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## THE COMMON LAW COVENANTS, THE COVENANT OF HABITABILITY, AND THE COVENANT AGAINST ENCUMBRANCES

In a modern conveyance of real property it is almost certain that covenants will be significant in the transaction.<sup>267</sup> Covenants of title relate to the validity and quality of the title which the grantor possesses at the time he purports to convey and are, in effect, promises to the grantee that the estate he actually receives is consistent with the recitals in the deed.<sup>268</sup> Such promises are important in that they protect the purchaser of property from fraud and unscrupulous practices, and provide a remedy in the form of damages in the event that one of the covenants is breached.<sup>269</sup>

There are two methods by which a title covenant may be created. First, the parties may specifically include the covenant in the deed. Parties may express covenants freely subject only to public policy and the legality of the agreement.<sup>270</sup> In Texas, however, title covenants generally become part of a conveyance by implication.<sup>271</sup> An implied covenant is of full legal effect and may arise by operation of law, from the use of particular words by the parties, or by statute.<sup>272</sup>

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267. An exception might be a quitclaim deed, which does not purport to convey land, but only to relinquish any rights which the grantor may have. *See Baldwin v. Drew*, 180 S.W. 614, 616 (Tex. Civ. App.—Beaumont 1915, no writ). *See generally Fritz, The Texas Law of Conveyancing*, 3 TEX. REV. CIV. STAT. ANN. 3, 18 (1962).

268. *See generally* 3 AMERICAN LAW OF PROPERTY § 12.124 (A. Casner ed. 1952).

269. *Dilbeck v. Bill Gaynier, Inc.*, 368 S.W.2d 804, 807 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.); *Freeman v. Magnolia Petroleum Co.*, 165 S.W.2d 111, 115 (Tex. Civ. App.—Amarillo 1942, no writ); *Rosek v. Kotzur*, 267 S.W. 759, 762 (Tex. Civ. App.—San Antonio 1924, no writ).

270. *Ragan v. Mosher*, 225 S.W.2d 438, 440 (Tex. Civ. App.—Galveston 1949, writ ref'd n.r.e.); *Klein v. Palmer*, 151 S.W.2d 652, 654 (Tex. Civ. App.—Galveston 1941, no writ).

271. *Fritz, The Texas Law of Conveyancing*, 3 TEX. REV. CIV. STAT. ANN. 3, 19 (1962); *see, e.g., L-M-S Inc. v. Blackwell*, 149 Tex. 348, 353-54, 233 S.W.2d 286, 289 (1950); *Schaefer v. Bonner*, 469 S.W.2d 216, 220 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.).

272. The intention of the parties must be clearly shown in order to imply a covenant from the contract itself. *See, e.g., Freeport Sulphur Co. v. American Sulphur Royalty Co.*, 117 Tex. 439, 441, 6 S.W.2d 1039, 1041-42 (1928); *Kingsley v. Western Natural Gas Co.*, 393 S.W.2d 345, 352-53 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.); *Marvin Drug Co. v. Couch*, 134 S.W.2d 356, 361 (Tex. Civ. App.—Dallas 1939, writ dism'd jdgmt cor.); *see* TEX. REV. CIV. STAT. ANN. art. 1297 (1962). The statute only operates upon the use, in the instrument, of certain words. The statute provides:

From the use of the word "grant" or "convey" in any conveyances by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs or assigns, are implied, unless restrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance the grantor has not conveyed the same estate, or any right, title or interest therein, to any person other than the grantee.

2. That such estate is at the time of the execution of such conveyance free from encumbrances.

Title covenants are distinguishable from restrictive covenants in that the former guarantee that the estate actually conveyed conforms with the description in the deed, while the latter relate to the use of the estate after conveyance. Restrictive covenants are sometimes referred to as "negative easements" because most are negative in nature and create a servitude or easement on the land of the grantee.<sup>273</sup> For example, the deed may provide that the grantee will use the land only as a residential area. This agreement binds the grantee and operates in favor of the grantor because it is the grantor who may maintain an action in the event of a breach. Title covenants, on the other hand, bind the grantor for the benefit of the grantee.

Although a condition subsequent, which is a promise by the grantee to do or not do a given act,<sup>274</sup> and a covenant may be similar in form, they are easily distinguished by the remedy for their breach.<sup>275</sup> Breach of a condition subsequent results in forfeiture of the estate by the grantee and reinvestment in the grantor, while breach of a covenant results in a right of action for damages.<sup>276</sup>

The operation of a particular covenant is determined by its classification as real or personal. A real covenant is one "having for its object something annexed to, inherent in, or connected with, land or real property—one which relates to, touches or concerns the land . . ." <sup>277</sup> A recent Texas case, *Billington v. Riffe*,<sup>278</sup> lists three additional requirements—first, that the parties must intend to make a real covenant; second, that there must be privity of estate; and third, that either the grantor's heirs and assigns must be expressly bound by the agreement or the subject matter of the conveyance must be something in being at the time of the conveyance.<sup>279</sup> If these requirements are met, then a covenant is real in nature. This is important because a real

Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.

273. *Lebo v. Johnson*, 349 S.W.2d 744, 748-49 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.); see *Saccomanno v. Farb*, 492 S.W.2d 709, 713 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.).

274. It has been held that "a condition subsequent is one which operates upon some estate . . . already created and vested, and which, if not performed, may defeat it at the election of the grantor." *Alamo Cas. Co. v. Reeves*, 258 S.W.2d 211, 214 (Tex. Civ. App.—Fort Worth 1953, no writ).

275. See *Zapata v. Torres*, 464 S.W.2d 926, 929 (Tex. Civ. App.—Dallas 1971, no writ); *Dilbeck v. Bill Gaynier, Inc.*, 368 S.W.2d 804, 807 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.); *Freeman v. Magnolia Petroleum Co.*, 165 S.W.2d 111, 115 (Tex. Civ. App.—Amarillo 1942, no writ).

276. *Dilbeck v. Bill Gaynier, Inc.*, 368 S.W.2d 804, 807 (Tex. Civ. App.—Dallas 1963 writ ref'd n.r.e.).

277. *Panhandle & S.F.R.R. v. Wiggins*, 161 S.W.2d 501, 504 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.); see *Mobil Oil Corp. v. Brennan*, 385 F.2d 951, 953 (5th Cir. 1967).

278. 492 S.W.2d 343 (Tex. Civ. App.—Amarillo 1973, no writ).

279. Privity of estate can be said to be a mutual or successive interest in the same estate. See *Panhandle & S.F.R.R. v. Wiggins*, 161 S.W.2d 501, 505 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.).

covenant runs with the land, and, therefore, a subsequent assignee of the grantor or the grantee assumes the obligations, as well as the benefits, which arise under the covenant.<sup>280</sup> When these requisites are not met, the covenant is personal in nature and is binding only on the original parties.<sup>281</sup> It is not always clear why a particular covenant is classified as real or personal, but the classification is very important to a subsequent assignee. He must be careful to determine whether covenants in prior deeds in the chain of title are real, and binding on him, or merely personal, and have no effect on him. The various title covenants are not uniformly classified; some are real while others are personal.

