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the court held that whether the loan was *refused* the individual or *agreed* upon was an issuable question of fact for the jury to determine.²⁶ This latter decision of the New Jersey court adopts the rule established in *Jenkins v. Moyses*.

CONCLUSION AND RECOMMENDATION

It is apparent from the foregoing analysis that the lender can protect himself by first refusing to make the loan to the individual and then suggest that, if the borrower will incorporate, a loan will be made to the corporation. Should the lender agree to make the loan to the individual and then impose the condition that the borrower incorporate, he may well find himself subject to the penalties provided by the usury laws. This hairline distinction should not be recognized. The courts have repeatedly struck down various devices employed to avoid the usury laws.²⁷ The Supreme Court of Florida has said, concerning the usury laws, ". . . we deem it to be of paramount importance that a statute so salutary in its operation as is the statute against usury, should be sedulously guarded against the ingenious shifts and devices so often resorted to to evade its operation."²⁸ To frustrate evasions, the courts look beyond the form of transactions to their substance.²⁹ They will not, however, by "piercing the corporate veil," defeat the purpose of the statute depriving the corporation of the defense of usury. However, they cannot escape the fact that blindly closing their eyes to tainted transactions defeats the very letter and spirit of the usury laws. It is inconceivable that the law itself has provided unscrupulous money lenders with a device to successfully avoid the usury statutes. The needy borrower is no less deprived of his freedom of contracting and is as much at the mercy of the lender in this instance as in any other. When the problem presents itself to the courts the transaction should be closely scrutinized. If the court finds that the loan was to the corporation in form only while in fact it was to an individual, then it should make no difference in the way the lender approached the deal. The transaction should be considered as just another shift or device to avoid the usury statutes and be dealt with accordingly. Reality, not appearance, should determine legal rights.

LEONARD M. RIVKIND

COVENANTS FOR TITLE — PROTECTION AFFORDED BUYER OF REALTY IN FLORIDA

The "Covenants for Title", sometimes referred to as the "Common Law Covenants for Title", are six in number. They are: 1) The covenant

26. *Gelber v. Kugel's Tavern, Inc.*, 10 N.J. 191, 89 A.2d 654 (1952).

27. See *Evasion and Avoidance of Florida Usury Laws*, Comment, 5 MIAMI L.Q. 493 (1951).

28. *Belden v. Gray*, 5 Fla. 504, 508 (1854).

29. *Beachan v. Carr*, 166 So. 456 (Fla. 1936). But see *Kings Merchantile Co. v. Cooper*, 199 Misc. 381; 100 N.Y.S.2d 754, 756 (1950).

of seisin; 2) The covenant of right to convey; 3) The covenant against incumbrances; 4) The covenant for quiet enjoyment; 5) The covenant of warranty; and 6) The covenant for further assurances. The first five are widely used in the United States. The sixth, which is recognized in three states,¹ is commonly used in England. There may be some doubt as to the position Florida will take in the future, but it is safe to say that to date only the first five covenants have been recognized.

In construing the meaning of these covenants, the several states have given the word "seisin" two different definitions. Some jurisdictions say that it means "possession of land by one having or claiming a freehold estate, either by himself or by another."² However, the majority rule defines "seisin" as meaning "that the grantor has the estate, in quantity and quality, which he purports to convey."³

The covenant of right to convey is self-explanatory, and though it is said to be "usually equivalent to the covenant for seisin,"⁴ it may exist where "there is no seisin or title, as when the conveyance is under a power."⁵

Almost without exception the word "incumbrance" has been defined as "every right to or interest in the land which may subsist in third persons, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance."⁶

Probably the best way to define the covenants of quiet enjoyment and warranty is to tell what they guard against. Though the effect of the two is similar, the covenant of quiet enjoyment is designed primarily to guard against eviction, especially where the covenantee is a lessee; and the covenant of warranty is given to defend the premises against all lawful claims by third persons.⁷

Finally, the covenant for further assurances is a "covenant by the grantor to make such further assurances as may be necessary to perfect the title."⁸ Though this covenant is not popular in the United States, the merit of it lies in the fact that it is the basis of a suit for specific performance.

Florida is apparently in accord with these definitions, and certainly is in accord with the majority as to the meaning of "seisin"⁹ and "incumbrances".¹⁰

In the absence of statute none of these covenants are implied, but must be expressed in the deed of conveyance. Some states go so far as to specifically

1. Mo., N.D., and N.J.

2. TIFFANY, *THE MODERN LAW OF REAL PROPERTY*, 698 (New Abr. Ed. 1940).

3. *Id.* at 699.

4. *Id.* at 700.

5. *Ibid.*

6. *Id.* at 701.

7. *Id.* at 704.

8. *Id.* at 707.

