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Covenant of Warranty Student Symposium: Texas Land Titles.

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COVENANT OF WARRANTY

The covenant of warranty is one running with the land and operates as a guarantee by the grantor that title is vested in him and will vest in the grantee after conveyance.³⁷⁷ The general warranty is usually phrased,

[A]nd I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said _____ his heirs and assigns, against every person whomsoever, lawfully claiming or to claim the same, or any part thereof.³⁷⁸

To protect the grantee from failure of title the warranty imposes on the covenantor the duty to defend the covenantee's title in a suit for title, providing that the covenantee gives full notice to the covenantor of the pending suit and of the consequences of neglecting to defend.³⁷⁹ A further obligation exists to indemnify the grantee for failure of title³⁸⁰—a duty which is not contingent on the grantor's having notice of and defending the suit.³⁸¹

Although the covenant of warranty is a simple indemnification for failure of title, in Texas it is the broadest of the deed covenants, encompassing the covenant of quiet enjoyment³⁸² and the covenant against encumbrances.³⁸³ The application of the covenant of quiet enjoyment, however, is limited when construing the covenant of warranty since a mere cloud on the title does not constitute a breach of warranty.³⁸⁴ While mere possession by one other than the grantee breaches the covenant of quiet enjoyment, breach of the covenant of warranty requires a failure of title.³⁸⁵ Thus, the incidents of the covenant

377. *Forrest v. Hanson*, 424 S.W.2d 899, 904 (Tex. 1968); *White v. Frank*, 91 Tex. 66, 70, 40 S.W. 962, 964 (1897); *Richardson v. Levi*, 67 Tex. 359, 366, 3 S.W. 444, 447 (1887); *Phillips v. Woodard*, 327 S.W.2d 622, 625 (Tex. Civ. App.—Texarkana 1959, no writ).

378. 1 TEXAS FORMS—LEGAL AND BUSINESS § 2.32 (1969).

379. *Clark v. Mumford*, 62 Tex. 531, 533 (1884); *Old Nat'l Life Ins. Co. v. Bibbs*, 184 S.W.2d 313, 316-17 (Tex. Civ. App.—Austin 1944, writ ref'd w.o.m.).

380. *Bass v. Harper*, 441 S.W.2d 825, 827 (Tex. 1969); *White v. Frank*, 91 Tex. 66, 70, 40 S.W. 962, 964 (1897); *Phillips v. Woodard*, 327 S.W.2d 622, 625 (Tex. Civ. App.—Texarkana 1959, no writ).

381. *Clark v. Mumford*, 62 Tex. 531, 533 (1884); *Simpson v. Belvin*, 37 Tex. 674, 685 (1873); *Peck v. Hensley*, 20 Tex. 673, 677-78 (1858); *O'Connor v. Sanchez*, 229 S.W. 309, 311-12 (Tex. Comm'n App. 1921, jdgmt adopted); *McGregor v. Tabor*, 26 S.W. 443 (Tex. Civ. App. 1894, no writ).

382. *Williams v. Turner*, 50 Tex. 137, 142 (1878); *Compton v. Trico Oil Co.*, 120 S.W.2d 534, 536-37 (Tex. Civ. App.—Dallas 1938, writ ref'd); *Shannon v. Childers*, 202 S.W. 1030, 1031 (Tex. Civ. App.—El Paso 1918, writ ref'd).

383. *City of Beaumont v. Moore*, 146 Tex. 46, 56, 202 S.W.2d 449, 453 (1947); *Fannin Inv. & Dev. Co. v. Neuhaus*, 427 S.W.2d 82, 88 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ); *Triplett v. Shield*, 406 S.W.2d 941, 947 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.); *Chapman v. Parks*, 347 S.W.2d 805, 808 (Tex. Civ. App.—Amarillo 1961, writ ref'd n.r.e.); *Rives v. James*, 3 S.W.2d 932, 933 (Tex. Civ. App. San Antonio 1928, writ dism'd).

384. *Schell v. Black*, 321 S.W.2d 373, 375 (Tex. Civ. App.—Eastland 1959, no writ); *Worthen v. Peoples Loan & Homestead Co.*, 150 S.W.2d 830, 833 (Tex. Civ. App.—Galveston 1941, no writ).

385. *Jones' Heirs v. Paul's Heirs*, 59 Tex. 41, 45-46 (1883); *Schell v. Black*, 321 S.W. 2d 373, 375 (Tex. Civ. App.—Eastland 1959, no writ); *Fitzgerald v. Compton*, 67 S.W.

of quiet enjoyment will be included in a warranty only when consistent with the purpose of the warranty.³⁸⁶

The covenant against encumbrances, on the other hand, does not concern failure of title. It is intended to protect the grantee from the interests of third parties, such as liens or easements, which diminish the value of the estate conveyed.³⁸⁷ Because they are intended to protect against different types of disabilities, covenants against encumbrances and covenants of warranty operate differently.³⁸⁸ A covenant against encumbrances invokes the liability of the grantor for damages based on the diminished value of the estate,³⁸⁹ while a covenant of warranty operates as an indemnity for failure of title.³⁹⁰

Since a covenant of warranty protects actual title while a covenant against encumbrances protects only use and value, the inclusion of a covenant against encumbrances in a warranty is inconsistent with the purposes of the warranty. Many Texas courts, however, have continued to treat covenants against encumbrances as included in warranties and have thus reached some unusual results.³⁹¹

Since the warranty is a guarantee, it has no effect on the validity of a conveyance; rather it is a separate agreement for indemnification if title should fail.³⁹² As a separate contract, the warranty expresses the grantor's confidence in the title conveyed, and therefore, cannot strengthen the title or enlarge the estate conveyed.³⁹³ For example, if a quitclaim is conveyed with

131, 132 (Tex. Civ. App. 1902, no writ); *Stark v. Homuth*, 45 S.W. 761, 763 (Tex. Civ. App. 1898, writ dism'd).

