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WARRANTIES OF TITLE — A MODEST PROPOSAL

LEONARD LEVIN†

I. INTRODUCTION

MUCH CONFUSION and uncertainty attend the question of the responsibility of a grantor of land for defects in the title to the land conveyed. The confusion and uncertainty stem from the fact that courts historically have approached the problem with an attitude based on antiquated legal concepts. These concepts often subordinate both the intent of the parties involved and the practical realities of the situation to the dictates of legal formalism. Courts which achieve reasonable results within this framework frequently do so only by distorting the prevailing legal concepts beyond the point at which they have any real meaning. For example, courts typically make recovery for defective title dependent upon whether the plaintiff's possessory rights to the property are presently interfered with. To reach the desired result of affording a remedy to the titleholder, courts bound by the "present interference" requirement frequently go far to find a "constructive interference," even though the plaintiff has at all times retained actual possession.¹

In recent years the number of cases involving warranties of title appears to have declined significantly. As a result, the need for reform in this area of law has not been perceived as pressing. It is suggested, however, that the decline in the volume of suits is not reflective of any improvement in the law. Rather, the decline is attributable to the wider use of prophylactic measures employed pursuant to the title transfer. Professional title searches, which detect defects in title before transfer, and the growing practice of purchasing title insurance, under the terms of which the insurer or its agents conduct a title search prior to land transfers, are two common prophylac-

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¹. See, e.g., Brown v. Lober, 63 Ill. App. 3d 727, 379 N.E.2d 1354 (1978) (it is not necessary to show an actual eviction to prove breach of a covenant of quiet enjoyment); Foley v. Smith, 14 Wash. App. 285, 539 P.2d 874 (1975) (where vendor sold land to purchasers, a subsequent judgment for specific performance by prior purchasers constituted breach of vendor's covenant to purchasers); Brewster v. Hines, 155 W. Va. 302, 185 S.E.2d 513 (1971) (purchaser of land may sustain burden of proving constructive eviction from land by proving that the deed from the vendor passed no legal title and that purchaser surrendered possession to persons holding superior title).

(649)
tic measures. When such precautions are taken, litigation is seldom necessary if problems ultimately arise between title companies inter se.\(^2\) Instead, the company which initially insured the title typically acknowledges liability to subsequent insurers for defects which later surface. However, such measures are not used universally, and the confused law of warranties continues to pose a problem for recent cases not solved between title companies. This pragmatic approach employed by the title companies has many positive aspects, and the changes herein proposed in the manner in which title defect disputes are to be solved are in many ways similar.

The purpose of this article is twofold: first, to survey the origins and sources of the present confusion in the courts; second, to recommend a body of basic considerations, in the form of a proposed legislative enactment, to which courts may refer in order to reach results which are more consistent with both industry practice and the expectations of the parties. Thus it is hoped that a realistic and internally consistent body of law may develop to deal with the problems certain to arise in the future.

II. Historical Background

The doctrine of *caveat emptor*, prevalent in so many other areas of the law involving sales, historically has had little application in allocating the responsibility for defects in title between a grantor of land and his successor. In feudal times, the overlord’s responsibility for his tenants’ undertakings included his warranty of the land under tenure. If the overlord’s title to the land proved defective, he was obligated to supply the tenant with either alternative land or its value.\(^3\)

As the feudal era came to an end, growing dissatisfaction with that system’s form of redress for title defects, replete with procedural delays and inconveniences, ripened into a demand for a new system. It seems natural, then, that when the written form of conveyance became dominant, the express covenant of title became common.\(^4\) First

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2. Taub, *Rights and Remedies Under a Title Policy*, 15 REAL PROP., PROB. & TR. J. 422 (1980). The author notes that most claims against title insurance companies are settled without litigation. *Id.* at 428.

3. See generally 3 *American Law of Property* § 12.125 (A. Casner ed. 1952) (superceded) (citing W.H. Rawle, *Covenants for Title* (5th ed. 1887)). The overlord’s obligation to supply either alternative land or its value served a twofold purpose. In the first case, this obligation protected the tenant from paramount title of others. Moreover, this obligation protected the tenant against any attempt by his overlord to take back what he had parted with. *Id.*

For a classic history of the law of covenants for title, see W.H. Rawle, *Covenants for Title* (2d ed. 1854).

introduced in the latter part of the seventeenth century, express covenants of title soon became a routine part of land conveyances. Gradually the character of the grantor's covenant assumed a stylized form which included the five customary covenants of title. Three of the customary covenants were denominated warranties *in presenti*; any breach of their terms was deemed to occur upon delivery of the deed. Warranties *in presenti* included the covenant of seisin, which was breached when the grantor at the time of the conveyance owned an interest in the property less extensive than that which he purported to convey by the deed. The other two warranties *in presenti* were the warranty that the grantor had legal authority to convey the interest purported to be conveyed, and the warranty that the title was subject

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5. W.H. Rawle, supra note 3, at 43.
6. *Id.* The five covenants include: (1) a covenant for seisin; (2) a covenant that the grantor has a perfect right to transfer the property; (3) a covenant for quiet enjoyment; (4) a covenant against encumbrances; and (5) a covenant for further assurance. *Id.*
7. Courts have recognized the lack of a uniform definition of the term "seisin." See, e.g., Lakelands, Inc. v. Chippewa & Flambeau Improvement Co., 237 Wisc. 326, 342, 295 N.W. 919, 926 (1941) ("One can wade in the sea of adjudicated cases in order to discover what is meant by 'seisin' until he is totally submerged and lost"). Dean Cribbet has attempted to define seisin as a mythical concept which carries with it something greater than possession. See J.E. Cribbet, *Principles of the Law of Property* 14-15 (2d ed. 1975). He illustrates the concept by stating that the early English landholder seldom was thought of as owning the land, rather he was seised of it. The protected interest of value to him was his seisin. When he transferred his interest he did so by "livery of seisin," accomplished by going on the land and physically transferring a clod of earth or a twig to the new holder of the land. If an intruder ousted him from the land, he was said to have been disseised and until he re-entered the land, either by self help or by the appropriate legal remedy, he had lost his seisin. This could be disastrous since, if the original holder of the land died without regaining his seisin, the land did not descend to his heirs, while on the death of the disseisor the seisin would go to the latter's heirs by "descent cast.” *Id.* at 14.

