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Daniel K. Edwards

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meters are proving singularly effective in traffic regulation, diminishing the difficulty in finding parking spaces, reducing the number of patrolmen necessary to regulate parking, and in some instances, apparently reducing the number of traffic accidents by as much as thirty-five per cent.⁴⁹ Moreover they seem to be rapidly acquiring public approval wherever installed. If these reports are representative, a more lenient judicial attitude toward parking meters appears warranted.⁵⁰ But it is becoming increasingly apparent that revenue derived from the five-cent-per-hour fee generally imposed far exceeds any reasonable estimate of the costs of regulating parking,⁵¹ and this issue may well be the determining factor in future parking meter decisions.

V. LAMAR GUDGER.

Deeds—Defective Registration as Breach of Warranty.

A recent North Carolina decision, *Dorman v. Goodman*,¹ has received considerable attention and has inspired some comment² as an important ruling on an aspect of the recording and registry laws, namely, the effect of improperly indexing the name of the grantor. Another, and perhaps equally important, holding in the case was disregarded by the comment in the *Harvard Law Review*, and was almost ignored by the court itself. Accordingly, the case raises an unusual question concerning the legal remedies of persons damaged by the operation of registration statutes.

In 1925, *A* conveyed a parcel of land to *B* by warranty deed which was recorded, but the entry in the "grantors" index was defective by reason of a wrong initial. In 1925, *B* conveyed to *C* by warranty deed one half of the parcel of land, and in 1930, *B* conveyed the remaining half to *C* by warranty deed. Both of these deeds were properly recorded and indexed. In 1932, *C* conveyed the land to *D* by warranty deed properly recorded and indexed. In 1934, judgments against *A*, which had been obtained in 1926, were docketed by *X*. Execution was issued and the land sold by the sheriff, being bid in by *D*. *D* now sued *C* for breach of warranty of title. The court held that these judgments, when docketed, became a lien upon the land in question because of the improper indexing of the deed from *A* to *B*. The court further held that this encumbrance was in breach of the warranties contained in the deed from *C* to *D*. Only fourteen words of the opinion were devoted to this latter holding: ". . . In breach of the covenants and warranties in the deed from defendants to plaintiff."

⁴⁹ American City, July, 1939, p. 53; June, 1940, p. 46; Oct., 1940, p. 13.

⁵⁰ American City, Dec., 1939, p. 63; June, 1940, p. 81; Oct., 1940, p. 99.

⁵¹ See note 22, *supra*.

¹ 213 N. C. 406, 196 S. E. 352 (1938).

² Note (1938) 52 HARV. L. REV. 170.

In holding that a subsequently docketed judgment created a lien on the parcel of land, the court was faced with a highly controversial question in interpreting N. C. CODE ANN. (Michie, 1919) §3561,³ but in allocating the liability arising therefrom upon the defendant in this action, it passed into even more doubtful doctrine, and without much apparent deliberation. It should be noted that there was no encumbrance upon, nor defect in title to the land at the time the above defendant, C, executed and delivered his deed to the above plaintiff, D. The judgment lien attached, and the execution sale took place two years after that time. A serious question arises, therefore, whether a title to land or a right in land arising after the covenants in a deed have been made can be considered a breach of those covenants, and if so, to what extent and under what circumstances?

It seems to have been nowhere contended that a defect in registration or, indeed, the total absence of any recording of prior deed are circumstances within the scope of the covenants contained in an ordinary warranty deed, and there seems little reason to believe that they are, since a failure to record does not of itself create any encumbrance or impairment of title. Accepting that to be the sound view, we may discard for the purposes of the present inquiry those covenants operative *in praesenti*, such as covenants of seisin, good right to convey, and against encumbrances, for these are breached, if at all, when made.⁴ However, covenants such as general warranties of title, covenants to warrant and defend, and for quiet enjoyment are operative *in futuro*, in that they are breached by the successful assertion of a hostile, paramount title, claim, right, or interest in the property at some time in the future.⁵ The problem is to correctly construe these covenants in the light of the "probable intention of the parties" or, to be more realistic, "what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used";⁶ and since constant judicial decisions have established these covenants as formulae expressing a complexity of rights and obligations their meaning has become more a question of law than of fact and is to be found in an analysis of those decisions.

Rawle emphatically says that a covenant of warranty extends only

³ Note (1911) 24 HARV. L. REV. 505.

⁴ Eames v. Armstrong, 142 N. C. 506, 55 S. E. 405 (1906); Fishel v. Brown-
ing, 145 N. C. 71, 58 S. E. 759 (1907); Pridgen v. Long, 177 N. C. 189, 98 S. E.
451 (1919); Thompson v. Avery County, 216 N. C. 405, 5 S. E. (2d) 146 (1939);
see Wiggins v. Pender, 132 N. C. 628, 636, 44 S. E. 362, 364 (1903); Guy v. First
Carolinas Joint Land Bank of Columbia, 202 N. C. 803, 804, 164 S. E. 323, 324
(1932).