386. *Jones' Heirs v. Paul's Heirs*, 59 Tex. 41 (1883); *Schell v. Black*, 321 S.W.2d 373 (Tex. Civ. App.—Eastland 1959, no writ).

387. *Texas & Pac. Ry. v. El Paso & N.E.R.R.*, 156 S.W. 561, 565 (Tex. Civ. App.—El Paso 1913, writ ref'd) (liens, easements and servitudes are encumbrances that are consistent with the fee being in the grantor).

388. *Id.* at 565.

389. *Pochyla v. Cralle*, 42 S.W.2d 793, 794 (Tex. Civ. App.—Waco 1931, no writ).

390. *Texas & Pac. Ry. v. El Paso & N.E.R.R.*, 156 S.W. 561, 565 (Tex. Civ. App.—El Paso 1913, writ ref'd).

391. The courts seem to use warranty as a generic term. The most obvious example of this treatment is in the *City of Beaumont v. Moore*, 146 Tex. 46, 202 S.W.2d 449 (1947) where there was a public servitude on the property conveyed. Even though the court recognized the differences between the two covenants, it concluded that the public servitude was an encumbrance and therefore the title had partially failed. *Id.* at 51-55, 202 S.W.2d at 453-55. Another example of the confusion is *Eric Ericksson, Inc. v. Crooks*, 508 S.W.2d 115 (Tex. Civ. App.—Waco 1974, no writ) where at the time of the conveyance an easement for drainage existed. The court held that this easement was a breach of warranty but damages were assessed in the amount of diminished value, the proper calculation of damages for the covenant against encumbrances. *Id.* at 118.

392. *Gibson v. Turner*, 156 Tex. 289, 300, 294 S.W.2d 781, 787 (1956); *White v. Frank*, 91 Tex. 66, 70, 40 S.W. 962, 964 (1897); *Richardson v. Levi*, 67 Tex. 359, 366, 3 S.W. 444, 447 (1887); *Davis v. Andrews*, 361 S.W.2d 419, 424-25 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.); *Phillips v. Woodard*, 327 S.W.2d 622, 625 (Tex. Civ. App.—Texarkana 1959, writ ref'd).

393. *Gibson v. Turner*, 156 Tex. 289, 300, 294 S.W.2d 781, 787 (1956); *Richardson v. Levi*, 67 Tex. 359, 366, 3 S.W. 444, 447 (1887); *Phillips v. Woodard*, 327 S.W.2d 622, 625 (Tex. Civ. App.—Texarkana 1959, no writ).

a warranty, the protected interest will be the right, title and interest owned by the grantor at the time of the conveyance.³⁹⁴ In addition, a warranty cannot limit a grant, since indemnity applies only to the portions of the grant warranted.³⁹⁵

A covenant of warranty runs with the land, passing from one purchaser to another through each successive link in the chain of title.³⁹⁶ In *Flaniken v. Neal*³⁹⁷ a sheriff executed a quitclaim instrument in a foreclosure sale. Since there was a warranty in the chain of title, the supreme court found that the present grantee could recover against a previous grantor who had warranted such title.³⁹⁸ A warranty is not necessary for the validity of a conveyance; a deed without such a covenant will convey the grantor's entire interest in the estate, including the covenant of warranty.³⁹⁹ The existence of a covenant of warranty somewhere in the chain of title does not, however, always mean that the warranty continues to exist for all subsequent grantees. The covenant runs with the land only until it is broken.⁴⁰⁰ At the time of a breach the covenant becomes personal, and a subsequent conveyance, even with a new warranty, will not operate to assign an action under the original covenant.⁴⁰¹

In addition to a general warranty, which is an indemnity for failure of title in any situation, a grantor may limit the warranty to apply only to special situations. The most common of the limited warranties utilizes the limiting words "by, through or under me" and restricts the scope of the grantor's obligation to defend title against those specific claimants.⁴⁰² Thus, a grantee

394. *Roberts v. Corbett*, 265 S.W.2d 127, 129 (Tex. Civ. App.—Galveston 1954, writ ref'd).

395. *Bass v. Harper*, 441 S.W.2d 825, 828 (Tex. 1969). In *Davis v. Andrews*, 361 S.W.2d 419 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.) a portion of the deed stated "we do hereby bind ourselves, our heirs, executors and administrators to warrant and defend . . . against every person whomsoever lawfully claiming or to claim the same or any part thereof for a period of 20 years from date hereof and no longer." *Id.* at 421. The court concluded that since the limitation for years was found only in the warranty, its application was confined to the warranty and it was not intended to limit the title conveyed to less than a fee simple. *Id.* at 425.

396. *Flanniken v. Neal*, 67 Tex. 629, 633, 4 S.W. 212, 214 (1887); *Williams v. Turner*, 50 Tex. 137, 142 (1878); *Wiggins v. Stephens*, 246 S.W. 84, 86 (Tex. Comm'n App. 1922, jdgmt adopted); *Fender v. Farr*, 262 S.W.2d 539, 543 (Tex. Civ. App.—Texarkana 1953, writ ref'd n.r.e.); *Shannon v. Childers*, 202 S.W. 1030, 1031 (Tex. Civ. App.—El Paso 1918, writ ref'd).

397. 67 Tex. 629, 4 S.W. 212 (1887).

398. *Id.* at 634, 4 S.W. at 215.

399. *Id.* at 632, 4 S.W. at 214.

400. *Wiggins v. Stephens*, 246 S.W. 84, 86 (Tex. Comm'n App. 1922, jdgmt adopted); see *Massad v. Bumpus*, 146 S.W.2d 1073, 1075 (Tex. Civ. App.—Texarkana 1940, writ dism'd jdgmt cor.).