As used in a covenant, the term "seisin" is generally construed to mean that the grantor is seised of legal title. 20 AM. JUR. 2D Covenants, Conditions, Etc. § 73 (1965).
8. See generally 20 AM. JUR. 2D Covenants, Conditions, Etc. §§ 73 & 75 (1965). Seisin connotes something more than possession. Hence, mere possession of the property by a covenantor is not sufficient to satisfy the covenant. *Id* § 75. The covenant of seisin is deemed to have been breached by the mere existence of an outstanding paramount title. See, e.g., Hilliker v. Rueger, 28 N.Y. 11, 126 N.E. 266 (1920) (defining the covenant of seisin to mean that the grantor at the time of the conveyance was lawfully seised of an absolute and indefeasible estate of inheritance in fee simple, and had the power to convey the same; the covenant can be broken by failure of marketable title); Litman's v. O'Donnell, 173 Pa. Super. 570, 98 A.2d 462 (1953) (covenant is breached if there is an existing encumbrance at the time the deed is delivered). But cf. Marathon Builders v. Polinger, 263 Md. 410, 283 A.2d 617 (1971) (zoning restriction does not constitute an encumbrance on the land); Len v. Burke, 231 Pa. Super. 98, 331 A.2d 755 (1974) (possibility of future assessment where assessment has not yet been made is not an encumbrance even though local improvements have been completed).
only to those encumbrances disclosed on the face of the deed. In addition to the warranties in presenti, there were two customary warranties in futuro which were not breached, and with regard to which no cause of action accrued, unless and until some triggering event occurred after the conveyance. The warranties in futuro were the warranty of quiet enjoyment, also called the “covenant of warranty,” and the warranty of further assurances. The warranty of quiet enjoyment was deemed breached when the grantee’s use or enjoyment of the land was interfered with in fact or disturbed by a claim of an adverse interest. The warranty of further assurances required that the grantor take any necessary steps to protect the grantee’s title against adverse claimants. As these five covenants became increasingly standardized through custom and usage, their inclusion in deeds to land which was sold became the rule.

During the latter part of the nineteenth century and the beginning of the twentieth, the legislatures of most states undertook to simplify and systematize land conveyances. A 1909 Pennsylvania statute is in many ways typical of these early legislative ventures. Under this statute, deeds were separated into three types according to the specific language used in the deed. For example, a grantor could simply convey that which he held, without undertaking any responsibility at all, by denoting the deed a quitclaim.

9. W.H. Rawle, supra note 3, at 44.
10. See id.
11. For a general discussion of the covenant of warranty, see 20 Am. Jur. 2d, Covenants, Conditions, Etc. § 50 (1965). The covenant of warranty is a promise by the warrantor that upon the failure of the title which the deed purported to convey, either in part or for the whole estate, the warrantor will make compensation for the loss sustained. Id.
12. Id. § 108. The effect of a covenant for further assurance is that the grantor obligates himself to perform all acts, deeds, conveyances, and assurances as shall be lawfully and reasonably required by the grantee to perfect or confirm the title. Id. However, as this covenant applies only to the estate granted, it does not apply to defects over which the vendor has no control. See, e.g., Armstrong v. Darby, 26 Mo. 517 (1858) (covenant for further assurances embraces only those encumbrances over which the vendor has control; where the defect is beyond the control of the vendor, such as where there is an outstanding mortgage created by the vendor’s grantor, the vendor is not liable on his covenant for further assurance). So construed, those obligations seem to fit the definition of what has been denominated a special warranty deed rather than a general one.
13. See, e.g., LeRoy v. Beard, 49 U.S. (8 How.) 451 (1850) (by the 19th century, the custom of including warranties in deeds was so clearly established that the authority of an agent to convey carried with it the power to bind his principal to the obligations of a warranty deed).
(although not without a strong minority view)\textsuperscript{16} which indicates that the grantee under a quitclaim deed not only had no rights for defects in title as against the grantor, but was also precluded from asserting any rights based upon reliance on clear title. Thus, by both statutes and the common law of many states, a grantor under a quitclaim deed has not even been protected by recording statutes.\textsuperscript{17}

The Pennsylvania statute also provided for the "special warranty statute itself appears overly complex, the basic distinguishing characteristic of a quitclaim deed is that it is a conveyance of the grantor's interest in the property described in the deed, rather than of the property itself. See Greek Catholic Congregation v. Plummer, 347 Pa. 351, 352, 32 A.2d 299, 300 (1943) (quoting 16 AM. JUR. Deeds § 219 (1938)).

\textsuperscript{16} See Moelle v. Sherwood, 148 U.S. 21 (1893). The Court stated \textit{inter alia}:
The doctrine expressed in many cases that the grantee in a quitclaim deed cannot be treated as a bona fide purchaser does not seem to rest upon any sound principle. It is asserted upon the assumption that the form of the instrument, that the grantor merely releases to the grantee his claim, whatever it may be, without any warranty of its value, or only passes whatever interest he may have at the time, indicates that there may be other and outstanding claims or interests which may possibly affect the title of the property, and, therefore, it is said that the grantee, in accepting a conveyance of that kind, cannot be a \textit{bona fide} purchaser and entitled to protection as such; and that he is in fact thus notified by his grantor that there may be some defect in his title and he must take it at his risk. This assumption we do not think justified by the language of such deeds or the general opinion of conveyancers. There may be many reasons why the holder of property may refuse to accompany his conveyance of it with an express warranty of the soundness of its title or its freedom from the claims of others, or to execute a conveyance in such form as to imply a warranty of any kind even when the title is known to be perfect.

\textit{Id.} at 28-29.