9. *Williams v. Azar*, 47 So.2d 624 (Fla. 1950); *Burton v. Price*, 105 Fla. 544, 141 So. 728 (1932).

10. *Gore v. General Properties Corporation*, 149 Fla. 690, 6 So.2d 837 (1942).

provide by statute that there will be no implied covenants for title.¹¹ However, most states have statutes permitting the use of a short form warranty deed, which, if followed, will give effect to certain of the covenants for title as if they were expressed.¹² Florida is one of these.¹³ The majority of the states having such statutes enumerate the covenants that will be effective by use of the short form of warranty deed. Florida differs in that the statute simply provides:

A conveyance executed substantially in the foregoing form shall be held to be a warranty deed with full common law covenants, and shall just as effectually bind the grantor, and his heirs, as if said covenants were specifically set out therein. And this form of conveyance when signed by a married woman shall be held to convey whatever interest in the property conveyed which she may possess.¹⁴

It is because of this general language, *i.e.*, "full common law covenants", that there may be some doubt as to the existence or non-existence of the covenant for further assurances in Florida.

Having discussed the covenants and their meanings, and the Florida statute¹⁵ giving effect to them, we will now consider how these covenants protect the purchaser. Generally, the protection afforded the buyer in the event of a breach of covenant is a suit in law, either for damages or for the purchase price. However, a fuller and more specific understanding of the protection afforded the buyer requires that we know not only the measure of damages, but what constitutes a breach of any of the covenants, and how such a breach may possibly be utilized in a suit other than one for damages. To learn this, let us look at the cases that have been decided in Florida, starting first with those cases which involved the covenant of seisin, and then the others.

It has been held that, upon the breach of the covenant of seisin, the grantee may recover the purchase money paid with interest, and that the breach occurs upon execution and delivery.¹⁶ This is not the only remedy. The grantee may elect to buy the outstanding title, in which case he can recover the amount paid for it, not to exceed the amount of consideration for the deed, the cost of suit and attorney's fees.¹⁷ Also, if there is an actual adverse possessor on the premises, the grantee may sue in ejectment, and if successful, he will be entitled to taxable costs and reasonable attorney's fees.¹⁸ It is not necessary that there be a *total* failure of seisin before an action for breach can be brought. It is enough that there be a *partial* failure,

11. *E.g.*, Ariz., Ga., Mich., and Neb.

12. Ala., Ark., Calif., Idaho, Ill., Ind., Mass., Minn., Nev., Okla., and others.

13. FLA. STAT. § 689.03 (1951).

14. *Ibid.*

15. *Ibid.*

16. *Williams v. Azar*, 47 So.2d 624 (Fla. 1950); *Burton v. Price*, 105 Fla. 544, 141 So. 728 (1932).

17. *Williams v. Azar*, 47 So.2d 624 (Fla. 1950).

18. *Ibid.*

such as where a person is in adverse possession of a portion of a lot. In such a case the measure of damages is the proportionate fractional part of the whole consideration paid, with interest from the time that the plaintiff was deprived of the use of that part to which he could not acquire possession.¹⁹ It is important to note that the buyer cannot use breach of the covenant of seisin as a basis for rescission of the contract of sale or the restoration of the purchase money.²⁰

This writer could not find any cases on the covenant of right to convey. The reason for this situation probably lies in the fact that its breach is usually accompanied by a breach of the covenant of seisin. Similarly, there are no cases which involve the covenant of quiet enjoyment because the remedy under the covenant of warranty usually is sufficient. Also, the litigation on the covenant of quiet enjoyment usually involves lease agreements.

There has been a considerable amount of litigation on the covenant against incumbrances. From this we learn that the right of dower, inchoate or consummate, is an incumbrance.²¹ Also, a right in a third person to enter upon the land and enjoy the benefit of the oil and asphalt rights therein,²² and tax liens, subsisting at the time of the conveyance,²³ have been recognized as incumbrances. On the other hand, the legal existence of a railroad right of way, when the roadbed and tracks were upon the real estate at the time of conveyance, was not considered to be a breach of the covenant against incumbrances.²⁴ Similarly, a public highway and appurtenant drainage ditch that encroached upon the land were held not to sustain an action for breach of the covenant against incumbrances.²⁵ These last two examples seem to be in accord with the view that visible easements should be excepted from the operation of the covenant.²⁶

The Florida Supreme Court has held that the measure of damages is the amount paid, or the reasonable and necessary costs incurred in removing the incumbrances.²⁷ In another case the damages were the amount paid on tax liens, plus interest thereon.²⁸ Another way in which this covenant affords protection to the buyer is that it may work an estoppel. For example, a married woman executed a warranty deed jointly with her husband. She then tried to foreclose on a mortgage held by her prior to the conveyance. It was held that the woman was estopped from asserting the mortgage, after having covenanted that there were no incumbrances.²⁹

The covenant of warranty is by far the one most frequently relied upon

19. *Ibid.*

20. *Gore v. General Properties Corp.*, 149 Fla. 696, 6 So.2d 837 (1942).