401. *Compton v. Trico Oil Co.*, 120 S.W.2d 534, 538 (Tex. Civ. App.—Dallas 1938, writ ref'd) (conveyance of fee after breach is not an assignment of the right of action to the grantee); *accord*, *Fudge v. Hogge*, 323 S.W.2d 663, 667 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.).

402. The standard form for this limited warranty is:

And I hereby bind myself, my heirs, executors, and administrators to warrant and

will have no claim against the grantor on such a limited warranty if there is an adverse claimant.⁴⁰³

In order for a limited warranty to displace a general one, the necessary words of limitation must be clearly expressed.⁴⁰⁴ For instance, a warranty will generally be effective from the date a deed is executed; thus, to create a warranty which will become operative at a different time, the grantor must specify the effective date. In *Phillips v. Woodard*⁴⁰⁵ a warranted assignment of a mineral estate was to be effective on the date of the first oil production. The first production occurred prior to the execution of the assignment, at which time the title was free of any adverse claims. The grantee alleged that the warranty was to have operated from the date of the execution of the assignment, while the grantor alleged that the warranty had applied only from the effective date of the assignment. The civil appeals court concluded that since the limitation was not clearly expressed, the warranty became applicable at the date of the execution of the assignment, the usual time of application.⁴⁰⁶

Limiting the warranty to exclude restrictions, covenants or conditions appears unnecessary since none of these exceptions is inconsistent with the title. Designation of the covenant against encumbrances as part of the warranty, however, has prompted the use of this type of limited warranty. Thus, the covenantor who wants to restrict the covenant against encumbrances should do so by a specific warranty provision.

EFFECT ON AFTER ACQUIRED TITLE

The covenant of warranty requires the grantor to defend title as well as to indemnify for its failure. Consistent with this purpose, a grantor may not act in derogation of the warranted title.⁴⁰⁷ Since the warranty is a covenant

forever defend all and singular the premises unto the said ———, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof, by, through or under me, but not otherwise.

4 R. STAYTON, TEXAS FORMS § 2367 (1959) (emphasis added).

403. In *McCracken v. Taylor*, 146 S.W. 693, 695 (Tex. Civ. App.—Amarillo 1912, no writ), the grantor's wife had not been properly joined in her husband's conveyance of their homestead. The deed contained a warranty limited to claims "under" the grantor. When the wife subsequently brought suit and recovered the homestead, her claim was not under the grantor, but in her own right; thus her claim did not constitute a breach of the warranty. *Accord*, *Garrett v. Houston Land & Trust Co.*, 33 S.W.2d 775, 777 (Tex. Civ. App.—Galveston 1930, writ ref'd). *See also* *Hein v. Henry*, 299 S.W. 456 (Tex. Civ. App.—San Antonio 1927, no writ).

404. *James v. Adams & Wickes*, 64 Tex. 193, 196 (1885).

405. 327 S.W.2d 622 (Tex. Civ. App.—Texarkana 1959, writ ref'd).

406. *Id.* at 625. A warranty, therefore, can be limited to apply to failure of title that is within the chain of title [*Owen v. Yocum*, 341 S.W.2d 709, 710 (Tex. Civ. App.—Fort Worth 1960, no writ)], in time, [*Davis v. Andrews*, 361 S.W.2d 419, 424 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.)] or for any restrictions on title, [*Keith v. Seymour*, 335 S.W.2d 862, 866, 869 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.) (*grantor warranted to defend the title "except as against reservations, restrictions, covenants and conditions of record applicable to this property . . ."*)].

407. *Fannin Inv. & Dev. Co. v. Neuhaus*, 427 S.W.2d 82, 88 (Tex. Civ. App.—

running with the land, the estoppel applied to the grantor extends to those claiming under him, protecting both the subsequent grantee and those in privity with him.⁴⁰⁸ When there is a warranted conveyance by a grantor who does not have title, but who acquires title after the conveyance is made, the grantor is estopped to assert this after acquired title against his grantee or his privies: the grantor of a covenant of warranty may not himself cause a breach of that covenant by asserting a claim inconsistent with the estate conveyed and protected by the warranty.⁴⁰⁹

Not only is the grantor estopped to assert after acquired title, but the grantor's title passes *eo instanti* to his grantee.⁴¹⁰ For example, when an heir has conveyed an interest in an estate to which he subsequently acquires title in the administrator's sale, his title passes to the grantee.⁴¹¹ This applies even when the grantor has not personally acquired title at the administrator's sale.⁴¹² In *Robinson v. Douthit*⁴¹³ where a son conveyed title to his father's estate and subsequently acquired title through another who had purchased at the administrator's sale, the title passed through the son to his grantee.⁴¹⁴ A similar result occurs when a partial interest is owned, the total estate is conveyed, and the entire interest is subsequently obtained.⁴¹⁵

After acquired title will pass to the grantee only in situations where the title warranted is inconsistent with the subsequent claim of the grantee. In *Harn v. Smith*⁴¹⁶ the grantor claimed the granted property by adverse possession. The court held that an after acquired title by adverse possession does

Houston [14th Dist.] 1968, no writ); *Wade v. Brockmann*, 404 S.W.2d 622, 626 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).

408. *Davis v. Agnew*, 67 Tex. 206, 214, 2 S.W. 376, 378 (1886).

409. *Clark v. Gauntt*, 133 Tex. 558, 562, 161 S.W.2d 270, 271 (1942); *Hale v. Holton*, 36 S.W. 288 (Tex. Civ. App. 1896), *rev'd on other grounds*, 90 Tex. 427, 39 S.W. 287 (1897). See generally *Hemingway, After-Acquired Title in Texas*, 20 Sw. L.J. 97 (1963).

In *Land Title Bank & Trust Co. v. Witherspoon*, 126 S.W.2d 71, 73 (Tex. Civ. App.—Amarillo 1939, no writ) the court held that if the grantor did not possess the estate which the deed purports to convey but the intention to convey a fee simple is shown by the deed, the grantor and his privies are estopped to claim by an after acquired title even though the deed contains no warranty.

