

September 1972

Real Property--Covenant of General Warranty--Novel Definition of Conservative Eviction in West Virginia

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Recommended Citation

Donald M. O'Rourke & Michael B. Keller, *Real Property--Covenant of General Warranty--Novel Definition of Conservative Eviction in West Virginia*, 74 W. Va. L. Rev. (1972).

Available at: <https://researchrepository.wvu.edu/wvlr/vol74/iss4/12>

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rather in response to the inequity of subjecting the vendor to strict liability, a drawback that would not be evident in applying traditional principles of negligence, such as the qualification of foreseeability.

The fact that the liquor stores in West Virginia are state owned and operated might presuppose a reluctance on the court's part to subject the doctrine of sovereign immunity to further attack. Whatever the value of that venerable doctrine, the government's immunity from civil liability is no longer as exclusive as it once was on either the federal, state or local levels. Even so, governments are certainly able to invoke the doctrine on their own accord, and the judiciary could leave the sovereign powers to their own defenses in light of the ease with which distinctions can be drawn between the liquor store suppliers and the tavern owner suppliers.

There can be little doubt that the enormous loss of life and property in this country due to alcoholism demands remedy. True, it is incumbent upon the legislative and executive branches of the government to propound solutions. More strict enforcement of existing laws and the creation of treatment programs for alcoholics would be a step in the right direction. But it seems inconsistent that the judiciary, with its peculiar capacity to provide both a deterrence to alcoholic abuse and a more just distribution of the loss, should choose to disregard the risk-producing activities of the commercial supplier. Although certainly not the first jurisdiction to adopt this new common law rule, the California court in *Vesely* dispersed the old rule with such alacrity that little doubt remains as to the general future course of the law in the area.

Roger A. Wolfe

**Real Property—Covenant of General Warranty—
Novel Definition of Constructive Eviction in West Virginia**

In 1960, defendant Hines conveyed by deed 145 acres of raw timber land in Webster County to plaintiff Brewster. The deed contained a covenant of general warranty of title.¹ Besides the initial

¹ W. VA. CODE ch. 36, art. 4 § 2 (Michie 1966) provides: A covenant by a grantor in a deed, 'that he will warrant generally the property hereby conveyed,' or a covenant of like import, or the use of the words 'with general warranty' in a deed, shall have the same effect as if the grantor had covenanted that he, his heirs and personal representatives will forever warrant and defend the said property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of all persons whomsoever.

purchase price of \$8,000, plaintiff expended \$2,390 in 1967 to cut roads over the land and generally prepare it for the sale of the timber. A question was raised as to the validity of plaintiff's title, and a subsequent title search revealed a fee simple title in Mary and Edward Holway, residents of Ohio. In August 1967, plaintiff Brewster brought a civil action against defendant to recover for breach of the covenant of general warranty. In his answer, defendant claimed that there had been no showing of actual or constructive eviction, and therefore, the complaint failed to state a cause of action. Defendant filed a motion for summary judgment.

In October, while this action was still pending, plaintiff also instituted a civil action against the Holways to settle title to the land. The Holways filed an answer and moved for a summary judgment based on their documented evidence of chain of title. Although the defendant in the first action was not made a party to the second action, notice and a request for assistance were served on his attorney on December 14, 1967. There was a hearing on the motion for summary judgment in the second action to litigate title on January 3, 1968. On January 8, the court held legal title was in the Holways paramount to plaintiff's claim of title based on the deed from Hines.

In an amended complaint to the first action, plaintiff claimed defendant had neither legal nor marketable title to convey the property (based his claim on the summary judgment in favor of the Holways). Plaintiff contended the Holways' outstanding paramount title amounted to his constructive eviction from the tract of land. Defendant answered that there had been no actual or constructive eviction, that no valid notice had been given to the covenantor of the action to litigate title, and that there had been no hostile assertion of paramount title by a third party.

On defendant's motion for a summary judgment the trial court held there had been no proper notice to defendant of the action to litigate title and no actual or constructive eviction on which plaintiff could maintain an action for breach of covenant of general warranty. *Held*, reversed. Plaintiff could properly allege a "constructive eviction" from the land if he could show that the grantor of the covenant of general warranty did not have a good, valid, and marketable title to the land at the time of conveyance and that valid title in fee was in a third party. Furthermore, an adverse judgment from an action instituted by the grantee to litigate title will be sufficient to

allege a "constructive eviction." *Brewster v. Hines*, 185 S.E.2d 513 (W. Va. 1971).