#### FURTHER ASSURANCE

In the covenant of further assurance the grantor promises to perform all acts, conveyances, or assurances which are necessary to confirm the purchaser's title and to execute any instruments which are required to perfect the title of the purchaser.<sup>282</sup> The covenant is usually stated in similar form:

Grantor and all persons hereinafter claiming under him will at any time hereafter, at the request and expense of grantee, his heirs or assigns make all such further assurances for the more effectual conveying of the above-granted premises, with the appurtenances, as may be reasonably required by him or them.<sup>283</sup>

Although this covenant is common in England, and has been used in some American states,<sup>284</sup> there does not appear to be any mention of it by Texas courts. Since the covenant of further assurance apparently will not be implied in Texas, it will arise only if expressly stated in the conveyance.<sup>285</sup>

Further assurance requires only that the grantor insure the conveyance of

280. 3 AMERICAN LAW OF PROPERTY § 12.124 (A. Casner ed. 1952). A covenant running with the land means that "a liability to perform duties or a right to receive advantages thereof passes to a vendee or other assignee of the land." *Panhandle & S.F.R.R. v. Wiggins*, 161 S.W.2d 501, 504 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.).

It seems obvious that in order for a covenant to run with the land, it must pertain to the land conveyed, that there must be privity of estate between the covenantee and the later claimant of benefit under the covenant, and that, aside from an express provision of the deed as to whether the covenant shall or shall not run with the land, the best test is as to whether it enhances the land's value or renders it more beneficial and convenient to those by whom it is owned or occupied.

3 AMERICAN LAW OF PROPERTY § 12.124 (A. Casner ed. 1952).

281. *Billington v. Riffe*, 492 S.W.2d 343, 346 (Tex. Civ. App.—Amarillo 1973, no writ).

282. *See Uhl v. Ohio River R.R.*, 41 S.E. 340, 343 (W. Va. 1902). *See also* 3 AMERICAN LAW OF PROPERTY § 12.130 (A. Casner ed. 1952).

283. 7 AM. JUR. LEGAL FORMS 2d § 77:33 (1972).

284. *Blaum v. May*, 16 So. 2d 329, 330 (Ala. 1944); *Zabriske v. Baeudendistel*, 20 A. 163 (N.J. Ch. 1890); *Werner v. Wheeler*, 127 N.Y.S. 158, 166 (Sup. Ct. 1911); *Hahn v. Fletcher*, 128 S.E. 326, 328 (N.C. 1925); *Uhl v. Ohio River R.R.*, 41 S.E. 340, 343 (W. Va. 1902). *See generally* 3 AMERICAN LAW OF PROPERTY § 12.130 (A. Casner ed. 1952).

285. This is assumed from the fact that the covenant has apparently never been mentioned by a Texas court.

the estate originally intended to be conveyed.<sup>286</sup> For example, in *Uhl v. Ohio River Railroad*,<sup>287</sup> the grantee sought to invoke the covenant to force the grantor to execute a deed conveying title in fee, which the grantee claimed he should have received by the original conveyance. The court looked to the granting clause of the conveyance and determined that it passed only an easement. Since the granting clause purported to transfer only an easement, the covenant could be employed to force a valid conveyance only of that estate, but could not be used to expand or enlarge the estate.<sup>288</sup> Generally, the grantor will not be liable for a breach of the covenant of further assurance until there is an eviction by one with a superior title;<sup>289</sup> thus the covenant can be said to operate prospectively.<sup>290</sup> The statute of limitations, which would be based on the contract, does not begin to run when the conveyance occurs, but only on eviction.<sup>291</sup> In the event of breach, the amount of damages awarded is the purchase price plus interest. Since this covenant obligates the vendor to perfect title, the purchaser may also have an action in equity for specific performance if he can show that the remedy at law is insufficient.<sup>292</sup>

Further assurance is a real covenant<sup>293</sup> and provides valuable protection for a purchaser because it allows him to require a grantor to actually convey the estate originally intended. The requirement of eviction somewhat negates its effectiveness, however, because the purchaser must wait until he loses possession in order to recover. It would seem preferable to allow a purchaser to recover for a breach of the covenant on discovery of some outstanding title inconsistent with the estate conveyed. While the covenant once provided a useful tool for the protection of purchasers, it appears that its popularity in the United States has declined, and other real covenants are now relied on more heavily.<sup>294</sup>

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286. *Uhl v. Ohio River R.R.*, 41 S.E. 340, 343 (W. Va. 1902).

287. *Id.* at 340.

288. *Id.* at 343.

289. See *Blaum v. May*, 16 So. 2d 329, 331 (Ala. 1944); *Firebaugh v. Wittenburg*, 141 N.E. 379, 381-82 (Ill. 1923); *Building, Light & Water Co. v. Fray*, 32 S.E. 58 (Va. 1899). But see *Werner v. Wheeler*, 127 N.Y.S. 158, 166 (Sup. Ct. 1911). Although a breach may technically occur without eviction, the grantee would be able to show only nominal damages. The grantor may thus perfect title at any time before eviction.

290. *Marathon Builders, Inc. v. Polinger*, 283 A.2d 617, 620 (Md. Ct. App. 1971). There is no breach unless the grantor fails to carry out his promise when a demand is made.

291. The limitation period is 4 years in Texas. See TEX. REV. CIV. STAT. ANN. art. 5527 (1958).

292. See, e.g., *Werner v. Wheeler*, 127 N.Y.S. 158 (Sup. Ct. 1911). See also 3 AMERICAN LAW OF PROPERTY § 12.130 (A. Casner ed. 1952).

293. See, e.g., *Hahn v. Fletcher*, 128 S.E. 326, 328 (N.C. 1925).

294. One other covenant of historical interest is the covenant of quantity, which makes a grantor liable for damages to a grantee when a conveyance is made specifically by quantity and a shortage subsequently is discovered. Quantity was recognized in Texas in *Weir v. McGee*, 25 Tex. (Supp.) 21 (1860). The relevance of the covenant

## QUIET ENJOYMENT

The purchaser whose deed expressly or impliedly contains a covenant of quiet enjoyment is assured that he may peaceably and quietly enjoy the premises. The covenant is generally stated,

Grantee, his heirs and assigns shall at all times hereafter, peaceably and quietly have, hold, use, occupy, possess, and enjoy the above-granted premises, and every part and parcel thereof, with the appurtenances, without any suit, molestation, eviction, or disturbance by grantor, his heirs or assigns, or by any other person or persons lawfully claiming the same.<sup>295</sup>

Quiet enjoyment is recognized throughout the United States.<sup>296</sup> While the covenant is important in Texas leases, its applicability to sales of real property is severely limited. The limitation has arisen primarily because quiet enjoyment is often considered similar in effect to the covenant of warranty.<sup>297</sup> In Texas the warranty covenant is expressed in virtually all conveyances of an inheritable estate and is relied on primarily in construing rights and obligations of title arising under a deed of sale of real property.<sup>298</sup> Consequently, quiet enjoyment is rarely if ever considered by Texas courts in litigation arising in this area.