In 1931 New Jersey specifically directed that a grantee under a quitclaim deed might qualify as a \textit{bona fide} purchaser by legislative fiat. See N.J. STAT. ANN. §§ 46:5-6 to :5-9 (West 1940).

\textsuperscript{17} See, e.g., Johnson v. Williams, 37 Kan. 179, 183, 14 P. 537, 539 (1887) (a grantee of a quitclaim deed is not a \textit{bona fide} purchaser with respect to outstanding interests shown by the records, or which are discoverable in making proper examinations and inquiries); Meeks v. Bickford, 96 N.J. Eq. 321, 125 A. 15 (1924)(grantee under a quitclaim deed was not a \textit{bona fide} purchaser for value as against a prior grantee by bargain and sale to the same lands, whose deed was unrecorded, where at the time the grantor executed the quitclaim deed the grantor had no interest in the premises).

\textit{See} MICH. COMP. LAWS ANN. § 565.29 (1967). The Michigan statute reads as follows:

\begin{quote}
Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. The fact that such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or part thereof.
\end{quote}

\textit{Id.}
deed” and the “general warranty deed.” The special warranty deed rendered the grantor responsible for all defects that were created by the grantor or which arose while the grantor held title. The general warranty deed under the Pennsylvania statute included the five customary warranties of title described above. Unlike the special warranty deed, the general warranty deed imposed liability upon the grantor for defects in title which were created by any predecessor in title, not just those created by the grantor.

The goals of the legislative reforms typified by the Pennsylvania statute were twofold: (1) to simplify the process of fixing responsibility for defects in title, and (2) to eliminate potential sources of confusion, dispute, and ultimately, litigation. The reformers were only partially successful in realizing their goals. The introduction of “magic words” has largely eliminated problems directly related to construction of language on the face of the deed. Thus, a deed was deemed a quitclaim deed if the operative words of conveyance were “release, quitclaim, or discharge,” a special warranty deed if the operative words were “grant or convey,” and a general warranty deed only if expressly indicated. However, difficult problems relating to the parameters of the liabilities and responsibilities thereby created remain as elusive and intractable as ever.

III. THE EXISTING LAW—A CATALOGUE OF THE TROUBLING ASPECTS

One of the most troublesome aspects of the present law of warranties of title arises out of the conjunction of the statute of limitations and the limitation of assessment of damages which may combine to prevent any meaningful recovery beyond a nominal damage award. Consider, for example, the following hypothetical situation which seems neither unique nor rare.

Following a grant to A from O, it is discovered that B has an outstanding interest in the property. B takes no steps to enforce his rights in the land. While the warranties in futuro clearly have not been

19. 21 PA. CONS. STAT. ANN. § 5 (Purdon 1955). Many jurisdictions do not distinguish general and special warranty deeds. In this type of jurisdiction, liability is imposed upon the grantor under a warranty deed for all defects regardless of their source. See generally 20 AM. JUR. 2D Covenants, Conditions, Etc. § 75 (1965).
breached, the warranties in presenti are breached at the moment the deed is delivered by reason of the defect in title. The existence of a cause of action by definition creates a present right of suit. Thus, any statute of limitation applicable to an action for breach of warranty in presenti would begin running at the moment of the conveyance. This would be so even though there has been no interference with A's possession or enjoyment of the land and even though there may never be such an interference. Because the statute of limitation would be running, A may have to bring suit before his possession is in fact interfered with, or be barred from ever doing so.

The question of damages in a suit by A in the above situation is particularly troublesome. It may be that A's possession and enjoyment will never be disturbed. A may eliminate the adverse claim through adverse possession or estoppel. A may also be able to obtain a quitclaim deed from the holder of the outstanding interest at little or no cost, thus eliminating the defect in the title. In assessing an appropriate damage award, how is a court to evaluate such possibilities? Particularly when the warranties involved are those relating to title rather than encumbrances, there is substantial authority for the proposition that a grantee is limited to nominal damages unless and until another party has in fact asserted a right against him. There-

23. See notes 9-12 and accompanying text supra. The warranties considered in futuro are the covenant of warranty and the warranty for quiet enjoyment. Id. A breach of one of the warranties in futuro is established upon proof of acts of disturbance of possession by a holder of lawful paramount title. 20 Am. Jur. 2d Covenants, Conditions, Etc. § 100 (1965).

24. 20 Am. Jur. 2d Covenants, Conditions, Etc. § 100 (1965). It is generally said that a covenant in presenti is broken, if at all, when it is made. Id. The mere existence of an outstanding paramount title constitutes a breach of the covenant, even without eviction, so that an immediate right of action accrues in favor of the vendee. Id. See, e.g., Adams v. Seymour, 191 Va. 372, 61 S.E.2d 23 (1950) (where timber with removal rights had previously been conveyed by a recorded deed, covenant of quiet possession free from encumbrance was broken when made, and gave rise to a right of action).

25. See generally Annot., 99 A.L.R. 1050 (1935). There is some conflict as to when the statute begins to run in cases based on warranties in presenti. However, for purposes of this article, it is important to recognize that most courts have held that if an encumbrance exists at the time a deed is executed, the covenant against encumbrances is then breached and the statute of limitations begins to run. See id. at 1052. See also Brown v. Lober, 75 Ill. 2d 547, 389 N.E.2d 1188 (1979); Chapman v. Kimball, 7 Neb. 399 (1878).

26. See Fraser v. Benter, 160 Cal. 390, 119 P. 509 (1911)(in regard to a covenant against encumbrances, only nominal damages may be recovered for an encumbrance which causes the grantee no actual injury). But see Fechtner v. Lake County Sav. & Loan, 66 Ill. 2d 128, 361 N.E.2d 575 (1977)("there exists the possibility that more than nominal damages may be suffered even though plaintiffs have not been 'disturbed in the title' or 'paid nothing to remove the encumberance' "); Hilliker v. Rueger, 228 N.Y. 11, 126 N.E. 266 (1920)(a covenant of seisin, if it is broken at all, is
fore, the statute of limitations may bar A's claim before A has an effective claim to any but nominal damages.