The major issue before the court in *Brewster v. Hines* was whether a grantee of a covenant of general warranty could maintain an action for breach of warranty by alleging lack of good title in his grantor and paramount title in some third person, not a party to the action.²

The grantor in a general warranty deed covenants to defend the grantee's title against any claim or attack of any other person.³ It is a guarantee to defend title whenever the covenant is breached by either actual or constructive eviction.⁴ If there is a breach of the covenant, the grantee may recover the purchase price plus interest from the date of eviction.⁵ It is generally agreed that an eviction is necessary before there is a breach of the covenant of general warranty.⁶ West Virginia cases involving breach of the covenant of general warranty have followed this principle requiring a showing of eviction to maintain an action for breach of general warranty deed.⁷ The West Virginia Supreme Court of Appeals also held that either an actual or constructive ouster will constitute an eviction.⁸

² Procedurally, the court was also confronted with the question of whether proper notice was given to the grantor to defend the grantee's title. Defendant Hines contended he had not received sufficient notice of the action to litigate title. By way of the covenant, he had a right to be a party to that action. He argued that such failure of notice barred Brewster from bringing an action for breach of covenant. The court, in deciding this issue in Brewster's favor, held that whenever service is required or permitted to be made upon a party represented by an attorney of record, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. W. VA. R. CIV. P. 5(b).

³ W. VA. CODE ch. 36, art. 4, § 2 (Michie 1966); *McKinley Land Co. v. Maynor*, 76 W. Va. 156, 85 S.E. 79 (1915).

⁴ *Cain v. Fisher*, 57 W. Va. 492, 50 S.E. 752 (1905).

⁵ *Myers v. Graner*, 110 W. Va. 349, 158 S.E. 171 (1931); *Butcher v. Peterson*, 26 W. Va. 447 (1885).

⁶ "Nothing is more generally or more truly said than that 'An eviction is necessary to a breach of the covenants for quiet enjoyment and of warranty.'" W. RAWLE, A PRACTICAL TREATISE ON THE LAW OF COVENANTS FOR TITLE 173 (5th ed. 1887); *Jones v. Caldwell*, 176 Ky. 15, 195 S.W. 122 (1917); *Morgan v. Haley*, 107 Va. 331, 58 S.E. 564 (1907); *Hoffman v. Dickson*, 65 Wash. 556, 118 P. 737 (1911).

⁷ *Cummings v. Hamrick*, 74 W. Va. 406, 82 S.E. 44 (1914); *Knotts v. McGregor*, 47 W. Va. 566, 35 S.E. 899 (1900); *Rex v. Creel*, 22 W. Va. 373 (1883).

⁸ *Harr v. Shaffer*, 52 W. Va. 207, 43 S.E. 89 (1902). The overwhelming weight of authority is that actual eviction is not necessary. West Virginia and its neighboring states fall in this majority rule. *Crawford v. Baker*, 235 Ky. 784, 32 S.W.2d 340 (1930); *Boulden v. Wood*, 96 Md. 332, 53 A. 911 (1903); *Herbert v. Northern Trust Co.*, 269 Pa. 306, 112 A. 471 (1921); *Savage v. Cauthorn*, 109 Va. 694, 64 S.E. 1052 (1909); *McKinley Land Co. v. Maynor*, 76 W. Va. 156, 85 S.E. 79 (1915).

An actual eviction means the actual deprivation of the use of enjoyment of all or part of the conveyed property by the paramount title holder.⁹ Clearly, from the facts of this case, plaintiff could not have claimed an actual eviction from the property. Consequently the meaning and ramifications of the term "constructive eviction" were important in the decision of this case.