In states where quiet enjoyment is widely employed in deeds of sale, the covenant has been consistently held to be real and to run with the land.<sup>299</sup>

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in modern practice is curtailed, however, by the rule that a quantity statement gives way to a boundary description when the two are not in harmony. See *Rahl v. Compton*, 112 S.W.2d 509, 511 (Tex. Civ. App.—Austin 1937, writ dismissed). To illustrate, one Texas court said "a sale is not one by the acre just because the deed mentions a certain number of acres." *Briley v. Hay*, 13 S.W.2d 997, 999 (Tex. Civ. App.—Eastland 1929, no writ); accord, *Reid v. Byrd*, 34 S.W.2d 305, 307 (Tex. Civ. App.—Beaumont 1930, no writ). The present warranty covenant provides an adequate remedy to the grantee who is the unfortunate recipient of a shortage. See *Mortgage Inv. Co. v. Bauer*, 493 S.W.2d 339, 343 (Tex. Civ. App.—El Paso 1973, writ refused n.r.e.). The necessity for the covenant is further abrogated by the grantee's remedies in tort or equity. Thus, if the quantity is stated in the deed, even if only by way of description, the grantee will often have a remedy for fraud, mutual mistake, or money had and received. See *McCord v. Bailey*, 200 S.W.2d 885 (Tex. Civ. App.—Eastland 1947, no writ); *Reid v. Byrd*, 34 S.W.2d 305 (Tex. Civ. App.—Beaumont 1930, no writ); *Briley v. Hay*, 13 S.W.2d 997, 999-1000 (Tex. Civ. App.—Eastland 1929, no writ).

The quantity covenant is not generally considered one of the common law covenants of title. Should a shortage of acres appear, it seems best to rely on the alternative remedies unless the covenant is expressed in the instrument.

295. 7 AM. JUR. LEGAL FORMS 2d § 77:34 (1972).

296. See, e.g., *Andrus v. St. Louis Smelting & Ref. Co.*, 130 U.S. 643, 648 (1889); *Chicago, Mobile Dev. Co. v. G.C. Coggin Co.*, 66 So. 2d 151, 156 (Ala. 1953); *Standard Live Stock Co. v. Pentz*, 269 P. 645, 648 (Cal. 1928); *Eggers v. Mitchem*, 38 N.W. 2d 591, 592 (Iowa 1949); *Linville v. Nance Dev. Co.*, 304 P.2d 453, 460 (Kan. 1956).

297. *Gulf Ref. Co. v. Fetschan*, 130 F.2d 129, 132-33 (6th Cir.), cert. denied, 318 U.S. 764 (1942).

298. "The deed with a covenant of general warranty is by long odds the most commonly used form of deed in Texas . . ." Fritz, *The Texas Law of Conveyancing*, 3 TEX. REV. CIV. STAT. ANN. 3, 18 (1962).

299. See, e.g., *Chicago, Mobile Dev. Co. v. G.C. Coggin Co.*, 66 So. 2d 151, 156 (Ala. 1953); *Linville v. Nance Dev. Co.*, 304 P.2d 453, 460 (Kan. 1956).

Thus, a right of action for breach will arise in favor of the person to whom the land has been conveyed at the time of the breach. For example, in denying the right of action to a grantee who had conveyed to an assignee before the breach, the Alabama Supreme Court said, "The covenant runs as an appurtenant and a right of action for its breach comes into being in favor of him who by conveyance would at the time of the ouster be deprived of his right by reason thereof."<sup>300</sup>

A breach of the covenant requires an eviction, actual or constructive, or a refusal by one with paramount title to relinquish possession to the grantee.<sup>301</sup> As explained by the Alabama Supreme Court,

"It operates *in futuro*, unless the true owner is in actual possession at the time the covenant is entered into, in which case there is a breach *eo instante*; it runs with the land, that is, it is intended for the benefit of the ultimate grantee in whose time it is broken, and there can be no breach except by an actual or constructive eviction."<sup>302</sup>

Although eviction normally must be by one who has paramount title,<sup>303</sup> acts of a third person without paramount title may be sufficient to breach the covenant if the landlord has authorized such acts.<sup>304</sup> The grantor therefore has no responsibility under the covenant unless the third party actually has a superior right to the demised premises or is authorized by the grantor in his acts. The remedy in cases of eviction by one without superior title is not for breach of the covenant, but "is [instead] to dispossess the intruder" and make legal claim against him.<sup>305</sup>

The covenant of quiet enjoyment is implied in every lease of real property in Texas, unless there is an express provision to the contrary.<sup>306</sup> The lessee

300. *Chicago, Mobile Dev. Co. v. G.C. Coggin Co.*, 66 So. 2d 151, 156 (Ala. 1953).

301. "Since complainant has suffered no eviction or disturbance in its possession of the land, it has no right of action for the breach of the covenant for quiet enjoyment . . ." *Id.* at 156; *accord*, *Andrus v. St. Louis Smelting & Ref. Co.*, 130 U.S. 643, 648 (1889); *Standard Live Stock Co. v. Pentz*, 269 P. 645, 648 (Cal. 1928); *Eggers v. Mitchem*, 38 N.W.2d 591, 592 (Iowa 1949); *E.B. Jones Motor Co. v. Niedringhaus*, 323 S.W.2d 31, 35 (Mo. Ct. App. 1959).

302. *Chicago, Mobile Dev. Co. v. G.C. Coggin Co.*, 66 So. 2d 151, 157 (Ala. 1953).

303. *See, e.g.*, *Andrus v. St. Louis Smelting & Ref. Co.*, 130 U.S. 643, 648 (1889); *Bowers v. Sells*, 123 N.E.2d 194, 197 (Ind. Ct. App. 1954); *Brown v. International Land Co.*, 116 P. 799, 800 (Okla. 1911). One court has said, "A paramount title is one which prevails in an action or is successfully asserted." There is no breach "by the existence of an outstanding, but unfounded claim upon the property." *Eggers v. Mitchem*, 38 N.W.2d 591, 592 (Iowa 1949).

304. *Bowers v. Sells*, 123 N.E.2d 194, 197 (Ind. Ct. App. 1954); *cf.* *Frazier v. Wynn*, 459 S.W.2d 895, 897 (Tex. Civ. App.—Amarillo 1970), *rev'd on other grounds*, 472 S.W.2d 750 (Tex. 1971).

305. *Andrus v. St. Louis Smelting & Ref. Co.*, 130 U.S. 643, 648 (1889). An entry without paramount title or authorization will cast the person entering into the position of a wrongdoer who should be personally liable to the owner or tenant for his wrongful acts.