410. *Baldwin v. Root*, 90 Tex. 546, 553, 40 S.W. 3, 6 (1897); *Galloway v. Moeser*, 82 S.W.2d 1067, 1069-70 (Tex. Civ. App.—Eastland 1935, no writ).

411. *Robinson v. Douthit*, 64 Tex. 101 (1885); *Ackerman v. Smiley*, 37 Tex. 211 (1873); *Gould v. West*, 32 Tex. 338 (1869); *Land Title Bank & Trust Co. v. Witherspoon*, 126 S.W.2d 71 (Tex. Civ. App.—Amarillo 1939, no writ).

412. *Robinson v. Douthit*, 64 Tex. 101, 106 (1885).

413. *Id.* at 101.

414. *Id.* at 105. See generally 27 TEXAS L. REV. 856 (1949).

415. *Galloway v. Moeser*, 82 S.W.2d 1067 (Tex. Civ. App.—Eastland 1935, no writ); *Carnes v. Swift*, 56 S.W. 85 (Tex. Civ. App. 1900, no writ).

In *Galloway v. Moeser*, 82 S.W.2d 1067 (Tex. Civ. App.—Eastland 1935, no writ) a mortgage with a general warranty was executed on partnership property by only one partner. The court held that when the partner later acquired the remainder of the interest, that interest also passed to the mortgagee. *Id.* at 1068; *accord*, *Roberts v. Corbett*, 265 S.W.2d 127, 129 (Tex. Civ. App.—Galveston 1954, writ ref'd). But see *Clark v. Gauntt*, 138 Tex. 558, 161 S.W.2d 270 (1942).

416. 79 Tex. 310, 15 S.W. 240 (1891).

not pass to the grantee;⁴¹⁷ thus, an adverse title acquired by the grantor during the grantee's right of possession under the deed is not a breach of warranty.⁴¹⁸ The covenant cannot be extended to cover future laches of the vendee by which he loses the title conveyed to him.⁴¹⁹ Likewise, it guarantees title only at the time of the conveyance. Thus if a grantor regains title from the grantee through a tax sale, for example, the tax title does not then pass to the grantee.⁴²⁰ Consistent with this reasoning, a grantor who transfers by a quitclaim instrument may assert an after acquired title against the grantee.⁴²¹ The quitclaim purports to convey only the right, title or interest of the grantor at the time of the conveyance; therefore, if a grantor of a quitclaim subsequently acquires title to the estate, this new title does not conflict with the estate previously conveyed. In addition, an after acquired title will not pass to the grantee if no consideration was given for the warranty.⁴²²

Thus, an evaluation of the purpose of the warranty offers the best test in determining the circumstances in which an after acquired title automatically passes to the grantee. If the claim is in derogation of the title granted, then the subsequently acquired title will pass to the grantee. If not, the grantor may assert his claim.

BREACH OF WARRANTY

Both complete and partial failure of title constitute breaches of warranty.⁴²³ Title does not fail because there is a cloud on the title,⁴²⁴ or because the estate is in the possession of a trespasser,⁴²⁵ since neither of these situations interferes with the existence of title in the grantee.

To constitute a breach of warranty, there must first be an outstanding paramount title⁴²⁶—one which is superior to the grantee's and which existed at

417. *Id.* at 314, 15 S.W. at 242.

418. *Hein v. Henry*, 299 S.W. 456 (Tex. Civ. App.—San Antonio 1927, no writ).

419. *Harn v. Smith*, 79 Tex. 310, 314, 15 S.W. 240, 242 (1891); *accord*, *Daniel v. Jones*, 450 S.W.2d 928, 932-33 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.). *But see Sabine Valley Timber & Lumber Co. v. Cagle*, 149 S.W. 697 (Tex. Civ. App.—Texarkana 1912), *rev'd*, 109 Tex. 178, 202 S.W. 942 (1918).

420. *Foster v. Johnson*, 89 Tex. 640, 36 S.W. 67 (1896).

421. *Roberts v. Corbett*, 265 S.W.2d 127, 129 (Tex. Civ. App.—Galveston 1954, writ ref'd); *cf.* *Burns v. Goodrich*, 392 S.W.2d 689, 692-93 (Tex. 1965).

422. *Chace v. Gregg*, 88 Tex. 552, 559, 32 S.W. 520, 522 (1895); *Ackerman v. Smiley*, 37 Tex. 211, 217 (1872).

423. See for example, *Jones' Heirs v. Paul's Heirs*, 59 Tex. 41 (1883); *Schell v. Black*, 321 S.W.2d 373, 375 (Tex. Civ. App.—Eastland 1959, no writ); *Fitzgerald v. Compton*, 67 S.W. 131, 132 (Tex. Civ. App. 1902, no writ); *Stark v. Homuth*, 45 S.W. 761, 763 (Tex. Civ. App. 1898, writ dism'd).

424. *Norton v. Schmucker*, 83 Tex. 212, 214, 18 S.W. 720, 721 (1892); *Schell v. Black*, 321 S.W.2d 373, 375 (Tex. Civ. App.—Eastland 1959, no writ); *Simonton v. Taylor*, 306 S.W.2d 775, 779 (Tex. Civ. App.—Beaumont 1957, no writ).

425. *Norton v. Schmucker*, 83 Tex. 212, 214, 18 S.W. 720, 721 (1892); *Biggs v. Doak*, 259 S.W. 665, 666 (Tex. Civ. App.—El Paso 1924, no writ).