The concept of "constructive eviction" does not have a well-settled legal definition as does "actual eviction."¹⁰ For example, case law in West Virginia and most states has continually held that the mere existence of an outstanding paramount title will not authorize a recovery on a general warranty of title.¹¹ There are certain basic events which courts generally consider sufficient for constructive eviction, the most common of which are: (1) paramount title held by the government;¹² (2) purchase by the grantee of a paramount title hostilely asserted;¹³ (3) possession in the hands of one with paramount title at the time of conveyance;¹⁴ (4) compulsion of the grantee to yield to paramount title demanding possession;¹⁵ or (5) court determination on the title, adverse to the grantee.¹⁶ Before *Brewster*, in order for an adverse judgment to be considered a constructive eviction, the action had to be commenced by the owner of the paramount title.¹⁷ In *Brewster*, the grantee brought the action to clear cloud on title *before* the Holways hostilely asserted their title. In effect, plaintiff had switched roles with the Holways. Courts are

⁹ W. RAWLE, A PRACTICAL TREATISE ON THE LAW OF COVENANTS FOR TITLE, 175 (5th ed. 1887).

¹⁰ The term eviction or more specifically the term constructive eviction has caused the courts great difficulty through the years. The Massachusetts Supreme Court established a unique definition in an attempt to cope with the term. "Perhaps a more correct statement drawn from the modern use of the word would be that an eviction is what will constitute a breach of the covenant of warranty." *Kramer v. Carter*, 136 Mass. 504 (1884).

¹¹ *Waggener v. Howsley's Adm'r*, 164 Ky. 113, 175 S.W. 4 (1915); *Strong v. Nesbitt*, 267 Pa. 294, 110 A. 250 (1920); *Jones v. Richmond*, 88 Va. 231, 13 S.E. 414 (1891); *McKinley Land Co. v. Maynor*, 76 W. Va. 156, 85 S. E. 79 (1915); *Smith v. Parsons*, 33 W. Va. 644, 11 S.E. 68 (1890).

¹² *Burr v. Greeley*, 52 F. 926 (8th Cir. 1892); *Cover v. McAden*, 183 N. C. 641, 112 S.E. 817 (1922).

¹³ *McCormick v. Marcy*, 165 Cal. 386, 132 P. 449 (1913); *Pritchett v. Redick*, 62 Neb. 296, 86 N.W. 1091 (1901).

¹⁴ *McConaughy & Co. v. Bennett's Ex'rs.*, 50 W. Va. 172, 40 S.E. 540 (1901).

¹⁵ *Harr v. Shaffer*, 52 W. Va. 207, 43 S.E. 89 (1902).

¹⁶ *Tull v. Fleming Bros. Lumber & Mfg. Co.*, 189 Va. 171, 52 S.E. 2d 150 (1949); *Morgan v. Haley*, 107 Va. 331, 58 S.E. 564 (1907).

¹⁷ "Constructive eviction presupposes that acts of disturbance are caused by persons in whose favor there is a lawful or paramount title which may defeat the estate granted." *Eggers v. Mitchem*, 240 Iowa 1199, 38 N.W.2d 591 (1949). See generally Annot., 172 A.L.R. 18, 26 (1948).

in general agreement that the paramount title holder must be the party plaintiff and the grantee the party defendant in an action to litigate title.¹⁸ There can be no recovery in an action for breach of covenant of general warranty until the paramount title has been hostilely asserted.¹⁹

The West Virginia court held that in maintaining an action for breach of general warranty Brewster could allege in his complaint that, in another action instituted by him to quiet title, paramount title had been held to be in a third party and that his allegation was sufficient to show "constructive eviction." This may seem rather surprising after reading the facts and the preceding summation on the law of covenants of general warranty. In effect, the court said it does not matter who started the action, the grantee with the covenant of general warranty or the paramount title holder. If title was found to be in some third party, a sufficient constructive eviction to maintain an action for breach had occurred. The court also stated that a showing of paramount title in some third party at the time of conveyance was sufficient constructive eviction to support an action for breach of covenant.