306. *See, e.g.*, *L-M-S Inc. v. Blackwell*, 149 Tex. 348, 353-54, 233 S.W.2d 286, 289 (1950); *Frazier v. Wynn*, 459 S.W.2d 895, 897 (Tex. Civ. App.—Amarillo 1970), *rev'd on other grounds*, 472 S.W.2d 750 (Tex. 1971); *Richker v. Georgandis*, 323 S.W.2d 90,

is assured that his possession will not be interfered with by the lessor, one claiming under him, or one with paramount title,<sup>307</sup> but the covenant has no application to acts of strangers.<sup>308</sup> Breach occurs in the event of eviction, either actual or constructive,<sup>309</sup> or interference with the peaceable use of the premises.<sup>310</sup> For example, an entry into the demised premises by another tenant of the landlord has been considered a breach.<sup>311</sup> An unauthorized entry by the landlord is a breach, even if it is for the purpose of making repairs, unless the right to repair is expressly reserved in the lease.<sup>312</sup> Additionally, where the lessor enters into a lease of the premises with a third party during the term of the original lease, the covenant is breached upon entry by the third party.<sup>313</sup> In *Richker v. Georgandis*,<sup>314</sup> the lessor placed a barricade in front of the leased restaurant which impaired the view of the premises, interfered with access, and caused the restaurant to be filled with dust. The civil appeals court considered this sufficient interference to constitute a breach of the covenant.<sup>315</sup>

In the event of a breach, the lessee has a right of action for all damages which naturally and proximately result from the breach.<sup>316</sup> Texas courts

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95 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.). It has been held in earlier cases that the implication arises through the use of the word "lease" or "demise." See *Nelson v. Lamb*, 252 S.W.2d 713, 714 n.1 (Tex. Civ. App.—Dallas 1952, no writ). While it seems that one of these words will be used in most lease conveyances, the latest cases, cited above, do not appear to require their use.

307. *Atler v. Erskine*, 111 S.W. 186 (Tex. Civ. App. 1908, writ ref'd); *Thomas v. Brin*, 85 S.W. 842, 845 (Tex. Civ. App. 1905, no writ); *accord*, *Andrus v. St. Louis Smelting & Ref. Co.*, 130 U.S. 643, 648 (1889); *Bowers v. Sells*, 123 N.E.2d 194, 197 (Ind. Ct. App. 1954).

308. *Atler v. Erskine*, 111 S.W. 186 (Tex. Civ. App. 1908, writ ref'd); *Sedberry v. Verplanck*, 31 S.W. 242 (Tex. Civ. App. 1895, no writ); *accord*, *Andrus v. St. Louis Smelting & Ref. Co.*, 130 U.S. 643, 648 (1889); *Bowers v. Sells*, 123 N.E.2d 194, 197 (Ind. Ct. App. 1954).

309. *Richker v. Georgandis*, 323 S.W.2d 90, 95 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.). The elements required for a constructive eviction in Texas are set out in *Steinberg v. Medical Equip. Rental Serv., Inc.*, 505 S.W.2d 692, 696-97 (Tex. Civ. App.—Dallas 1974, no writ).

310. See, e.g., *Richker v. Georgandis*, 323 S.W.2d 90, 98 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.); *Fort Terrett Ranch Co. v. Bell*, 275 S.W. 81, 82 (Tex. Civ. App.—Austin 1925, no writ).

311. *Fort Terrett Ranch Co. v. Bell*, 275 S.W. 81, 82 (Tex. Civ. App.—Austin 1925, no writ); cf. *Frazier v. Wynn*, 459 S.W.2d 895, 897 (Tex. Civ. App.—Amarillo 1970), *rev'd on other grounds*, 472 S.W.2d 750 (Tex. 1971).

312. *Higby v. Kirksey*, 163 S.W. 315, 316 (Tex. Civ. App.—Fort Worth 1913, writ ref'd). The case of *Stool v. J.C. Penney Co.*, 404 F.2d 562, 566 n.13 (5th Cir. 1968), asserts that the rule in *Higby* is still in force in Texas. As to the existence of a duty to repair and the corresponding right of entry by a landlord, see RESTATEMENT (SECOND) OF TORTS § 357 (1965).

313. See *Frazier v. Wynn*, 459 S.W.2d 895, 897 (Tex. Civ. App.—Amarillo 1970), *rev'd on other grounds*, 472 S.W.2d 750 (Tex. 1971).

314. 323 S.W.2d 90 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).

315. *Id.* For another example see *Stephens v. Anderson*, 275 S.W.2d 869 (Tex. Civ. App.—Austin 1955, writ ref'd n.r.e.).

316. *McKenzie v. Carte*, 385 S.W.2d 520, 528 (Tex. Civ. App.—Corpus Christi 1964, writ ref'd n.r.e.); *Richker v. Georgandis*, 323 S.W.2d 90, 98 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).



have held that lost profits, when they can be ascertained with reasonable certainty from past recorded profits, may be recovered if the premises were being used as an established business.<sup>317</sup> The tenant may also seek the equitable remedy of injunction in cases where the harm is of a continuing nature and will result in irreparable damage to the tenant.<sup>318</sup>

#### SEISIN AND GOOD RIGHT TO CONVEY

The covenants of seisin and good right to convey are synonymous in Texas.<sup>319</sup> The purpose of the covenant is to assure a grantee that the grantor is seized of an indefeasible estate of the quality and quantity which he purports to convey.<sup>320</sup> By virtue of article 1297, the covenant is implied in every conveyance of an inheritable estate which uses the word "grant" or "convey" unless it is expressly excluded.<sup>321</sup> A sample form of the covenant provides,

At the time of the delivery of these presents, grantor is lawfully seized of a good, absolute, and indefeasible estate of inheritance, in fee simple, of all and in singular, the above-granted premises.<sup>322</sup>

While the wording of the statute differs somewhat from this sample, the protection offered is the same.<sup>323</sup> Both assure a purchaser that his grantor is the owner of the estate he purports to convey, and they provide a remedy for breach of the covenant in the event that this is found to be untrue.

The significance of the seisin covenant is that it allows the grantee a right of action at any time after the conveyance is made if the grantor "does not own the estate in the land he undertakes to convey."<sup>324</sup> The grantee is not required to wait for an eviction before he can claim relief under the

317. *McKenzie v. Carte*, 385 S.W.2d 520, 528 (Tex. Civ. App.—Corpus Christi 1964, writ ref'd n.r.e.); *Richker v. Georgandis*, 323 S.W.2d 90, 98 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).

318. *Nelson v. Lamb*, 252 S.W.2d 713, 715 (Tex. Civ. App.—Dallas 1952, no writ); *Henderson v. Parish*, 265 S.W. 226, 227 (Tex. Civ. App.—Texarkana 1924, no writ); *Wicker v. Thomson*, 242 S.W. 1106, 1107 (Tex. Civ. App.—Amarillo 1922, no writ).

319. *Childress v. Siler*, 272 S.W.2d 417, 420 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.); *Fender v. Farr*, 262 S.W.2d 539, 543 (Tex. Civ. App.—Texarkana 1953, no writ).

320. *See Childress v. Siler*, 272 S.W.2d 417, 420 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.), which states that in the absence of qualifying expressions this covenant is "read into every conveyance of land or an interest in land, except in quitclaim deeds." The case also noted that where the covenant was "contained" in a deed, this fact negated the idea that it was a quitclaim deed. The covenant was also said to apply to oil and gas leases. *Id.* at 420.

321. TEX. REV. CIV. STAT. ANN. art. 1297 (1962); *see Childress v. Siler*, 272 S.W.2d 417, 420 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.).

322. 7 AM. JUR. LEGAL FORMS 2d § 66:41 (1972).

323. TEX. REV. CIV. STAT. ANN. art. 1297 (1962) states the covenant: "That previous to the time of the execution of such conveyance the grantor has not conveyed the same estate, or any right, title or interest therein, to any person other than the grantee."