⁵ Hodges v. Latham, 98 N. C. 239, 3 S. E. 495 (1887); Mizell v. Ruffin, 118
N. C. 69, 23 S. E. 927 (1896); Wilson v. Vreeland, 176 N. C. 504, 97 S. E. 427
(1918); Cover v. McAden, 183 N. C. 641, 112 S. E. 817 (1922).

⁶ HOLMES, COLLECTED LEGAL PAPERS (1921) 204.

to "elder and better titles—to those then existing and not to those subsequently acquired."⁷ He quotes from *Grenclife v. W*—: "All the judges agreed that when a man bound himself and his heirs to warranty, they are not bound to warrant new titles of action accruing through the feoffee or any other after the warranty made, but only such titles as are *in esse* at the time of the warranty made."⁸ As a more modern authority for his view, he cites *Wade v. Comstock*⁹ which has received the approval of other courts.¹⁰ In that case the Ohio court found that "from the time of Lord Coke to the present, and with the exception presently to be noted, they (the authorities) all establish and confirm the position, that the covenant of general warranty relates solely to the title *as it was at the time the conveyance was made*, and merely binds the grantor to protect the grantee and his assigns against a lawful better title, *existing before or at the date of the grant*."¹¹ The exception to be noted was *Curtis v. Deering*,¹² which Rawle condemns as being wrong in principle and contrary to all authority.

The warranty discussed in *Grenclife v. W*—,¹³ and by Coke in his commentaries upon Littleton¹⁴ was an early common law warranty, and not the covenant of warranty now generally used in American conveyancing. "There is no evidence that the covenant in such general use in this country, called 'the covenant of warranty', ever had a place in English conveyancing."¹⁵ But while some of the remedies available under the common law warranty are no longer available, that warranty was sometimes treated as a covenant upon which a tenant could bring a personal action for damages against the warrantor,¹⁶ and to that extent, at least, is analogous to the modern warranty of title.¹⁷

While the conclusion of *Dorman v. Goodman* seems erroneous under any theory found in the authorities, the broad rule supported by Rawle cannot be unqualifiedly endorsed. Much would seem to depend upon the nature and source of the fault which causes the provisions of the registration statute to operate to bestow the subsequent right or title to the land. If a grantor convey to one grantee who fails to record his deed, and thereafter deliberately conveys to another grantee who records, the first grantee should be allowed to have an action against the grantor upon the warranties contained in his deed. But if a grantor

⁷ RAWLE, COVENANTS FOR TITLE (5th ed. 1887) 168, n. 5.

⁸ 1 Dyer 42(a), 42(b) (K. B. 1539).

⁹ 11 Ohio 71 (1860).

¹⁰ Maeder v. Carondelet, 26 Mo. 112 (1857); Lukens v. Nicholson, 4 Phil. R. 22 ().

¹¹ 11 Ohio 71, 79 (1860) (italics by the court).

¹² 12 Me. 499 (1835).

¹³ 1 Dyer 42(a) (K. B. 1539).

¹⁴ 2 Co. Litt. *388(b).

¹⁵ RAWLE, COVENANTS FOR TITLE (5th ed. 1887) 17.

¹⁶ Marston v. Hobbs, 2 Mass. 433 (1807).

¹⁷ Biwer v. Martin, 294 Ill. 488, 128 N. E. 518 (1920).

conveys to a grantee, who fails to record, and thereafter a judgment is docketed against the grantor, then the grantor should not be held liable. *Dorman v. Goodman* is in essence like this latter hypothetical situation, for there fault could be imputed to no one except the register of deeds.

In *Curtis v. Deering*¹⁸ the Maine court made the distinction above drawn. Land had been conveyed in mortgage, with covenants for seisin and of warranty, but the mortgagee failed to record the mortgage. The land was then conveyed in fee by the mortgagor to a purchaser without notice, who recorded his deed. Under the registry statutes of Maine, this purchaser thereupon took title free and clear of the mortgage. Forthwith the mortgagee brought an action against the mortgagor on the covenant of warranty, and the court allowed recovery. The court reasoned that a conveyance in fee by the mortgagor in disregard of the rights of the mortgagee, was a wrongful act. The justification for this premise need not detain us; the fact that the court deemed such a premise indispensable to its conclusion is the important thing.