21. *Gore v. General Properties Corp.*, 149 Fla. 690, 6 So.2d 837 (1942).

22. *Flood v. Graham*, 61 Fla. 207, 54 So.456 (1911).

23. *Cole & Co. v. Whiddon*, 77 Fla. 842, 82 So. 297 (1919).

24. *Van Ness v. Royal Phosphate Co.*, 60 Fla. 284, 53 So. 381 (1910).

25. *Charles H. Deeb, Inc. v. Kestner*, 59 So.2d 514 (Fla. 1952).

26. RAWLE, *THE LAW OF COVENANTS FOR TITLE*, 117 (3d ed. 1860).

27. *Gore v. General Properties Corp.*, 149 Fla. 690, 6 So.2d 837 (1942).

28. *Cole & Co. v. Whiddon*, 77 Fla. 842, 82 So. 297 (1919).

29. *Vliet v. Anthony*, 121 Fla. 439, 164 So. 138 (1935).

by the purchaser. This is because it is broad enough to cover a multitude of defects. The words, as set out in the statute, which give rise to the covenant of warranty are as follows: ". . . and the said party of the first part does hereby fully warrant the title to said land, and will defend the same against the lawful claims of all persons whomsoever."³⁰ Statutes in derogation of the common law are often given a strict construction. For this reason, the Florida Supreme Court has held that failure to use the word "fully" in the statutory form renders the deed void of any covenants except those expressed.³¹ In a case where the grantor warranted title against ". . . claims of all persons whomsoever, by, through and under him . . .", it was held that the additional words "by, through and under him" made the effect of the deed to be in special warranty only.³² Therefore, it must be stressed that a buyer should be careful to follow the language of the statute if he wants to receive the full covenants with the covenant of warranty. It can be said of the covenant of warranty (as of the covenants of seisin and against incumbrances) that it will estop the grantor from denying the intended effect of the deed.³³ The covenant of warranty will not pass by estoppel an estate greater than that which was expressly conveyed.³⁴ If a deed of conveyance puts a limitation on the covenant of warranty, by a conveyance subject to a mortgage, for example, it does not put a prudent purchaser on inquiry as to an unrecorded mortgage.³⁵ Therefore, the vendee has a cause of action where an unrecorded mortgage exists. Similarly, if a purchaser has knowledge of an existing mortgage and accepts a warranty deed, he can expect that the existing mortgage will be paid out of the down payment, or that the amount of the original mortgage will be deducted from the purchase price.³⁶ It has been said that the measure of damages for breach of warranty is generally the same as that for breach of the covenant of seisin.³⁷ Yet, in a case where the vendor resold the property after selling it to the covenantee, the court held that the recovery should be for the damages resulting from the loss of the bargain.³⁸ The court reasoned that the situation was the same as if the covenantor had good title and refused to convey. It was not a breach of warranty where a vendor failed to pay off a lien for street improvements imposed after the sale price was agreed upon.³⁹ Finally, in a small group of cases involving purchase money mortgages, the court has steadfastly held that if the mortgagor remains in undisputed possession under a deed warranting his title, and no eviction or

30. FLA. STAT. § 689.02 (1951).

31. *Van Ness v. Royal Phosphate Co.*, 60 Fla. 284, 53 So. 381 (1910).

32. *Burton v. Price*, 105 Fla. 544, 141 So. 728 (1932).

33. *Reid v. Barry*, 93 Fla. 849, 112 So. 846 (1927).

34. *Ibid.*

35. *Pierson v. Bill*, 138 Fla. 104, 189 So. 679 (1939).

36. *Coleman v. Johnson*, 136 Fla. 609, 187 So. 263 (1939).

37. *Calder v. Richardson*, 11 F.Supp. 948 (S.D. Fla. 1935).

38. *Eaton v. Hopkins*, 71 Fla. 615, 71 So. 922 (1916).

39. *Charbonier v. Arbona*, 68 Fla. 194, 67 So. 41 (1914).

fraud on the part of the vendor is shown, he cannot set up an outstanding title or breach of warranty as a defense to a foreclosure, but has his remedy at law on the broken covenant.⁴⁰

One of the most important ways in which all the covenants for title protect the buyer is that parol evidence in derogation of the covenant is not admissible. This is best illustrated by a case which held that a breach of the covenant against incumbrances cannot be overcome by parol evidence alleging an assumption of tax liens by the vendee.⁴¹

Having discussed the Florida case law on the covenants for title, two questions remain unanswered. The first is concerned with the status of the covenant for further assurances. The second question is in regard to the position the Florida Supreme Court will take when it is confronted with the problem of deciding whether the covenants of seisin and against incumbrances run with the land.

