a tax lien on the land warranted to be free from encumbrances, the Statute of Limitations did not begin to run

25. 7 R. C. L. 1187; 15 C. J. 1267; RAWLE, COVENANTS FOR TITLE (5th ed. 1887) § 205.

26. *Brooks v. Mohl*, 104 Minn. 404, 116 N. W. 931 (1908), noted in (1909) 17 L. R. A. (n. s.) 1195, where it is stated that it is the undoubted trend of the later decisions to have the Statute of Limitations run from the time of the substantial breach; *In re Hanlin's Estate*, 133 Wis. 140, 113 N. W. 411 (1907).

27. *In re Hanlin's Estate*, 133 Wis. 140, 113 N. W. 411 (1907), noted in (1909) 17 L. R. A. (n. s.) 1189.

28. See the note in (1909) 17 L. R. A. (n. s.) 1189, 1191.

29. 13 Mo. App. 240 (1883). In accord: *Wyatt v. Dunn*, 93 Mo. 459, 2 S. W. 402, *aff'd on rehearing*, 93 Mo. 459, 6 S. W. 273 (1887); *Priest v. Deaver*, 22 Mo. App. 276 (1886).

until the grantee had paid the taxes and not at the time the covenant was made, though the encumbrance existed then; while in *Rainey v. Davidson*,³⁰ the decision was that the covenants of warranty and seisin were broken at the delivery of the deed as the covenantor had no estate, title, or possession to the land he warranted. However, the *Rainey* case and all the others that made this distinction arose prior to 1919, at which date the Missouri legislature added to what is now Section 860, Missouri Revised Statutes 1929, the following: "Provided, that for the purposes of this article, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and free and complete relief obtained." Although there are as yet no cases based upon this addition to Section 860, it is submitted that the language is broad enough to prevent the Statute of Limitations from running until the substantial breach has occurred in a situation whether or not the covenantor had any interest, title, or possession of the land at the time of the warranty and seisin, and where the substantial damage did not occur until after the substantial breach. Such an interpretation is not only in keeping with the apparent intention of the legislature, but it is also in line with the basic idea involved in covenants for title, i. e., adequate opportunity for the one who has suffered the substantial damage to recover for that damage. Furthermore, although it is perhaps arguable that, since Section 861 provides specifically only for the covenants of seisin and warranty, those are the only covenants to which Section 860 refers. Such an argument involves a very narrow construction and the result it seeks to impute to the legislature is contrary to the protection these covenants for title are intended to bring. This possible contention is also refuted further by the last clause of Section 861 which reads: "third, actions for relief, not herein otherwise provided for." This sentence seemingly should cover the remaining covenants for the title not particularly mentioned elsewhere in the particular chapter of the statutes dealing with the various Statutes of Limitations in civil actions and to which Section 860 applies.

As to those jurisdictions that have not yet provided, either through judicial decision or by statute, for this protection against such breaches, it may be suggested that the purpose of covenants for title is to protect the purchaser who is actually damaged by a defect or failure of title; and as the courts have, from the earlier cases to the present day, been bending the common law concepts to extend this protection to the one needing it, the purpose should not be hampered so materially by starting the Statute of Limitations to run from the time of the technical breach.

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30. 224 Mo. App. 679, 26 S. W. (2d) 841 (1930). In accord: *Falk v. Organ*, 160 Mo. App. 218, 141 S. W. 1 (1911); *McGrew v. Elkins*, 225 Mo. App. 368, 36 S. W. (2d) 424 (1931).