426. *Flanagan v. Ward*, 12 Tex. 209 (1854); *Worthen v. Peoples Loan & Homestead Co.*, 150 S.W.2d 830, 833 (Tex. Civ. App.—Galveston 1941, no writ); *Felts v. Whitaker*, 129 S.W.2d 682, 685 (Tex. Civ. App.—Fort Worth 1939), *aff'd*, 137 Tex. 578, 155

the time of the conveyance.⁴²⁷ The second requisite for a breach of warranty is that there must also be an eviction.⁴²⁸ The definition of eviction has sometimes been limited in scope to apply only when the grantee has been ousted by a court judgment.⁴²⁹ The supreme court has found this strict rule to be unjust because it delays proceedings against the grantor and increases the amount of damages by adding the cost of defending an additional lawsuit.⁴³⁰ Accordingly, the rule has been relaxed in cases where the grantee attempts to take possession and finds another claiming under superior title. If the claimant refuses to give up possession, threatening enforcement of his rights, the grantee is considered evicted.⁴³¹ The rule has been liberalized even further by adoption of the standard of "eviction in legal contemplation."⁴³² This type of eviction occurs regardless of possession, when the facts reveal that it would be useless for the grantee to attempt to maintain the title conveyed; therefore, when the grantee yields to a force he cannot resist, he is, in contemplation of law, evicted.⁴³³ Examples of this type of eviction include where a claimant has superior title, has possession by superior title, or threatens with superior title.⁴³⁴

Eviction also occurs when a claimant obtains superior title by judgment in a trespass to try title suit.⁴³⁵ But since the grantor under a covenant of warranty has the duty, when notified, to defend his grantee's title, such a judgment alone is not sufficient to establish a breach of warranty if the grantor was not a party to the suit to try title.⁴³⁶ In that situation the judgment is evidence only of eviction. Independent evidence that the claimant's title is superior to the warrantee's is necessary in order to prevent collusion

S.W.2d 604 (1941); *Dupree v. Savage*, 154 S.W. 701, 703 (Tex. Civ. App.—Amarillo 1913, writ ref'd).

427. *See Westrope v. Chamber's Estate*, 51 Tex. 178, 187 (1879); *Love v. Minerva Petroleum Corp.*, 105 S.W.2d 892, 895 (Tex. Civ. App.—Beaumont 1937, no writ).

428. *Rancho Bonito Land & Livestock Co. v. North*, 92 Tex. 72, 75-76, 45 S.W. 994, 996 (1898); *Cross v. Thomas*, 264 S.W.2d 539, 543 (Tex. Civ. App.—Fort Worth 1953, writ ref'd n.r.e.); *Love v. Minerva Petroleum Corp.*, 105 S.W.2d 892, 894 (Tex. Civ. App.—Beaumont 1937, no writ); *Dupree v. Savage*, 154 S.W. 701, 703 (Tex. Civ. App.—Amarillo 1913, writ ref'd); *cf. Southern Title Guar. Co. v. Prendergast*, 494 S.W.2d 154, 156 (Tex. 1973).

429. *Westrope v. Chamber's Estate*, 51 Tex. 178, 187 (1879).

430. *Id.* at 187; *accord, Schneider v. Lipscombe County Nat'l Farm Loan Ass'n*, 146 Tex. 66, 71, 202 S.W.2d 832, 834 (1947).

431. *Felts v. Whitaker*, 129 S.W.2d 682, 685 (Tex. Civ. App.—Fort Worth 1939), *aff'd*, 137 Tex. 578, 155 S.W.2d 604 (1941).

432. *Id.* at 685.

433. *Id.* at 685. *Schneider v. Lipscombe County Nat'l Farm Loan Ass'n*, 146 Tex. 66, 71, 202 S.W.2d 832, 835 (1947) promulgated the two elements of a constructive eviction—(1) a positive assertion of a paramount title and (2) yielding to that assertion.

434. *Felts v. Whitaker*, 129 S.W.2d 682, 685 (Tex. Civ. App.—Fort Worth 1939), *aff'd*, 137 Tex. 578, 155 S.W.2d 604 (1941).

435. *Simpson v. Belvin*, 37 Tex. 674, 685 (1873).

436. *Johns v. Hardin*, 81 Tex. 37, 16 S.W. 623 (1891); *Peck v. Hensley*, 20 Tex. 673 (1858); *McGregor v. Tabor*, 26 S.W. 443 (Tex. Civ. App. 1894, no writ). *See generally* TEX. R. CIV. P. 39.

between the claimant and the warrantee.⁴³⁷ Thus, the most efficient practice is to join the warrantor in any suit for title between the claimant and the warrantee, making the judgment binding on all the parties and establishing it as conclusive proof of superior title.⁴³⁸

Eviction may also be effected when the claimant merely threatens by superior title. When paramount title is positively asserted against a warrantee, he is not required to make futile resistance to a manifestly superior claim.⁴³⁹ By surrendering the estate under this option, however, the warrantee assumes the burden of proving, in a subsequent suit against his warrantor, the superiority of the title to which he has yielded.⁴⁴⁰ In *Felts v. Whitaker*⁴⁴¹ the grantor, purporting to convey land to one grantee by a general warranty deed, had previously conveyed an unrecorded deed to another grantee.⁴⁴² Since the previous deed was not of record, it was actually inferior to that taken by the subsequent grantee: the strength of the previous deed, to which the grantee yielded, was dependent on the claimant's securing title by limitations. Since the grantee had to prove that the title to which he yielded was superior, he was unable to establish a breach of the warranty.⁴⁴³ A grantee may be convinced there is an outstanding title, but this belief must be supported by the evidence.⁴⁴⁴

Eviction also occurs when at the time of the conveyance the grantee finds the premises in possession of another claiming under paramount title.⁴⁴⁵ In order to establish eviction and a breach of warranty in this situation, the warrantee is not required either to attempt to take possession or to bring suit for title against the claimant.⁴⁴⁶ But, since the warrantor is not bound to

437. *Peck v. Hensley*, 20 Tex. 673, 678 (1858); *McGregor v. Tabor*, 26 S.W. 443, 444 (Tex. Civ. App. 1894, no writ); *Maverick v. Routh*, 26 S.W. 1008, 1009 (Tex. Civ. App. 1894, writ ref'd).