The covenant for further assurances is not in common use in the United States, but it is, nevertheless, one of the six common law covenants. As such, it would seem to fall within the "full common law covenants" of the Florida statute.⁴² There has been no Florida case based on this covenant, as yet, nor has there been a Florida case setting out what the common law covenants are. Oddly enough, the only case that did state the common law covenants in common use in Florida was a case in the Federal court.⁴³ This case did not mention the covenant for further assurances. How the Supreme Court of Florida will react to an action for breach of the covenant for further assurances, based on the statutory warranty deed is a moot question. It seems that recognition of this covenant would afford additional protection to the purchaser, and for this reason, would be desirable.

The recording statute affords protection to subsequent purchasers or creditors in Florida.⁴⁴ The question is whether or not the covenants for title afford any protection to remote purchasers. The answer may evolve from a discussion of covenants for title running with the land. "It is a settled rule on both sides of the Atlantic that until breach, the covenants for title, without distinction between them, run with the land to heirs and assigns."⁴⁵ In the United States the majority view is that the covenants for title are of two distinct types—those *in futuro* and those *in praesenti*.⁴⁶ It is said that the covenant of seisin, the covenant of right to convey, and the covenant against incumbrances are all *in praesenti*, and therefore are broken

40. Knapp v. Fredricksen, 146 Fla. 239, 1 So.2d 181 (1941); R. J. & B. F. Camp Lumber Co. v. State Savings Bank, 59 Fla. 455, 51 So. 543 (1910); Adams v. Fry, 29 Fla. 318, 10 So. 559 (1892); Randall v. Bourquardez, 23 Fla. 264, 2 So. 310 (1887).

41. Bond v. Hewitt, 111 Fla. 180, 149 So. 606 (1933).

42. See note 13, *supra*.

43. Coral Gables Inc., v. Payne, 94 F.2d 593 (4th Cir. 1938).

44. See Comment, 6 MIAMI L.Q. 595 (1952).

45. RAWLE, THE LAW OF COVENANTS FOR TITLE, 336 (3d ed. 1860).

46. *Ibid.*

immediately upon execution and delivery of the deed.⁴⁷ Continuing along this line of reasoning, all that remains is a cause of action personal to the grantee. Therefore, these covenants do not run with the land. "On the other hand, it is held in England that no such distinction exists between the different covenants. That for seisin, it has been said, is not like a covenant to do an act of solitary performance, which not being done, the covenant is broken once for all, but it is rather in the nature of a covenant to do a thing *toties quoties* as the exigencies of the case may require, and that the want of seisin is therefore a continuing breach."⁴⁸

This is the view followed by some of our American courts,⁴⁹ even though they admit along with the other courts that these covenants are broken immediately upon delivery. In Florida it is not known which rule will be followed. Although it has been decided that the covenants of seisin and against incumbrances are broken immediately upon delivery,⁵⁰ the court has not taken a position as to whether these covenants run with the land. The import of a decision on this point is illustrated by the following hypothetical situation. Suppose that A conveys to B by warranty deed, and B conveys to C in similar fashion, but then C conveys to D by quitclaim deed. In the event the land is incumbered, what right does D have against A or B? If the covenant of incumbrance runs with the land, then D has an action against either A or B who covenanted against incumbrances. On the other hand, if the covenant of incumbrances is broken immediately upon delivery of the deed and all that remains is a personal cause of action in the grantee, then D is left without a remedy.

Until the doubts concerning the covenant for further assurances and the question of whether the covenants of seisin and against incumbrances run with the land are resolved, we can only say this much about the covenants for title in Florida and the protection they give to the buyer. As between the grantor and the covenantee, the use of the statutory form of warranty deed will give rise to at least five covenants. These are the covenants of seisin, of right to convey, against incumbrances, for quiet enjoyment, and of warranty. The breach of these covenants leaves the covenantee with a right of action in law for damages, and the theory of damages is compensatory. In the absence of fraud, use of the courts of equity to obtain relief has been denied.⁵¹ A buyer in Florida can rest assured that he need accept nothing more than the statutory warranty deed to receive the same protection that he might have in any other state.

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47. *Ibid.*

48. *Id.* at 337.

49. *Brinton v. Johnson*, 35 Idaho 667, 298 Pac. 1028 (1922); *Anderson v. Larson*, 177 Minn. 606, 225 N.W. 902 (1929); *Talbert v. Crist*, 198 Mo. App. 482, 201 S.W. 906 (1918); *Geizler v. DeFraaf*, 166 N.Y. 339, 59 N.E. 993 (1901).

50. *Supra*, note 27.

51. *Supra*, note 20.