The court relied upon three authorities to support its contention that an adverse judgment on the title constituted a constructive eviction even if the action to try title was commenced by the grantee.²⁰ The first case relied on by the court did little to support that principle. In *Cox v. Bradford*, an Arkansas decision, the court held that a decree of a chancery court cancelling the deeds through which a grantee claimed his title was a sufficient constructive eviction. This case, however, did not alter the law that the paramount title holder

¹⁸ In substance and effect the covenant is a guaranty against an actual eviction, or a constructive eviction by possession of another under paramount title. Hence it is not broken until there is an eviction, actual or constructive. It is not broken as long as the enjoyment of the property is not disturbed. *It is not broken as long as there is no necessity that the title of the vendee be defended.*"

McKinley Land Co. v. Maynor, 76 W. Va. 156, 160, 85 S.E. 79, 80 (1915) (emphasis added). See generally Annot., 172 A.L.R. 18, 26-27 (1948).

¹⁹ The fact that the paramount title must be hostilely asserted is a broad rule that seems to be applied by most jurisdictions in dealing with breach of covenant of general warranty. Basically the courts seem to require two elements in this area. First, there must be a disturbance, and secondly, that disturbance must be caused by the owner of paramount title. McGary v. Hastings, 39 Cal. 360 (1870).

²⁰ The three principal authorities relied on by the West Virginia court were *Cox v. Bradford*, 101 Ark. 302, 142 S.W. 170 (1911); *Sarlls v. Beckman*, 55 Ind. App. 638, 104 N.E. 598 (1914); and Annot., 172 A.L.R. 18 (1948).

must bring the action for a judgment adverse to the grantee to be a constructive eviction, since in this case the grantee was defending his title.²¹ The second authority (a lengthy annotation) relied on by the court stated that any adverse judicial determination in which the question of title was in issue constituted a sufficient constructive eviction. The court drew this statement from a list of basic principles on constructive eviction. However, the court failed to note that the list was restricted to acts undertaken by the paramount title holder.²² In *Sarlls v. Beckman*,²³ an Indiana decision, the West Virginia court did find support for its argument. In *Sarlls*, the grantee learned of a defect in his title, brought an action to quiet title, received an adverse judgment, and recovered for breach of warranty from his grantor. The reasoning behind the decision was that it would be a harsh rule to force the grantee to deny himself all of the advantages of a holder in fee simple until the paramount title holder took action or until the period of adverse possession had run.

Although the decision in *Brewster* was contrary to the weight of authority in holding that a grantee could commence the action to quiet title and then claim constructive eviction, it appears to be an equitable decision. To hold otherwise, the court would have forced *Brewster* to maintain a ten thousand dollar investment with no return. If *Brewster* did seek a return by clearing timber, the *Holways* could eventually seek treble damages for injury to the freehold.²⁴ Prior to *Brewster*, the paramount title had to be hostilely asserted before the grantee could claim a constructive eviction.²⁵ The legal

²¹ In the *Cox* case, an action to quiet title was brought by the administratrix of the deceased paramount title holder against *Cox*, the grantee of the covenant. 101 Ark. 302, 142 S.W. 170 (1911).

²² "Before these general rules are stated, however, it is well to point out that all of them presuppose that the acts of disturbance are caused by persons in whose favor there is the lawful or paramount title which may defeat the estate granted." Annot., 172 A.L.R. 26-27 (1948) (emphasis added).

²³ 55 Ind. App. 638, 104 N.E. 598 (1914). The Indiana court held: The purchasers of real estate, in this day of activity in trade and frequent transfers of property, who discovers a defect in his title, upon his effort to make a desirable sale, cannot be held obliged to remain silent for a period of 20 years, and perhaps sustain serious losses on account thereof; but he has the clear right to notify the grantor of the defect in the title, and, if the grantor refuses, as in this case, to assume the burden of curing the defect, then the grantee may go into court, have the title determined, and compel his grantor to respond in damages in such amount as may be shown he has sustained.

Id. at 643, 104 N.E. at 600 (emphasis added).

²⁴ W. VA. CODE ch. 61, art. 3, § 48a (Michie 1966).

²⁵ *McKinley Land Co. v. Maynor*, 76 W. Va. 156, 85 S.E. 79 (1915). See W. RAWLEY, A PRACTICAL TREATISE ON THE LAW OF COVENANTS FOR TITLE, 173 (5th ed. 1887); Annot., 172 A.L.R. 18 (1948).

rationale behind this position is that it discourages the grantee from using court actions as a harassing technique. A grantee, dissatisfied with a purchase, could continually bring actions to litigate title until the grantor, having tired of courtroom disputes, repurchased the title. This was a valid argument, but much of its effect is lost since the grantee must bear his own attorney fees when he initiates such actions. Nowhere in the *Brewster* decision did the court order the grantor to pay the cost of litigating the title.²⁶ These costs to the grantee should sufficiently deter the use of court action as a harassing technique.