438. The warrantee has to join his warrantor in a suit for title to establish conclusive proof of superior title. *McGregor v. Tabor*, 26 S.W. 443, 444 (Tex. Civ. App. 1894, no writ).

439. *Schneider v. Lipscombe County Nat'l Farm Loan Ass'n*, 146 Tex. 66, 71, 202 S.W.2d 832, 835 (1947); *Felts v. Whitaker*, 129 S.W.2d 682, 685 (Tex. Civ. App.—Fort Worth 1939), *aff'd*, 137 Tex. 578, 155 S.W.2d 604 (1941); *Love v. Minerva Petroleum Corp.*, 105 S.W.2d 892, 894-95 (Tex. Civ. App.—Beaumont 1937, no writ); *Larkin v. Trammel*, 105 S.W. 552, 556 (Tex. Civ. App. 1907, no writ).

440. *Schneider v. Lipscombe County Nat'l Farm Loan Ass'n*, 146 Tex. 66, 71, 202 S.W.2d 832, 835 (1947); *Westrope v. Chamber's Estate*, 51 Tex. 178, 188 (1879); *Simonton v. Taylor*, 306 S.W.2d 775, 779 (Tex. Civ. App.—Beaumont 1957, no writ).

441. 129 S.W.2d 682 (Tex. Civ. App.—Fort Worth 1939), *aff'd*, 137 Tex. 578, 155 S.W.2d 604 (1941).

442. *Id.* at 685.

443. *Id.* at 686.

444. *Cross v. Thomas*, 264 S.W.2d 539, 542 (Tex. Civ. App.—Fort Worth 1953, writ ref'd n.r.e.). *But see Shannon v. Childers*, 202 S.W. 1030, 1031 (Tex. Civ. App.—El Paso 1918, writ ref'd n.r.e.).

445. *Jones' Heirs v. Paul's Heirs*, 59 Tex. 41, 45-46 (1883); *accord, Compton v. Trico Oil Co.*, 120 S.W.2d 534, 538 (Tex. Civ. App.—Dallas 1938, writ ref'd).

446. *Jones' Heirs v. Paul's Heirs*, 59 Tex. 41, 46 (1883); *Simonton v. Taylor*, 306

protect against the assertions of trespassers, the warrantee, in a suit on the covenant, must prove that the claimant in possession has the superior title.⁴⁴⁷

A grantee cannot evict himself. If a grantee purchases a title when he already possesses a title superior to that conveyed to him by his grantor, it would be extending the eviction concept beyond reason to designate this as a breach of warranty.⁴⁴⁸ To allow the warrantee to proceed against his warrantor would be contrary to the concept that the warrantee may not voluntarily yield to the claimant: the grantee cannot be forced to yield to himself.⁴⁴⁹ In addition, a warrantee may not invite an assertion of superior title.⁴⁵⁰ A trespass to try title suit, however, will not be considered such an invitation.⁴⁵¹

To establish a breach of warranty, then, a grantee must prove (1) that there has been a positive assertion of a paramount title, and (2) that he has been forced to yield to that assertion.⁴⁵² There are decisions, however, which have not considered these elements when evaluating a breach of warranty.⁴⁵³ In *City of Beaumont v. Moore*⁴⁵⁴ the supreme court found a breach of warranty in a case where there was a servitude on the estate but no hostile claim of title.⁴⁵⁵

Since *Moore* did not involve an assertion of superior title, it appears that a breach of the covenant against encumbrances was used as the vehicle by which to find a breach of warranty. The purpose of the warranty is not served by allowing a claim of anything less than superior title to constitute a breach. The only purpose of a warranty is to protect title; thus a finding of breach of the warranty should reflect this purpose by requiring both an assertion of paramount title *and* an eviction or an operational eviction by yielding to the assertion.

Once there is a breach of warranty, the covenant no longer runs with the

S.W.2d 775, 779 (Tex. Civ. App.—Beaumont 1957, no writ); *Larkin v. Trammel*, 105 S.W. 552, 556 (Tex. Civ. App. 1907, no writ).

447. *Worthen v. People's Loan & Homestead Co.*, 150 S.W.2d 830, 833 (Tex. Civ. App.—Galveston 1941, no writ); *Felts v. Whitaker*, 129 S.W.2d 682, 686 (Tex. Civ. App.—Fort Worth 1939), *aff'd*, 137 Tex. 578, 155 S.W.2d 604 (1941).

448. *Rancho Bonito Land & Livestock Co. v. North*, 92 Tex. 72, 75-76, 45 S.W. 994, 996 (1898).

449. *Id.* at 75-76, 45 S.W. at 996; *accord*, *Gibson v. Turner*, 156 Tex. 289, 302-303, 294 S.W.2d 781, 788-89 (1956).

450. *Coleman v. Luetcke*, 164 S.W. 1117, 1118 (Tex. Civ. App.—San Antonio 1914, no writ).

451. *Id.* at 1119.

452. *Schneider v. Lipscombe County Nat'l Farm Loan Ass'n*, 146 Tex. 66, 71, 202 S.W.2d 832, 834-35 (1947); *Veteran's Land Bd. v. Akers*, 408 S.W.2d 795, 797 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.).

453. *City of Beaumont v. Moore*, 146 Tex. 46, 202 S.W.2d 449 (1947); *Beken v. Elstern*, 503 S.W.2d 408 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

454. 146 Tex. 46, 202 S.W.2d 449 (1947).