The above result, which prevails under existing law, ignores very real elements of loss which the grantee may well have suffered upon discovery of the defect in title. For example, the grantee may not have a sufficiently marketable title to sell the land. The grantee may also be effectively precluded from improving the land for fear that his title to the land may successfully be challenged at a later date. While the grantee may in certain cases be able to negotiate a release of the outstanding interest, this option would be unavailable if the outstanding interest were held by an unascertained or unlocated party. Contacting the holder of the outstanding interest also involves a risk of stirring up controversy and may create the potential for greater economic loss to the grantee.

Courts frequently avoid the injustice of the above result by liberally interpreting the concept of constructive interference with the possessory rights of the grantee, thus enabling the grantee to proceed on the warranties in futuro. However, this approach is problematic in broken at the time of the conveyance; in an action for breach of a covenant of seisin the grantee is not restricted to nominal damages).

27. See, e.g., Hilliker v. Rueger, 228 N.Y. 11, 126 N.E. 266 (1920)(recognizing that where there is a breach of the covenant of seisin, the grantee may not hold marketable title necessary to resell the land).

28. This fear is best illustrated through an analogy to zoning requirements, which, although different in character from encumbrances of title, similarly restrict unfettered use of property. See, e.g., Morgan v. Veach, 59 Cal. App. 2d 682, 139 P.2d 976 (1943). In Morgan, the court affirmed a mandatory injunction calling for the removal of a residence that the defendants had knowingly constructed in violation of set-back requirements. Id. Considering the drastic character of the order and the expense involved in complying with the order, it reasoned that the Morgan defendants would not have proceeded to develop the land had they anticipated that the restriction would not be enforced. Similarly, a grantee of land to which a defect in title adheres may be wary of developing encumbered property because of fear that a court may uphold a seemingly minor encumbrance. Such a judicial determination appears particularly probable in this situation, where the grantee is aware of the restriction prior to the development of the land. See Stewart v. Finkelstone, 206 Mass. 28, 92 N.E. 37 (1910) (set-back restrictions contained in deeds to certain property were in "perpetuity" and created a right in the nature of an easement; where the defendant knowingly violated these restrictions and took his chances as to the effect of his conduct, adjoining property owners were entitled to a mandatory injunction requiring removal of the structure).

29. Traditionally, in order to establish a breach of a warranty in futuro, it was necessary to demonstrate an actual interference with the grantee's property rights. However, recent decisions indicate that courts no longer require a showing of interference in fact to grant relief. See, e.g., Brown v. Lober, 63 Ill. App. 3d 727, 379 N.E.2d 1354 (1978) (showing of actual eviction not necessary to prove breach of a covenant of quiet enjoyment), re'd on other grounds, 75 Ill. 2d 547, 389 N.E.2d 1188 (1979)(there must be actual or constructive eviction by paramount titleholder); Foley v. Smith, 14 Wash. App. 284, 539 P.2d 874 (1975) (where vendor sold land to pur-
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its own right. Liberal interpretation of what is meant by possession distorts the meaning of the warranty of quiet enjoyment. It also creates uncertainty regarding whether the court will make the leaps necessary in many cases to find an interference with possession. Moreover, providing a remedy only under the warranties in futuro ignores both the legislative mandate creating the warranties in presenti and the very real loss which a grantee may suffer absent actual possessory interference.

The problem of assessing damages becomes even more complex upon a sale of the land by the grantee. Assume, for example, that the grantee receives full market value for the land. Should that receipt of full value be permitted as a defense by the original grantor to show that the grantee in fact suffered no loss? If the grantee had successfully recovered damages from the grantor previous to the sale by the grantee, the grantor may proceed against the grantee in restitution for return of the damages previously recovered.

Additional issues regarding damages arise with respect to subsequent purchasers. For example, a subsequent purchaser may wish to recover damages on the warranties of title in the prior grantor. This situation will often arise when the subsequent purchaser's grantor is either not available or is not financially responsible. The subsequent purchaser may also proceed against the prior grantor if he received either a quitclaim or special warranty deed from his immediate grantor, and the prior grantor gave a general warranty deed. Under these circumstances, the traditional wisdom has been to distinguish between the warranties in presenti, which are breached at the moment of conveyance, and the warranties in futuro, which look to a future triggering event.
gining event. Under this approach, warranties in presenti are deemed to be purely personal to the immediate grantee since their breach gives rise to an immediate cause of action. Warranties in futuro, on the other hand, are deemed to be available to whomever happens to be the owner of the land when the triggering event occurs.

This distinction, labeled as mere "technical scruple" even among traditionalists, was perhaps valid at the time when the power to assign choses in action was not generally recognized. However, today there is a virtually universal acceptance of the general power to assign, and the distinction no longer serves any useful purpose. It is therefore more in line with contemporary law to find that where a

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32. For a discussion of the traditional view of nonassignability of choses in action and its effect on actions for breach of warranties of title, see notes 33-37 and accompanying text infra. But see 4 J. KENT, COMMENTARIES *460 (1830). In rejecting this absolute distinction between warranties in presenti and warranties in futuro, Kent opined that the refusal to permit warranties in presenti constituted a "mere technical scruple." Id. Kent reasoned that the right to bring a cause of action due to a breach of covenant, whether present or prospective, should be available to an assignee, because the assignee "is the most interested, and the most fit person to claim the indemnity secured by [the covenants], for the compensation belongs to him, as the last purchaser, and the first sufferer." Id.

33. 4 J. KENT, COMMENTARIES *459 (1830). Kent wrote:

The covenants of seisin, and of a right to convey and against encumbrances, are personal covenants, not running with the land, or passing to the assignee; for, if not true, there is a breach of them as soon as the deed is executed, and they become choses in action, which are not technically assignable. But the covenant of warranty, and the covenant for quiet enjoyment, are prospective, and an actual ouster or eviction is necessary to constitute a breach of them. They are, therefore, in the nature of real covenants, and they run with the land conveyed, and descend to heirs, and vest in assignees or the purchaser.