324. *Childress v. Siler*, 272 S.W.2d 417, 420 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.).

covenant.<sup>325</sup> For example, in *Johns v. Karam Development Co.*<sup>326</sup> the assignor conveyed an oil and gas lease, claiming that he had " 'good right and authority to sell and convey the same,' " and, further guaranteeing and warranting that he was " 'the lawful owner and holder of the aforementioned right and interest under the original lease.' " <sup>327</sup> Soon after the conveyance the assignee discovered that the assignor did not have any interest in the minerals at the time he purported to convey, and the assignee brought suit. The El Paso Court of Civil Appeals held that the "language appellant used in his assignment . . . amounted to covenants of seisin and of good right to convey" and held that "[s]ince appellant did not own the estate he undertook to convey, there was a total failure of title which breached the covenants of seisin and good right to convey at the time the instrument was made."<sup>328</sup> While the covenant offers this advantage of suit without eviction, it is personal in nature and will be of no benefit to an heir or assignee of the original party.<sup>329</sup>

The remedy for breach of a covenant of seisin, as with all covenants, is damages. If there is a complete failure of title, the grantee's damages are generally held to be the consideration paid, up to the amount of the purchase price, plus interest.<sup>330</sup> The measure of damages is not so clearly defined in instances of a partial failure of title. It is not unlikely that the plaintiff will be granted an amount equal only to the proportion of the purchase price which the loss bears to the whole of the conveyance.<sup>331</sup> While this test appears fair in a case where the value of all the land conveyed is substantially equal, it will not be so where there is a material difference in the values of sections of the property. Where such a difference exists, the best rule would be to allow recovery of actual damages. This may be measured by subtracting the value of the land actually conveyed from the amount of consideration paid. Equity should require, however, that the recovery be limited to the purchase price.

Although the statute of limitations applicable to seisin is four years,<sup>332</sup>

325. See, e.g., *Johns v. Karam Dev. Co.*, 381 S.W.2d 933 (Tex. Civ. App.—El Paso 1964, writ ref'd n.r.e.).

326. *Id.*

327. *Id.* at 934.

328. *Id.* at 936; accord, *Fender v. Farr*, 262 S.W.2d 539, 543 (Tex. Civ. App.—Texarkana 1953, no writ).

329. *Childress v. Siler*, 272 S.W.2d 417, 420 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.).

330. *Johns v. Karam Dev. Co.*, 381 S.W.2d 933, 936 (Tex. Civ. App.—El Paso 1964, writ ref'd n.r.e.); *Childress v. Siler*, 272 S.W.2d 417, 420 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.).

331. This is substantially the test set out in *City of Beaumont v. Moore*, 146 Tex. 46, 54, 202 S.W.2d 448, 453 (1947). Although this is an accepted test in the instance of a partial failure of title under a covenant of warranty, its applicability is questionable in cases concerning the covenant against encumbrances.

332. Cf. *Schneider v. Lipscomb County Nat'l Farm Loan Ass'n*, 146 Tex. 66, 77, 202 S.W.2d 832, 838 (1947).

there is no direct authority specifying when the statute begins to run. Since breach of this covenant occurs when the covenant is executed, the statute might reasonably begin to run at the time conveyance is accomplished. Since the seisin covenant, like the covenant against encumbrances, is breached when made,<sup>333</sup> Texas courts might choose to adopt a rule similar to that applied in cases of breach of the covenant against encumbrances—that a technical breach at the time the covenant was made is immaterial.<sup>334</sup> Applying this concept to the covenant of seisin, the statute would not begin to run until there was some interference with the grantee's possession or some other event to put the grantee on notice that a breach had occurred.<sup>335</sup>

Without the implied covenant of seisin the modern buyer would have no implied guarantee that his grantor had title to the property conveyed. If this were the case, the doctrine of *caveat emptor* would dictate that there would be no remedy based on the sale, and the buyer would be forced to prove a case of fraud or mutual mistake.

#### COVENANT AGAINST ENCUMBRANCES

The covenant against encumbrances insures that there are no liens or other encumbrances on the conveyed property.<sup>336</sup> It is designed to protect the purchaser against outstanding interests which, while consistent with the title passed by the vendor, diminish the value or impair the enjoyment of the estate conveyed.<sup>337</sup> The covenant generally provides,

The premises conveyed by the within deed are free, clear, and discharged of and from all former and other grants, titles, charges, judgments, executions, taxes, assessments, and encumbrances of whatsoever nature or kind; and further, neither grantor nor any other person or persons whomsoever have done or suffered anything whereby the title of the premises conveyed by the within deed, or any part thereof, can or may be frustrated or annulled in any manner.<sup>338</sup>

Since in Texas the covenant is implied in every deed using the word "grant" or "convey" which transfers an inheritable estate, unless contrary terms are expressed in the deed,<sup>339</sup> it is sometimes said that a "general warranty clause

333. *City of Beaumont v. Moore*, 146 Tex. 46, 54, 202 S.W.2d 448, 453 (1947).

334. *Seibert v. Bergman*, 91 Tex. 411, 413-14, 44 S.W. 63, 64 (1898). *See also* *Wolff v. Commercial Standard Ins. Co.*, 345 S.W.2d 565, 568 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.).

335. *Cf. McCord v. Bailey*, 200 S.W.2d 885, 888 (Tex. Civ. App.—Eastland 1947, no writ).

336. *See* TEX. REV. CIV. STAT. ANN. arts. 1297, 1298 (1962).

337. *See Ragsdale v. Langford*, 358 S.W.2d 936, 938 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.); *Faull v. City of Dallas*, 97 S.W.2d 1031, 1033 (Tex. Civ. App.—El Paso 1936, writ dism'd). In *City of Dayton v. Allred*, 123 Tex. 60, 74, 68 S.W.2d 172, 178 (1934), an encumbrance was defined as including "liens, and any other burden resting on the property itself, or on its title, which tends to lessen its value, or interfere with its free enjoyment."

338. 7 AM. JUR. LEGAL FORMS 2d § 77:44 (1972).

339. TEX. REV. CIV. STAT. ANN. art. 1297 (1962); *see City of Beaumont v. Moore*,

includes a covenant against encumbrances."<sup>340</sup> While this may be true, the statement that a covenant of general warranty includes a covenant that "the property conveyed is free from encumbrances" leads to confusion.<sup>341</sup> The covenant of general warranty and the covenant against encumbrances are different and should be distinguished; the covenant of warranty relates to the grantor's title and his duty to defend the vendee's title, while the covenant against encumbrances is designed to protect against burdens on the land which exist independently of the title conveyed. The title conveyed, for example a fee simple, is perfectly valid even if a lien exists on the property. In this situation, then, the covenant of warranty is not breached because the estate purportedly conveyed is actually conveyed. The *covenant against encumbrances* is breached, however, because the lien diminishes the value of the estate.