455. *Id.* at 55, 202 S.W.2d at 455; *see* *Beken v. Elstern*, 503 S.W.2d 408, 410 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ); *cf.* *Eric Ericksson, Inc. v. Crooks*, 508 S.W.2d 115 (Tex. Civ. App.—Waco 1974, no writ) (easement found to be a breach of warranty).

land, and the 4 year statute of limitations begins to run.⁴⁵⁶ Since a breach occurs when there has been both a positive assertion of paramount title and a yielding to that assertion, the statute will begin to run at the eviction. If at the time of conveyance the grantee finds the premises in the possession of one claiming under paramount title, the statute will begin to run at the time of the conveyance.⁴⁵⁷ In *Morrison v. Howard*,⁴⁵⁸ for example, a royalty deed was conveyed while a third person was in possession, but the grantee did not bring suit until 40 years after the conveyance. The court held that the statute had begun to run at the time of the conveyance, thus barring the suit.⁴⁵⁹ If the land is unoccupied at the time of the conveyance, but a claimant with superior title subsequently takes possession, the statute will begin to run when possession is taken.⁴⁶⁰ In a case where the claimant does not take possession, the statute begins to run when superior title is asserted.⁴⁶¹ Moreover, a grantee may bring suit against any warrantor in the chain of title, and an intermediate warrantor has 4 years from the time the action is brought against him to bring suit against a previous warrantor.⁴⁶²

DAMAGES

Under the English common law the grantee could recover on a breach of warranty only the value of the land at the time when the warranty was made.⁴⁶³ Originally, the grantee was given an estate of equal value, but when the purchase and sale of land became prevalent, the grant of land of equal value was replaced by a refund of the consideration paid.⁴⁶⁴

As indemnity against failure of title, the warranty entitles a grantee to damages, which are usually measured according to the consideration shown by recitals in a deed or by parol evidence.⁴⁶⁵ If there is no evidence of considera-

456. *Schneider v. Lipscombe County Nat'l Farm Loan Ass'n*, 196 S.W.2d 954, 957 (Tex. Civ. App.—Amarillo 1946), *rev'd on other grounds*, 146 Tex. 66, 202 S.W.2d 832 (1947); *Alvord v. Waggoner*, 29 S.W. 797, 798 (Tex. Civ. App.), *aff'd sub nom.*, *Eustis v. Fosdick*, 88 Tex. 615, 32 S.W. 872 (1895). See generally TEX. REV. CIV. STAT. ANN. art. 5527 (1958).

457. *Eustis v. Cowherd*, 23 S.W. 737 (Tex. Civ. App. 1893, no writ); *cf.* *Fudge v. Hogge*, 323 S.W.2d 663, 667 (Tex. Civ. App.—Dallas 1959, no writ).

458. 261 S.W.2d 910 (Tex. Civ. App.—Austin 1953, no writ).

459. *Id.* at 912.

460. *Jones' Heirs v. Paul's Heirs*, 59 Tex. 41, 46 (1883).

461. See *Eustis v. Fosdick*, 88 Tex. 615, 32 S.W. 872 (1895); *Wolff v. Commercial Standard Ins. Co.*, 345 S.W.2d 565 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.).

462. *McPike v. Smith*, 209 S.W. 815, 816 (Tex. Civ. App.—Galveston 1919, no writ).

463. See *Wiggins v. Stephens*, 246 S.W. 84, 85 (Tex. Comm'n App. 1922, jdgmt adopted).

464. *Id.* at 85.

465. *Glen v. Mathews*, 44 Tex. 400, 406 (1876); *Faull v. City of Dallas*, 97 S.W.2d 1031, 1033 (Tex. Civ. App.—Dallas 1936, writ dism'd).

tion, the grantee may recover no more than nominal damages.⁴⁶⁶ When consideration can be proven, the measure of damages for failure of title is limited to the amount of the purchase money plus interest⁴⁶⁷ since the damages should not exceed what the grantee has paid.⁴⁶⁸ An interesting situation occurs when there has been an exchange of land as consideration.⁴⁶⁹ In such a case, the measure of damages will be the value of the property given as consideration at the time of the conveyance.⁴⁷⁰ Interest on the purchase price is available to the grantee when he has not taken possession of the land, or when the interest is more than the reasonable rental value of the land.⁴⁷¹

A breach of warranty does not require absolute failure of the entire title; there may be a complete failure of part of the title.⁴⁷² Damages for a partial failure will be "the actual value of the particular lots or parcels to which there was a failure of title, to be ascertained by their relative value compared with the balance of the land, assuming the price agreed on"⁴⁷³ Based on the price paid, the damages, then, bear the same proportion to the whole of the purchase money as the value of the part to which title fails bears to the whole premises.⁴⁷⁴ Thus, if land is sold by the acre, and all the acres are of equal value, the amount of damages will be determined by first dividing the *number* of acres to which title has failed by the total *number* of acres conveyed, and then multiplying the resulting proportion by the total purchase price. If the acres are of differing values, the recoverable proportion of the total purchase price will be determined by dividing the *value* of the acres to which title has failed by the *value* of the total acres conveyed.⁴⁷⁵

466. *Glen v. Mathews*, 44 Tex. 400, 406 (1876); *Tarrant v. Schulz*, 441 S.W.2d 868, 869 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.); *Lawless v. Evans*, 14 S.W. 1019 (Tex. Civ. App. 1889, no writ).

467. *Turner v. Miller*, 42 Tex. 418, 420 (1875); *Tarrant v. Schulz*, 441 S.W.2d 868, 870 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.).

468. *Wiggins v. Stephens*, 246 S.W. 84, 85 (Tex. Comm'n App. 1922, jdgmt adopted).

469. *See id.* at 85.

470. *Id.* at 86.

471. *Ledbetter v. Howard*, 395 S.W.2d 951, 953 (Tex. Civ. App.—Waco 1965, no writ).

472. *Felts v. Whitaker*, 129 S.W.2d 682, 685 (Tex. Civ. App.—Fort Worth 1939), *aff'd*, 137 Tex. 578, 155 S.W.2d 604 (1941).