Id. (footnote omitted). For additional discussion concerning the viability of actions against remote grantors, see 20 Am. Jur. 2d Covenants, Conditions, Etc. § 164 (1965). Not all decisions follow the traditional distinction between warranties in presenti and warranties in futuro for determining whether a purchaser can bring an action against a remote grantor. See, e.g., Schofield v. The Iowa Homestead Co., 32 Iowa 317 (1871) (court determined that the covenant of seisin, although theoretically a covenant in presenti, runs with the land, and confers upon the last grantee a right of action thereon).

34. For a discussion of the origins of this label, see note 33 supra. It is not surprising to find that American courts which refuse to apply this distinction and hence allow a purchaser to bring suit against a remote grantor have picked up on Chancellor Kent's less-than-favorable label for the distinction. See, e.g., Schofield, 32 Iowa at 319 (1871) ("Chancellor Kent ... admits that the American doctrine is supported upon a 'technical scruple,' and assigns the most conclusive reasons in support of the opposite English rule").

35. See generally A. CORBIN, CORBIN ON CONTRACTS § 856 (1952) ("chooses in action" were not assignable at common law, a tradition which continued into the beginning of the twentieth century).

36. See id. Corbin traces the historical development of the recognition that assignments are legally operative and enforceable. See also RESTATEMENT OF CON-
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grantor transfers his entire interest in land, an assignment of his rights against his transferor ought to be inferred absent evidence on the face of the transferee's deed of a contrary intent. If less than all of the transferor's title is conveyed, then a pro tanto assignment should be inferred. At least one court has in fact taken this position. However, many courts are reluctant to recognize the rights of remote grantees. This reluctance might be based upon unspoken considerations which would well transcend the so-called technical scruple.

A hypothetical scenario illustrates the reasons for some of this judicial reluctance. Assume that O conveys land to A by a warranty deed. A discovers that the title is defective and successfully sues O in a state which permits recovery for the actual value of the defect though there has been no actual interference with A's possession. A thereafter sells the same property to B for its full value. A has thus recouped a double recovery. Assume further that B's possession is later actually interfered with and B brings an action against O for breach of the warranty of quiet enjoyment. The question then arises as to whether B should be permitted to seek the same damages which A had previously recovered from O. If (1) the covenants in presenti are treated as creating a distinct and separate cause of action from the covenants in futuro, and (2) the covenants in futuro are available to future owners who own the land at the time they accrue, then there would appear to be no available legal concept which would prevent O from being liable a second time for the same loss. It is true that O might have a theoretical right of restitution against A, and B might have a separate independent action against A, depending on the character of A's deed. However, these rights, even if they exist, may

37. See Schofield v. The Iowa Homestead Co., 32 Iowa 317 (1871). In Schofield, the primary question before the Iowa court was whether a covenant of seisin runs with land. Id at 318. The grantor of land, who gave the covenant, defended on the grounds that prior to the commencement of the instant action, the plaintiff-grantee sold for value a portion of the land to a third party, and that the subsequent purchaser of the portion was barred from recovering upon the covenant. Id. Upon concluding that the covenant runs with the land, the Iowa court stated that "covenants running with the land are susceptible to division, so that if the land be conveyed in parcels to several persons, each may maintain an action upon the covenant to recover for the land in which he has an interest." Id at 321.

38. For citations to cases illustrating this judicial reluctance, see note 39 infra.


40. For a brief discussion of the grantor's potential rights of restitution, see note 31 and accompanying text supra.

41. For a discussion of the different categories of deeds, see notes 14-22 and accompanying text supra.
be meaningless if A is no longer available or if he is judgment-proof. This dilemma could be avoided by denying recovery for breach of any of the warranties in presenti, thereby limiting recovery to the owner whose possession is actually interfered with by the breach. Another possible solution to this problem is to limit the extent to which the remote party may recover on warranties of his predecessor.42

Some attempts to solve the problem of the potential double liability of O could lead to results which are as unsatisfactory as those sought to be avoided. For example, in the hypothetical set forth above, if the party with the adverse claim never interferes with the owner and no action for the warranties in futuro ever accrues, neither A nor B may establish any right of recovery; A, because he has sustained no loss,43 and B, because no cause of action accrued to him.44 This is true even though, as previously noted, a very real injury may have resulted from the lost opportunity to improve the property.45

The difficulties underlying the situation outlined above arise out of three interrelated problems. First, courts fail to recognize that, regardless of whether liabilities are expressed in terms of one covenant of title or five covenants of title, there is in fact only a single underlying liability. Second, the courts have failed to develop a flexible method of measuring damages for a defect or a failure of title when

42. Under the approach taken by many courts, recovery for breach of the warranty in presenti may be had upon a mere showing of constructive interference. By denying recovery under the warranties in presenti, courts can ensure that only those grantees who have suffered actual interference may recover damages. For a discussion of the concept of constructive interference, see note 29 and accompanying text supra.

43. Under the suggested solution, A would not be able to recover because in order to preclude double liability of O, it is posited that recovery be denied where the eviction was merely constructive. See note 29 supra. A, the immediate grantee, therefore would not have suffered any loss for which he could recover because there was no actual interference with A's possession.

44. If there has been no interference by the party holding the outstanding claim, the warranties in futuro have not been breached. It is only these warranties which give a cause of action to subsequent owners of property. Alternatively, the warranties in presenti have theoretically been breached by the mere existence of outstanding title at the time of the conveyance from O to A. However, B cannot bring suit based upon this breach, because warranties in presenti are purely personal, giving rise to a cause of action only in the immediate grantee. For a discussion of the warranties in presenti, see notes 7-9 and accompanying text supra.

45. See, e.g., Hilliker v. Rueger, 228 N.Y. 11, 126 N.E. 266 (1920) (a prior restriction upon title may result in a loss of marketable title). An example of the type of loss a grantee may suffer without experiencing actual possessory interference is a grantee discovering that his property is subject to a restrictive covenant or to a reversionary interest, such as a right of reentry or the possibility of reverter which has not yet ripened. No actual interference may occur within the limitations period in which to bring suit for breach of warranties in presenti. Thus, only by risking forfeiture of his property may the owner establish a cause of action with the possibility of recovering real damages.
there has been no interference with the holder's rights. Third, courts have failed to deal realistically with the question of who is the appropriate party to bring the action when the original grantee conveys the property to another.