An additional distinction exists in that the covenant against encumbrances is "a covenant *in praesenti*, which is breached, if at all, upon the execution and delivery of the deed, though damages may not arise until a later date."<sup>342</sup> As a result, the covenant is breached when title passes if there is a burden or encumbrance on the land at that time.<sup>343</sup> On the contrary, the covenant of warranty is breached only on eviction or interference with the grantee's possession.<sup>344</sup>

While article 1298 defines the term "encumbrances," it does not contain a complete list of all the types of burdens on land which may constitute a

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146 Tex. 46, 54, 202 S.W.2d 448, 453 (1947); *Schaefer v. Bonner*, 469 S.W.2d 216, 220 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.); *Ragsdale v. Langford*, 358 S.W.2d 936, 938 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.).

340. *Triplett v. Shield*, 406 S.W.2d 941, 947 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.).

341. *Fannin Inv. & Dev. Co. v. Neuhaus*, 427 S.W.2d 82, 88 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ). An example of the confusion which exists in this area is *Ledbetter v. Howard*, 395 S.W.2d 951 (Tex. Civ. App.—Waco 1965, no writ), concerning loss of the buyer's land because of foreclosure of a prior tax lien. Despite the fact that a tax lien is specifically included as an encumbrance by TEX. REV. CIV. STAT. ANN. art. 1298 (1962), the court appeared to have considered the lien as a breach of the covenant of warranty. In *Morris v. Short*, 151 S.W. 633 (Tex. Civ. App.—Texarkana 1912, writ ref'd), the court held that the existence of paramount title in a third person at the time of the conveyance was a breach of the covenant against encumbrances. As shown by the definition of the covenant, it is not designed to protect against defects in the title and the breach appears to properly have been of the covenant of warranty.

342. *City of Beaumont v. Moore*, 146 Tex. 46, 54, 202 S.W.2d 448, 453 (1947). "Appellant's covenant against encumbrances was broken upon execution of the deed. . . . This is true because an encumbrance existed at the time of the execution of the deed." *Triplett v. Shield*, 406 S.W.2d 941, 948 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.).

343. While the covenant is technically breached at this point, however, the right of action will be for nominal damages only until the buyer is evicted or forced to incur some expense. See *Wolff v. Commercial Standard Ins. Co.*, 345 S.W.2d 565, 568 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.); *Hill v. Provine*, 260 S.W. 681, 683 (Tex. Civ. App.—El Paso 1924, writ dism'd).

344. See generally 3 AMERICAN LAW OF PROPERTY § 12.129 (A. Casner ed. 1952).

breach of the covenant.<sup>345</sup> Liens in general, as well as tax liens specifically, are expressly included, and usually present no problem of interpretation.<sup>346</sup> One complicating factor in this area, however, is in determining if a breach has actually occurred; if the lien has not attached when title passes, then the covenant has not been breached. Controversy may arise when an assessment or other encumbrance attaches while the purchaser is in possession, but before the deed is delivered. It is usually held that possession passes the equitable title, and thus an encumbrance does not breach the covenant.

[A]lthough the legal title does not pass to the vendee under a contract of sale until actual delivery of a deed to the property still the vendee under such contract of purchase, especially where he goes into possession of the property, is invested with the equitable title from the date of the contract, or in any event, from the date he takes possession, and . . . any detriment, depreciation, or loss thereto without fault of either party must be borne by him.<sup>347</sup>

A prior outstanding lease on the property breaches the covenant because it unquestionably interferes with the enjoyment of the premises.<sup>348</sup> The existence of a use restriction on the property, such as an enforceable restrictive covenant, may also be considered an encumbrance which breaches the covenant.<sup>349</sup> An easement, such as a right of way over the demised land, constitutes at least a technical breach of the covenant.<sup>350</sup>

The covenant against encumbrances is not breached if the encumbrance is expressly assumed by the grantee.<sup>351</sup> If the grantee has knowledge of the encumbrance but does not assume it, his knowledge will not bar his suit for

345. TEX. REV. CIV. STAT. ANN. art. 1298 (1962).

346. See, e.g., *Triplett v. Shield*, 406 S.W.2d 941, 947 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.); *Bullitt v. Coryell*, 85 S.W. 482, 483 (Tex. Civ. App. 1905, no writ).

347. *Leeson v. City of Houston*, 243 S.W. 485, 488 (Tex. Comm'n App. 1921, jdgmt adopted); accord, *Ingram v. Central Bitulithic*, 51 S.W.2d 1067 (Tex. Civ. App.—Waco 1932, writ ref'd); cf. *Bucher v. Employer's Cas. Co.*, 409 S.W.2d 583 (Tex. Civ. App.—Fort Worth 1966, no writ). Where the assessment is prior to the contract of sale, the lien has attached and the covenant is breached. See *Scott v. Snavelly*, 394 S.W.2d 42 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.).

348. See, e.g., *Schaefer v. Bonner*, 469 S.W.2d 216, 220 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.); *Ragsdale v. Langford*, 358 S.W.2d 936 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.). In the case of an outstanding lease it might be argued that the title is defective, because a lease interest is a right in the property, and thus is a breach of the covenants of warranty and quiet enjoyment. This might explain the confusion of terms which seem to abound in cases dealing with leases.

349. *Levine v. Turner*, 264 S.W.2d 478, 480 (Tex. Civ. App.—El Paso 1954, writ dism'd) (restriction limiting property to certain types of residential use). "As a general rule such restrictions as to the use to which premises may be put constitute encumbrances under a contract by which the vendor obligates himself to make a good or marketable title free and clear of encumbrances." *Id.* at 479. See also *Newman v. Hasselocher*, 242 S.W.2d 822, 823 (Tex. Civ. App.—San Antonio 1951, no writ).

350. Cf. *Rosenfield v. Pollock Realty Co.*, 416 S.W.2d 833, 836 (Tex. Civ. App.—Dallas 1967, no writ).

351. See *Triplett v. Shield*, 406 S.W.2d 941, 947 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.).

breach, but will be effective to mitigate his damages.<sup>352</sup>

The remedy for breach of the covenant is damages rather than rescission.<sup>353</sup> While the covenant is technically breached when made,<sup>354</sup> the remedy is limited to nominal damages until the purchaser is forced to pay off the encumbrance, a forfeiture occurs, or there is an eviction or inability to gain possession of the property because of an outstanding lease.<sup>355</sup> The covenant is one of indemnity and, therefore, affords no substantial remedy until the purchaser incurs actual damages.<sup>356</sup>

The general measure of damages should be the difference between the value of the property with and without the encumbrance. The value of the property without the encumbrance is usually measured by the consideration paid.<sup>357</sup> For example, if the encumbrance causes a complete failure of title, the property would have no value, and the damages would amount to the entire purchase price. In cases where the vendee pays off the encumbrance, the difference in value—and therefore the amount of the damages—is generally considered to be the amount paid to remove the encumbrance.<sup>358</sup>

A problem concerning damages arises in cases where the grantee is unable to take possession because the premises are encumbered by a prior lease. In *City of Beaumont v. Moore*<sup>359</sup> the city conveyed a mineral lease on land

352. *City of Beaumont v. Moore*, 146 Tex. 46, 57, 202 S.W.2d 448, 455 (1947); *Schaefer v. Bonner*, 469 S.W.2d 216, 220 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.).