Other courts draw the same distinction,¹⁹ and support is also found in analogous cases holding that a covenant of warranty extends to all acts of the covenantor himself whether tortious or otherwise.²⁰ Tortious acts of strangers are not embraced within the covenant since the law provides the grantee another remedy, and it would be unreasonable to make the grantor an insurer against such acts.²¹ But where the grantor himself enters under claim or assertion of right the cases seem uniform in holding that a breach of the covenant has occurred.²² Certainly, then, if a grantor enables a stranger to prevail over the original grantee by wrongfully issuing a second deed to land already conveyed, he has violated that covenant.²³

The grantor may be guilty of no wrongful act, yet the grantee may suffer an impairment of his property rights in four instances, *viz.*, by the omission or negligence of either himself, his immediate grantor, some prior grantor, or the official charged with the duty of recording and indexing deeds. In the absence of willful wrong on the part of the grantor, a grantee who neglects to have his own deed recorded should bear the consequences. The venerable case of *Grenclife v. W—*,²⁴

¹⁸ 12 Me. 499 (1835).

¹⁹ *Scott v. Scott*, 70 Pa. 244 (1871).

²⁰ *Shrago v. Gullely*, 174 N. C. 135, 93 S. E. 458 (1917); RAWLE, COVENANTS FOR TITLE (5th ed. 1887) 167.

²¹ *Andrus v. St. Louis Smelting & Refining Co.*, 130 U. S. 643, 9 Sup. Ct. 645, 32 L. ed. 1054 (1889); *Tierney v. Whiting*, 2 Colo. 620 (1875); *Jerald v. Elly*, 51 Iowa 321, 1 N. W. 639 (1879); *Wilder v. Ireland*, 53 N. C. 85 (1860); *Noyes v. Rockwood*, 56 Vt. 647 (1884).

²² *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123 (1885); RAWLE, COVENANTS FOR TITLE (5th ed. 1887) 167.

²³ *Cincinnati, U. & Ft. W. Ry. v. Pearce*, 28 Ind. 502 (1867); *Eaton v. Hopkins*, 71 Fla. 615, 71 So. 922 (1916); *Williamson v. Williamson*, 71 Me. 442 (1880).

²⁴ 1 Dyer 42(a), 42(b) (K. B. 1539).

sanctions this, for the court there holds that the plaintiff, whose failure to pay rent to the lord had caused his title to fail, "is the cause of the breach of the condition, whereof he shall not himself take advantage, so as to give himself an action by his own act." The three remaining possibilities cannot be so neatly disposed of; yet the authorities allowing a grantee to recover for warranty breached by a right arising subsequent to the conveyance require that such right arise as a result of an unlawful act by the grantor, and it would be strange to hold that the mere election of an owner not to record his own deed amounted to an unlawful act, to say nothing of the situations in which the defect in registration is the fault of the recording officer, or the omission of some remote grantor. As the grantor does not warrant the chain of deeds to the land to be accurately recorded, it appears unreasonable to construe his covenant to include any subsequent judgment docketed against him or a prior owner, or any unlawful conveyance of a prior owner. The books of registration are open to both vendor and purchaser. Further, where the gap in registration occurs by the neglect or fault of a public official, the injured grantee has a remedy against him. In North Carolina, the register of deeds must furnish an official bond to cover such contingencies.²⁵

In *Wade v. Comstock*, the Ohio court attributes to the covenant of quiet enjoyment qualities and characteristics not possessed by the covenant to warrant and defend, but does so without discussion or citation of authority.²⁶ Several reasons weigh against an extended consideration of that point here. First, the principal case was concerned with no specific covenant for quiet enjoyment;²⁷ second, it is not customary to insert such a covenant in deeds used in North Carolina;²⁸ and third, covenants of quiet enjoyment and covenants of warranty have long been considered identical in operation and effect.²⁹

When the Supreme Court of North Carolina again has occasion to pass on the instant question, it may well refuse to be bound by the scanty discussion in *Dorman v. Goodman*. At any event, we may hope for an articulation of the theory underlying the rule there applied.

DANIEL K. EDWARDS.

²⁵ N. C. CODE ANN. (Michie, 1939) 3555, *State ex rel. Kivett v. Young*, 106 N. C. 567, 10 S. E. 1019 (1890); *State ex rel. Daniel v. Grizzard*, 117 N. C. 105, 23 S. E. 93 (1895).

²⁶ 11 Ohio 71, 83 (1860).

²⁷ Information from counsel in the case.

²⁸ SIMMS AND SIMMS, *MANUAL OF LAW AND FORMS* (9th ed. 1938) 596.

²⁹ *Keel v. Ikard*, 222 Ala. 617, 133 So. 906 (1931); *Biwer v. Martin*, 294 Ill. 488, 128 N. E. 518 (1920); *Grist v. Hodges*, 14 N. C. 198 (1831); *Huntley v. Waddell*, 34 N. C. 32 (1851); *Fishel v. Browning*, 145 N. C. 71, 58 S. E. 759 (1907).