The Commissioners on Uniform Laws have proposed some degree of reform in this area. Under the Uniform Land Transactions Act (the Act), warranties of title are for the benefit of subsequent parties in the absence of express agreement to the contrary. This is true without regard to whether the particular covenant of title is classified as *in presenti* or *in futuro*. While this aspect of the Act is certainly a positive reform, the Act fails to address the evaluation of damages when there has not yet been interference with the possessory rights of the plaintiff. Similarly, the drafters of the Act did not attempt to solve the problem of multiple liability which arises when the rights to enforce warranties *in presenti* and warranties *in futuro* vest in different persons. As long as the various warranties of title are viewed as creating separate and distinct bases for liability, the risk of a seller being exposed to double liability seems unavoidable. Indeed, since the Act

   A seller who executes a deed that does not provide to the contrary impliedly warrants that:
   (1) the real estate is free from all encumbrances;
   (2) the buyer will have quiet and peaceable possession of or right to enjoy the real estate conveyed;
   (3) the seller has power and right to convey the title which he purports to convey; and
   (4) the seller will defend the title to real estate conveyed against all persons lawfully claiming it.

Id. The Uniform Act further provides that the seller's warranty of title, as set forth above, extends to the buyer's successors in title. Id. § 2-312, 13 U.L.A. at 615.

48. Id. § 2-312, 13 U.L.A. at 615. This section provides:
   (a) A seller's warranty of title extends to the buyer's successors in title.
   (b) Notwithstanding any agreement that only the immediate buyer has the benefit of warranties of quality with respect to the real estate or that warranties received by a prior seller do not pass to the buyer, a conveyance of real estate transfers to the buyer all warranties of quality made by prior sellers. However, any rights the seller has against a prior seller for loss incurred before the conveyance may be reserved by the seller expressly or by implication from the circumstances.
   (c) A seller's warranty of quality to a protected party extends to any successor in title of the protected party unaffected by any disclaimer or limitation of liability of which the successor had no reason to know at the time of the conveyance to the successor. A successor has reason to know of a disclaimer or limitation of liability if it appears in a recorded deed or other recorded document granting the real estate to the protected party.

Id.
retains the traditional covenants of title, the implications inherent in the traditional law, including the risk of double liability, remain unaffected. Since the Act is founded in large measure upon traditional concepts, it appears that most of the difficulties created by the traditional concepts and distinctions remain unresolved by the Act. Perhaps it is not undesirable that to date no state has adopted the Act.

IV. A PROPOSAL FOR CHANGE

In light of the various problems which exist in the law of warranties of title, a more complete solution than that offered by the Act appears necessary. Legal concepts extant in other areas of the law provide a basis for developing (by way of analogy) a more realistic set of criteria for dealing with the questions which arise from warranties of title.

Initially, the law should recognize as a truism that any defect in title creates but a single cause of action; a single basis for liability exists regardless of whether such liability is expressed in terms of one, two, or five different warranties of title. In this connection, it is suggested that all legal distinction between so-called warranties in presenti and warranties in futuro be abolished. In reality, both types of warranties are descriptions of precisely the same liability. Under this suggested formulation, whether the plaintiff's enjoyment of the property has been actually interfered with would remain relevant. It would, however, be regarded as merely one factor in the evaluation of damages, rather than as determinative of the existence of a cause of action or of the right to any damages at all. The plaintiff should determine the point at which he pursues his remedy and seeks to establish his loss, similar to the plaintiff's election of remedy in other areas of the law.

The running of the statute of limitations should not be determined by the character of the remedy sought, or by assigning a time to the so-called accrual of the cause of action. Rather, commencement of the statutory period should turn upon the reasonableness of

49. For the language of the Uniform Act which preserves the traditional covenants, see note 47 supra.

50. See U.L.A. MASTER Ed. 9-78 (1984) (indicating by listing uniform acts which states have enacted that this Act has not yet been adopted by any jurisdiction).

51. For a discussion of the formula contained in the Uniform Land Transactions Act, see note 47 and accompanying text supra.

52. See generally 25 AM. JUR. 2D Elections of Remedies § 1 (1966) ("purpose of the doctrine of election of remedies is not to prevent recourse to any remedy, but to prevent double redress for a single wrong").
the plaintiff's action or inaction. In other words, just as in the case of *ex delicto* actions such as conspiracy, which are concealed by their very nature, the limitations period should run from the time that the plaintiff either knows, or by due diligence, should have known, of the existence of his rights.\footnote{For cases applying the proposed rule in other areas of law, see, e.g., *Prince v. Trustees of Univ. of Pa.*, 282 F. Supp. 832 (E.D. Pa. 1968) (malpractice-negligence cause of action did not accrue until allegedly harmful results of injection were discovered or becomes discoverable); *Keating v. Zemel*, 281 Pa. Super. 129, 421 A.2d 1181 (1980) (where culpability cannot be discovered at time it occurs, the statute of limitations begins to run as of the date the culpability could reasonably have been discovered).
}

This statute of limitations rule should, however, be subject to the qualification that once a party's cause of action is barred, no subsequent party should be able to proceed upon the same cause of action. Similarly, once the statute of limitations begins to run against a party, it should continue to run against a transferee even if the transferee does not have actual knowledge of the existence of the cause of action. The above are simply applications of the familiar doctrine that an assignee will normally have no greater rights than his transferor, and that a transferee normally assumes the risks relating to the rights of his transferor.\footnote{See 6 AM. JUR. 2D Assignment § 2 (1966); RESTATEMENT (SECOND) OF CONTRACTS § 336 comment b, illustration 3 (1979) (as the assignment of a right ordinarily transfers only what the assignor has, the assignee's rights are subject to defenses, including the statute of limitations, that would have been available had there been no assignment).
}