353. *Hill v. Provine*, 260 S.W. 681, 682-83 (Tex. Civ. App.—El Paso 1924, writ dism'd); see *Ussery v. Hollebeke*, 391 S.W.2d 497, 501 (Tex. Civ. App.—El Paso 1965, writ ref'd n.r.e.); *Dilbeck v. Bill Gaynier, Inc.*, 368 S.W.2d 804, 807 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.).

354. *City of Beaumont v. Moore*, 146 Tex. 46, 54, 202 S.W.2d 448, 453 (1947).

355. *Wolff v. Commercial Standard Ins. Co.*, 345 S.W.2d 565, 568 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.); *Tindle v. Elms*, 108 S.W.2d 437, 439 (Tex. Civ. App.—Amarillo 1937, no writ); *McLendon v. Federal Mortgage Co.*, 60 S.W.2d 324, 326 (Tex. Civ. App.—Waco 1933, writ ref'd); *Hill v. Provine*, 260 S.W. 681, 683 (Tex. Civ. App.—El Paso 1924, writ dism'd).

356. See, e.g., *Wolff v. Commercial Standard Ins. Co.*, 345 S.W.2d 565, 568 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.).

357. "In cases of this character, the proper measure of damage is the difference in the value of the land at the time of purchase without the [encumbrance], and its value with the [encumbrance]." *Pochyla v. Cralle*, 42 S.W.2d 793, 794 (Tex. Civ. App.—Waco 1931, no writ). "The plaintiff may further recover for interest and taxes paid if he was never in possession or if his occupancy was not beneficial." *Ledbetter v. Howard*, 395 S.W.2d 951, 953 (Tex. Civ. App.—Waco 1965, no writ); accord, *City of Beaumont v. Moore*, 146 Tex. 46, 54, 202 S.W.2d 448, 453 (1947).

358. See *Carruth v. Allen*, 368 S.W.2d 672, 679-80 (Tex. Civ. App.—Austin 1963, no writ); *Wolff v. Commercial Standard Ins. Co.*, 345 S.W.2d 565, 568 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.). In *Schaefer v. Bonner*, 469 S.W.2d 216, 221-22 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.), construing a fee simple conveyance which was found to be encumbered by an outstanding sublease on part of the premises, the court held the measure of damages to be the reasonable rental value of the premises encumbered for the term of the sublease, less the rental due under the terms of the sublease. In *Faulk v. City of Dallas*, 97 S.W.2d 1031, 1033 (Tex. Civ. App.—El Paso 1936, writ dism'd), it was held that interest may also be awarded. See also *Tindle v. Elms*, 108 S.W.2d 437, 439 (Tex. Civ. App.—Amarillo 1937, no writ).

359. 146 Tex. 46, 202 S.W.2d 448 (1947).

which was encumbered by a public servitude to the city's airport. The court found a breach of the covenant against encumbrances, and determined the measure of damages by a formula of proportionate values:

The covenantor warrants that he will restore the purchase price to the grantee if the land is entirely lost; and in cases of partial loss the measure of damages is modified so as to allow a recovery of only such proportion of the consideration as the amount of the loss bears to the whole of it.<sup>360</sup>

The application of this rule to a breach of the covenant against encumbrances is confusing. Its use in *Moore* may have been valid because the servitude was not terminable by the vendor and could have been construed as resulting in a failure of title. Since the conveyance involved was a lease of minerals, and the outstanding prior lease to the airport was to the surface estate, the vendor had full title to the estate conveyed. Nevertheless, the purchaser was unable to enjoy his estate because of the encumbrance. Reasoned in this manner the title did not actually fail, but the entire value of the estate was lost because the encumbrance could not be removed by any payment by the purchaser. Thus, the best measure of damages would have been the purchase price. If the encumbering lease had been only for a portion of the premises and for a definite period, the best rule would have been to allow damages in the amount of the reasonable rental value of the leased premises for the term of the lease, less the rent paid.<sup>361</sup>

The statute of limitations for an action for breach of the covenant against encumbrances is 4 years.<sup>362</sup> There is, however, some question as to when the statute begins to run. At least one case has held that the limitation period does not begin to run until there is substantial damage to the purchaser; a prior technical breach is immaterial.<sup>363</sup> This appears most equitable because it does not penalize the purchaser if he has had no reason to know of the encumbrance until more than 4 years after the conveyance.

Like the other title covenants, the covenant against encumbrances exists to reduce the hardships of the doctrine of *caveat emptor*. Since the covenant is implied by statute, it most effectively contravenes the practices of those grantors who would purposely convey land with an encumbrance and without an expressed covenant. The covenant may still be negated, however, by the terms of the instrument or by the grantee's assumption of the encumbrance.

#### HABITABILITY

The covenant of habitability is an assurance to the purchaser, by the

360. *Id.* at 54, 202 S.W.2d at 453.

361. This is the rule in *Schaefer v. Bonner*, 469 S.W.2d 216, 221-22 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.). Compare the rule in *Moore* with the rule in *Ragsdale v. Langford*, 358 S.W.2d 936, 938 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.).

362. TEX. REV. CIV. STAT. ANN. art. 5527 (1958); see *City of Beaumont v. Moore*, 146 Tex. 46, 52, 202 S.W.2d 448, 452 (1947).

363. *Seibert v. Bergman*, 91 Tex. 411, 413-14, 44 S.W. 63, 64 (1898).

builder-vendor of a house, "that such a house was constructed in a good workmanlike manner and was suitable for human habitation."<sup>364</sup> In Texas the covenant is implied in all conveyances of new homes by a builder-vendor.<sup>365</sup> Prior to the adoption of the covenant of habitability in 1968, Texas followed the common law rule whereby a purchaser had no warranty that the house he bought was well-built or safe for habitation.<sup>366</sup>

In the 1968 case of *Humber v. Morton*,<sup>367</sup> the supreme court adopted the covenant of habitability as the rule in Texas.<sup>368</sup> The court first established that article 1297 does not bar implication of any covenant other than those specifically allowed by the statute.<sup>369</sup> The crucial question then facing the court was whether the doctrine of *caveat emptor* should be allowed to stand as a bar to recovery. The doctrine was viewed as having arisen in the common law based upon the premise that "the buyer and seller dealt at arm's length, and that the purchaser had means and opportunity to gain information concerning the subject matter of the sale which were equal to those of the

364. *Humber v. Morton*, 426 S.W.2d 554, 555 (Tex. 1968). The existence of the covenant is mentioned also in *Hollen v. Leadership Homes, Inc.*, 502 S.W.2d 837, 839 (Tex. Civ. App.—El Paso 1973, no writ) and *Diana v. Parks*, 433 S.W.2d 761, 763 (Tex. Civ. App.—Texarkana 1968, no writ).

365. *Humber v. Morton*, 426 S.W.2d 554, 555-56 (Tex. 1968); see *Hollen v. Leadership Homes, Inc.*, 502 S.W.2d 837, 839 (Tex. Civ. App.—El Paso 1973, no writ); *Diana v. Parks*, 433 S.W.2d 761, 763 (Tex. Civ. App.—Texarkana 1968, no writ).