473. *Raines v. Calloway*, 27 Tex. 678, 685 (1864); *accord*, *French v. Bank of the Southwest Nat'l Ass'n*, 422 S.W.2d 1, 7 (Tex. Civ. App.—Houston [1st Dist.] 1967, 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.).

474. *Allen v. Draper*, 256 S.W. 255, 256 (Tex. Comm'n App. 1923, opinion adopted); *Wiggins v. Stephens*, 246 S.W. 84, 86 (Tex. Comm'n App. 1922, jdgmt adopted); *French v. Bank of the Southwest Nat'l Ass'n*, 422 S.W.2d 1, 7 (Tex. Civ. App.—Houston [1st Dist.] 1967, writ ref'd n.r.e.).

475. *Wiggins v. Stephens*, 246 S.W. 84, 86 (Tex. Comm'n App. 1922, jdgmt adopted). If the deed recites the price per acre, extrinsic evidence may be introduced to show that the acreage to which title failed is more valuable than the average price per acre. *See McBride v. Burns*, 88 S.W. 394, 399 (Tex. Civ. App. 1905, writ dism'd).

If a grantee decides to buy the outstanding title, his damages are not measured by the amount of consideration originally paid. Rather, he is allowed to recover the amount paid to extinguish the outstanding claim.⁴⁷⁶ These damages are considered an indemnity for the grantee's actual loss.⁴⁷⁷ It is presumed that the grantee lost no more by extinguishing the outstanding title than he would have lost through failure of his title. There could be a difference, however, in the damages payable by the grantor if the grantee chooses to purchase the outstanding title rather than to sue for the purchase price. The grantor's liability thus depends on the grantee's choice of remedy rather than on the consideration paid. This view of damages is parallel to the measure of damages for a breach of the covenant against encumbrances, in which the grantee's damages are determined by the value of the encumbrance at the time of the conveyance. A very different result can occur from the purchase of an outstanding title, however, in that the value ultimately paid for the outstanding title may be radically different from the consideration paid at the time of conveyance. In *McLendon v. Federal Mortgage Co.*⁴⁷⁸ the Waco Court of Civil Appeals assessed the value of an outstanding encumbrance to be the amount paid by the grantee to discharge it, holding that the damages were for breach of warranty rather than breach of the covenant against encumbrances.⁴⁷⁹ This manner of measuring damages has probably resulted from an intermingling of the concepts of warranty with those of the covenant against encumbrances.

In a suit for damages a grantee's remedy may not be limited to the purchase price paid, because his right of action for breach of warranty is not restricted to his immediate grantor, and he may elect to sue any one of the warrantors in the chain of title.⁴⁸⁰ In making such an election the warrantee may recover from any one of the warrantors a sum not in excess of the amount received as consideration by that warrantor.⁴⁸¹ Since a warrantee can recover on the warranty of a remote grantor,⁴⁸² it would appear that even

See also Tarrant v. Schulz, 441 S.W.2d 868 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.) (circumstances under which parol evidence is admissible).

476. *Denson v. Love*, 58 Tex. 468, 471-72 (1883); *Johnson v. Sherrill*, 271 S.W. 276, 277 (Tex. Civ. App.—San Antonio 1925, no writ); *accord*, *Haynes v. Vermillion*, 242 S.W.2d 444, 447 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e.).

477. *Denson v. Love*, 58 Tex. 468, 471-72 (1883); *Johnson v. Sherrill*, 271 S.W. 276, 277 (Tex. Civ. App.—San Antonio 1925, no writ); *accord*, *Haynes v. Vermillion*, 242 S.W.2d 444, 447 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e.).

478. 60 S.W.2d 324 (Tex. Civ. App.—Waco 1933, writ ref'd).

479. *Id.* at 326; *accord*, *Haynes v. Vermillion*, 242 S.W.2d 444, 447 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e.); *Kimmins v. McKelvey*, 12 S.W.2d 1085, 1086 (Tex. Civ. App.—Galveston 1928, writ dism'd).

480. *Penney v. Woody*, 147 S.W. 872, 874 (Tex. Civ. App.—Amarillo 1912, no writ); *see Eustis v. Fosdick*, 88 Tex. 615, 32 S.W. 872 (1895); *Hollingsworth v. Mexia*, 37 S.W. 455, 457 (Tex. Civ. App. 1896, no writ).

481. *Penney v. Woody*, 147 S.W. 872, 874 (Tex. Civ. App.—Amarillo 1912, no writ).

482. *Lewis v. Ross*, 95 Tex. 358, 363, 67 S.W. 405, 407 (1902).

a grantee who had obtained a warranty without consideration would be able to recover from a remote grantor,⁴⁸³ and that each warrantor remains liable on the covenant for as long as the covenant continues to run with the land.

CONCLUSION

The importance of the warranty is directly related to the fact that it is so widely used. Warranties are used not only in conveying fee simple estates but also in conveying other real property interests such as deeds of trust, mineral estates, mortgages, liens, leases and easements. In construing a warranty it is necessary to determine the type of estate conveyed and whether the conveyance is valid. If there is an ineffective transfer of title, the next consideration is whether a breach has occurred. For a breach of warranty to occur there must have been a positive assertion of superior title by a claimant and a yielding by the grantee.

The covenant against encumbrances is also an important consideration in analyzing a warranty, since the Texas courts have intermingled them by allowing a breach of the covenant against encumbrances to be a breach of warranty. Thus, in a warranted conveyance a suit for breach of warranty can be maintained for a breach of the covenant against encumbrances, with damages assessed in accordance with warranty. This practice appears unnecessary because an action on breach of the covenant against encumbrances is sufficient to protect the grantee from resulting losses. A stricter interpretation of warranty would not infringe on the protection afforded the grantee and would allow its application to correspond to its purpose. Thus, warranty would protect only against claims in derogation of title and would be breached by nothing less than that type of claim.

483. See *Hollingsworth v. Mexia*, 37 S.W. 455, 458 (Tex. Civ. App. 1896, no writ).