In connection with the measure of damages, it is unrealistic to allow recovery only of nominal damages in all cases in which there has been no interference with the plaintiff's possessory rights. As previously noted, very real and substantial injury may result without actual interference.\footnote{For a discussion of the loss that may be suffered by a grantee due to an encumbrance upon title even in the absence of an actual interference, see notes 27-28 and accompanying text supra.
}

No convincing justification has ever been advanced for denying the plaintiff the opportunity to prove actual losses. While a plaintiff could prove his actual damage with more certainty by showing either that his title has actually been interfered with or that he has negotiated a settlement with the owner of an outstanding interest and thereby liquidated his damage,\footnote{See, e.g, *Adams v. Seymour*, 191 Va. 372, 61 S.E.2d 23 (1950) (recovery allowed against grantor for payments made by grantee in settlement with third parties for interference with their possession where grantor conveyed without notice of sale of timber of the land).}

such proof should be at the option of the plaintiff. Considerable precedent exists in other areas of the law for allowing recovery of equally uncertain

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53. For cases applying the proposed rule in other areas of law, see, e.g., *Prince v. Trustees of Univ. of Pa.*, 282 F. Supp. 832 (E.D. Pa. 1968) (malpractice-negligence cause of action did not accrue until allegedly harmful results of injection were discovered or becomes discoverable); *Keating v. Zemel*, 281 Pa. Super. 129, 421 A.2d 1181 (1980) (where culpability cannot be discovered at time it occurs, the statute of limitations begins to run as of the date the culpability could reasonably have been discovered).

54. See 6 AM. JUR. 2D Assignment § 2 (1966); RESTATEMENT (SECOND) OF CONTRACTS § 336 comment b, illustration 3 (1979) (as the assignment of a right ordinarily transfers only what the assignor has, the assignee's rights are subject to defenses, including the statute of limitations, that would have been available had there been no assignment).

55. For a discussion of the loss that may be suffered by a grantee due to an encumbrance upon title even in the absence of an actual interference, see notes 27-28 and accompanying text supra.

damages. One example is recovery in personal injury cases of damages for future pain and suffering, lost future wages or earning capacity and future medical expenses.\textsuperscript{57} Similarly, in contract cases it is sometimes possible for a plaintiff to recover for lost profits.\textsuperscript{58} By the same reasoning, it is possible for a finder of fact to evaluate, in the case of a potentially defective title, the likelihood of the adverse claim being asserted and the value of the loss from the resulting inability to improve or sell the property.

The problem of potential multiple plaintiffs can similarly be solved. Initially, it should be noted that whether a right of action shall pass from its original owner to his purchaser can be provided for by express agreement.\textsuperscript{59} Even absent an express agreement, however, there exists ample authority upon which a workable set of rules may be constructed. A hypothetical involving chattels is instructive. Assume a case in which property to which there are multiple rights of ownership is tortiously damaged or destroyed. Under present practice, the plaintiff with the primary interest in the damaged chattel will frequently be given the power to act as trustee for all outstanding interests, subject to a duty to account for any losses to those interests. This solution is commonly employed in the law of bailments. The bailee normally recovers damages not only for himself but also for his bailor.\textsuperscript{60} In an analogous factual situation in which title to real property is defective, a present title holder could act in a capacity similar to that of the bailee, and bring an action on his own behalf as well as on behalf of any prior owner able to establish a separate individual loss. The prior owner could prove such loss either by intervening in the principal suit or by bringing a separate action against the original plaintiff for a share of the damages awarded.\textsuperscript{61}

If the present property owner fails to bring suit within a specified period of time, then just as the bailor may bring his own action and

\textsuperscript{57} See generally 22 AM. JUR. 2D Damages §§ 309-313 (1966).

\textsuperscript{58} See, e.g., Western Show Co. v. Mix, 315 Pa. 139, 173 A. 183 (1934) (recovery for lost future profits allowed).

\textsuperscript{59} See, e.g., UNIF. LAND TRANSACTIONS ACT § 2-312(b), 13 U.L.A. 615 (1980).

\textsuperscript{60} See generally W. PROSSER, LAW OF TORTS at 94-96 (4th ed. 1979). Prosser states that at early common law recovery in trover was conditioned upon the plaintiff proving he was in possession of the goods at the time of the loss. Bailees under this view were held to be able to recover the full value of chattels which were damaged while in their possession. \textit{Id. See also} Warren, \textit{Qualifying as Plaintiff in an Action for Conversion}, 49 HARV. L. REV. 1084, 1097 (1936).

For a general discussion of the law of bailments, see 8 AM. JUR. 2D Bailments § 1 (1980).

\textsuperscript{61} An example of a separate loss suffered by a prior owner would be if that owner had been compelled to sell at a price below the market value by reason of the title defect. For other examples, see notes 27-28 and accompanying text \textit{supra}.
establish his own loss, so too might the prior owner bring an action in his own right. In any event, since there is but a single loss, a single recovery should be permitted no matter which party actually brings the action.

It would be possible for the proposed changes to be made judicially. However, in view of the considerable alteration required in doctrinal thought and the chronic judicial conservatism with respect to property rights, it is preferable that the reform of the law take legislative form. Because the proposed reform attempts to clarify the probable intent of the parties rather than to alter their substantive rights in the property, application of the reform to preexisting deeds does not jeopardize vested rights. On a practical level, retroactive application of the reform would enable the much needed change to take effect without a lengthy waiting period before all existing deeds are transferred. Moreover, retroactive application of a rule designed to clarify present intent and present expectations raises no serious constitutional problems.

V. Conclusion

While the elimination of all litigation in the area is a goal unlikely to be achieved, an adoption of the ideas suggested in this article would furnish a firm basis for the development of a realistic, internally consistent and flexible body of law for dealing with the problems which exist in this area of law. The following appendix contains a proposal for a legislative enactment to implement the ideas herein suggested.