366. The court in *Humber v. Morton*, 426 S.W.2d 554, 557 (Tex. 1968) viewed the fall of the doctrine of *caveat emptor* as having been initiated by: *Carpenter v. Donohoe*, 388 P.2d 399 (Colo. 1964); *Glisan v. Smolenske*, 387 P.2d 260 (Colo. 1963); *Weck v. A.M. Sunrise Constr. Co.*, 184 N.E.2d 728 (Ill. Ct. App. 1962); *Jones v. Gatewood*, 381 P.2d 158 (Okla. 1963); *Hoye v. Century Builders, Inc.*, 329 P.2d 474 (Wash. 1958); *Perry v. Sharon Dev. Co.*, 4 All E.R. 390 (C.A. 1937); *Miller v. Cannon Hills Estates, Ltd.*, 1 All E.R. 93 (K.B. 1931). The *Humber* decision also contains a comprehensive discussion of the development of the covenant and the fall of the common law rule.

367. 426 S.W.2d 554 (Tex. 1968).

368. The development of a covenant for the protection of a new home purchaser did not arise suddenly in Texas. In *Loma Vista Dev. Co. v. Johnson*, 177 S.W.2d 225, 227 (Tex. Civ. App.—San Antonio), *rev'd on other grounds*, 142 Tex. 686, 180 S.W.2d 922 (1943), an action for damages by the purchaser against the builder-vendor based on misrepresentations by a real estate broker employed to sell the house, the court said that "[b]y offering the house for sale as a new and complete structure appellant impliedly warranted that it was properly constructed and of good material . . . ."

In *Moore v. Werner*, 418 S.W.2d 918 (Tex. Civ. App.—Houston [14th Dist.] 1967, no writ), the court of civil appeals analogized the sale of a defective new house to a sale of personalty and found "no reason for any distinction." The court said that it was "the seller's duty to perform the work in a good and workmanlike manner and to furnish adequate materials" and concluded that "the rule of implied warranty of fitness applies." *Id.* at 920. The reference to an "implied warranty of fitness" probably arises from the warranty now set out in TEX. BUS. & COMM. CODE ANN. § 2.315 (1968).

369. The prohibition of article 1297 was held not applicable on the basis that:

The article relates to covenants which may or may not arise from the use of certain specific words in a conveyance, namely, 'grant' or 'convey'. . . . It relates to the covenants of title which arise out of conveyances and not to collateral covenants such as the suitability of a house for human habitation . . . . The implied warranty of fitness arises from the sale and does not spring from the conveyance.

*Humber v. Morton*, 426 S.W.2d 554, 555-56 (Tex. 1968).



seller."<sup>370</sup> The court felt that this premise was not practically operable today because the average homebuyer is not in the position to know or discover defects in the construction of a house.<sup>371</sup> Therefore, basing its decision on public policy favoring protection of the average homebuyer, the court declared the *caveat emptor* rule to be an "anachronism patently out of harmony with modern home buying practices" and held that the covenant of habitability should be implied.<sup>372</sup>

The remedy for a breach of the covenant of habitability lies in an action in tort.<sup>373</sup> There is little authority concerning the resulting damages, but it must be assumed that general tort remedies apply. The Houston Court of Civil Appeals has held that where the defect does not impair the usefulness of the building as a whole, the damages are the reasonable cost of repair.<sup>374</sup> Using this rationale, the purchaser should collect the full purchase money amount only in cases where the defect is so extensive that repair is infeasible.

The statute of limitations against actions in tort is 2 years.<sup>375</sup> In actions for breach of the covenant of habitability it has not yet been determined whether the statute begins to run from the time of conveyance or only from the time when the purchaser should have reason to know of the defect. The latter seems more equitable. For example, a purchaser may buy a house and 2 years later the foundation suddenly collapses, rendering the house unsuitable for human habitation. If the collapse was due to an original construction defect, the purpose of the covenant would be subverted unless the period of limitation began to run when the purchaser had knowledge, actual or constructive, of the defect.

The covenant of habitability requires only that a builder-vendor conform to generally accepted standards of workmanship.<sup>376</sup> Strict liability does not apply in such cases: a builder will not be liable if he shows he is free from fault. He is not made an insurer of the house, but is only required to meet

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370. *Id.* at 557. The court said:

The old rule of *caveat emptor* does not satisfy the demands of justice in such cases. The purchase of a home is not an everyday transaction for the average family, and in many instances is the most important transaction of a lifetime. To apply the rule of *caveat emptor* to an inexperienced buyer, and in favor of a builder who is daily engaged in the business of building and selling houses, is manifestly a denial of justice.

*Id.* at 561, quoting *Bethlahmy v. Bechtel*, 415 P.2d 698 (Idaho 1966).

371. *Id.* at 561.

372. *Id.* at 562.

373. *Id.* at 556.

374. *Moore v. Werner*, 418 S.W.2d 918, 920 (Tex. Civ. App.—Houston [14th Dist.] 1967, no writ). The necessity of proving damages is shown in *Overmyer Co. v. Harbison*, 453 S.W.2d 368, 372 (Tex. Civ. App.—El Paso 1970, no writ).

375. TEX. REV. CIV. STAT. ANN. art. 5526 (1958).

376. Two Texas cases have appeared subsequent to *Humber* which considered the covenant in differing fact situations. See *Hollen v. Leadership Homes, Inc.*, 502 S.W.2d 837 (Tex. Civ. App.—El Paso 1973, no writ); *Diana v. Parks*, 433 S.W.2d 761 (Tex. Civ. App.—Texarkana 1968, no writ). The covenant is alluded to in *Overmyer Co. v. Harbison*, 453 S.W.2d 368, 371-72 (Tex. Civ. App.—El Paso 1970, no writ).

reasonable industry standards. The covenant is a promise that the builder will not negligently produce a house which fails to meet reasonable standards. The builder is in the best position to know how to construct a dwelling, and it is reasonable that the burden of curing defective construction should be borne by the one responsible for the defect.

#### CONCLUSION

Covenants protecting a grantee of real property from unfair exchange are both legally and practically valuable. The covenants of seisin, further assurance, and quiet enjoyment provide protections concerning title to the estate; the covenant against encumbrances adds a remedy in the event that there is some outstanding claim on the property, consistent with the title, which diminishes its value or usefulness. These covenants, as well as the covenant of habitability, developed as a reaction to the harshness of the doctrine of *caveat emptor*.

Some criticism might properly be made of the general rule that knowledge by the grantee of the lack of title or of an encumbrance has no effect. Thus, while knowledge by the grantee does not diminish the unscrupulous nature of a grantor's conduct, it may properly be an equitable basis to deny recovery on a covenant. A grantee who enters into an agreement with knowledge of a defect has little reason to complain later, at least on the basis of fairness. Balancing the actions of the parties, however, seems to overcome this criticism, for the act of conveying non-owned or encumbered property is the more devious offense to justice, and such conduct should not be sanctioned.

In modern times, property changes hands rapidly and often, and it is desirable that the law provide protection to the unwary and unskillful. It may be useful to attempt to reformulate the covenants into a single guarantee that will provide all-encompassing protection against unscrupulous or fraudulent conveyancing. In this regard, the statutory implication might be expanded to strengthen the legal protection it now offers.