62. For a general discussion concerning retroactive application of statutory reform, see Levin, Section 6104(d) of the Pennsylvania Rule Against Perpetuities: The Validity and Effect of the Retroactive Application of Property and Probate Law Reform, 25 Vill. L. Rev. 213 (1980).

63. The unfortunate situation of delayed reform was present in the area of apportionment of trust estates, and for many years the rules governing apportionment into principle and income varied according to what statute was in force at the time the trust was created. Compare In re Crawford's Estate, 362 Pa. 458, 67 A.2d 124 (1949) (where the Principal and Income Act of 1947, repealing the Uniform Principal and Income Act of 1945, was a substantial re-enactment thereof, the Act of 1945 must be construed as continuing in active operation) with In re Pew's Estate, 362 Pa. 468, 67 A.2d 129 (1949) (the provisions of the Uniform Principal and Income Act of 1945 and of the Principal and Income Act of 1947 are unconstitutional when applied to trusts created before their enactments).

This state of affairs was resolved with the overruling of the Crawford and Pew decisions. See In re Catherwood's Trust, 405 Pa. 61, 173 A.2d 86 (1961). In Catherwood's Trust, the Pennsylvania Supreme Court determined that the terms of the Uniform Principle and Income Act applied retroactively to all trusts, regardless of when they were created, so long as the apportionable event occurred after the effective date of the Act. Id.
PROPOSED LEGISLATION

Section 1. Legislative Purpose

The purpose of this statute is to define the obligations of a grantor of real property to a grantee and to subsequent grantees for defects in the title conveyed.

Section 2. Definitions

As used in this Act, the term

(a) “Quitclaim Deed” means
   (1) any deed so labelled; or
   (2) any deed in which the words for transfer are limited to “quitclaim,” “release,” or “discharge.”

(b) “Special Warranty Deed” means
   (1) any deed so labeled; or
   (2) any deed in which the words for transfer are “grant,” “convey,” or “transfer;” or
   (3) any deed which does not indicate what type of deed is intended.

(c) “General Warranty Deed” means
   (1) any deed so labelled; or
   (2) any deed in which the grantor clearly indicates on the face of the deed that he intends to assume liability for all defects in title whether created by him or his predecessor in title.

Section 3. Obligations of a Grantor Who Conveys by a Quitclaim Deed

A grantor who conveys real property by a Quitclaim Deed shall not be subject to any liability under this Act.

The acceptance of a Quitclaim Deed by the grantee shall not affect the right of the grantee

(a) to succeed to any rights of the grantor; or

(b) to rely on any benefits accruing to him as a bona fide purchaser under the Recording Act or any other rule of the common law.

Section 4. Obligations of a Grantor Who Conveys by a Special Warranty Deed
WARRANTIES OF TITLE

(a) A grantor who conveys real property by a Special Warranty Deed is liable to
(1) the grantee; and
(2) all subsequent grantees taking the land, or any portion of the land in the proportion that the value of such portion transferred bears to the value of the entire property, BUT ONLY in the absence of an express contrary provision in the subsequent deed.

(b) A grantor under this section shall be liable for
(1) any encumbrance not excepted in the deed; and
(2) any defect in title, PROVIDED THAT such encumbrance or defect arose out of the acts of the grantor or arose during the period of time during which the grantor held title to, or was in possession of, the property.

Section 5. Obligations of Grantor Who Conveys by a General Warranty Deed

(a) A grantor who conveys real property by a General Warranty Deed is liable to
(1) the grantee; and
(2) all subsequent grantees taking the land, or any portion of the land in the proportion that the value of such portion transferred bears to the value of the entire property, BUT ONLY in the absence of an express contrary provision in the subsequent deed.

(b) A grantor under this section shall be liable for
(1) any encumbrance not excepted in the deed; and
(2) any defect in title.

(c) A grantor under this section shall be liable regardless of whether the encumbrance or defect arose out of the acts of the grantor or out of the acts of his predecessors in title, and regardless of when the encumbrance or defect arose.

Section 6. Breach of the Grantor’s Obligations

(a) Except to the extent that the deed expressly exempts the grantor’s obligation, a grantor who conveys by Special Warranty Deed or by General Warranty Deed shall be deemed to be in breach of his obligations in the following situations:
(1) title was subject to an easement or equitable servitude; or
(2) title was subject to any mortgage, judgment or any other monetary claim of any type; or
(3) title is any interest other than a fee simple absolute; or
(4) title is subject to a reasonable claim of adverse possession, forgery, unauthorized signature, lack of operative delivery of any other prior deed, or any other basis for avoiding the title of any grantor or of his predecessor.

(b) A grantor may be liable under this section regardless of whether the grantee’s possession and enjoyment are interfered with by the situations listed in Section (a) (1)-(4).

(c) For the purposes of this section, any grantee or his successors in interest whose interest has been interfered with may attempt to establish any loss or damage reasonably related to and caused by the breach through any relevant evidence, regardless of whether the grantee or successor in interest is in possession of the property.

Section 7. Limitations of Action

All actions under this Act must be brought within six (6) years of such time as the plaintiff discovers or, by reasonable diligence, should discover, the existence of the cause of action. Anything to the contrary notwithstanding, no person shall have the power to transfer any greater rights than he has. If a right has not been totally barred, but the period of limitations has begun to run, then the right of action of the transferree shall be barred at the same time as that of the transferor as though there had been no such transfer.

Section 8. Standing to Sue

(a) The present owner of land conveyed shall have the right to recover from any prior party who has given a warranty deed which has been deemed breached for all losses occasioned by the breach. The right of such present owner shall be subject to the right of any prior owner to intervene to establish his individual loss, or to bring an appropriate action for an accounting for his portion of the loss against the current owner who has collected on such breach of warranties.

(b) Any prior owner who has suffered a loss due to any breach of a warranty deed may make a written request to the present owner to bring proceedings against the breaching party. In the event that the present owner fails to bring such an action within thirty (30) days of such written request, the
prior party may bring an action to recover for his loss. Recovery by such prior party shall be *a pro tanto* defense to any subsequent action against the breaching party based on his obligations of title in his deed.