The court also may have affected the law on covenants in West Virginia by holding that a mere showing of paramount title in some third person at the time of conveyance was a constructive eviction. Although the preceding discussion on the law of covenants would indicate that authorities generally support the position that the existence of paramount title is not a sufficient eviction, the court's holding is supported to a degree. The court cited cases from several states for the proposition that if a grantor conveys property with a covenant of general warranty, and he has neither title nor possession, there is at once a constructive eviction.²⁷ The court then concluded by stating that *Brewster* could sustain the burden of proving a constructive eviction if he alleged and proved that the deed passed no valid legal title and that he, in good faith, surrendered possession to persons holding the paramount or superior title.²⁸ However, every case cited in support of this conclusion can be distinguished from this case in that either paramount title had been hostilely asserted

²⁶ The general rule that the grantor is liable for costs in an unsuccessful attempt to *defend* grantee's title still stands. *Conrad v. Effinger*, 87 Va. 59, 12 S.E. 2 (1890). However, the court in *Brewster* was silent as to whether the grantor must pay grantee's costs when he *commenced* the action. The case of *Sarlls v. Beckman*, relied on heavily by the *Brewster* court, did award court costs to the grantee who commenced the action. However, because of the policy reasons mentioned in this comment and because of the court's silence on the point, it must be assumed such costs would be borne by the grantee.

²⁷ *Rabon v. Turner*, 115 So. 2d 243 (La. App. 1959); *Brunt v. McLaurin*, 178 Miss. 86, 172 So. 309 (1937); *Bull v. Beiseker*, 16 N.D. 290, 113 N.W. 870 (1907).

²⁸ This conclusion was supported by an extensive list of authorities: *Platner v. Vincant*, 187 Cal. 443, 202 P. 655 (1921); *DuBois v. Smith*, 76 Ga. App. 556, 46 S.E.2d 590 (1948); *Mizell v. Schubert*, 31 Ga. App. 651, 121 S.E. 852 (1924); *Shuford v. Phillips*, 235 N.C. 387, 70 S.E.2d 193 (1952); *Camden County Welfare Bd. v. Federal Dep. Ins. Corp.*, 1 N.J. Super. 532, 62 A.2d 416 (1948); *Schneider v. Lipscomb County Nat. Farm Loan Ass'n.*, 146 Tex. 66, 202 S.W.2d 832 (1947); *Felts v. Whitaker*, 129 S.W.2d 682 (Tex. Civ. App. 1939).

by the true owner, or that possession was already in the hands of the paramount title holder. Thus, the court's decision appeared to be based not on *stare decisis* but rather on sound policy considerations. For the same policy reasons as previously stated, it is better to hold that there has been a constructive eviction when the grantee can prove paramount title in another than to have him wait until such title is hostilely asserted.

Judge Haymond in his dissenting opinion stated that the law of covenants of general warranty was well settled. The thrust of his contention was that until the paramount title holder hostilely asserted his claim, there was no eviction. The opinion went so far as to cite cases used by the majority and showed how, under case law today, there was no possible eviction.²⁹

The dissent argued that Brewster had an adequate remedy in rescission of the deed and recovery of the purchase price based on the contention of failure of consideration. Brewster, however, did not appear to have an adequate remedy. Brewster had expended over \$2,000 in clearing and preparing the land for sale of timber. Undoubtedly, in cutting roads through the land and preparing it for cutting timber, damage had occurred to the freehold for which Brewster could be held liable. If Brewster rescinded the deed, he could be liable to the Holways for damages during his trespass. Under the majority decision Brewster might have an adequate remedy, if the Holways claim damages, since it is an open question whether the grantor of the covenant is liable to the grantee for any such claims.³⁰

The decision in *Brewster* clearly changed the law in West Virginia in regard to constructive evictions under a covenant of general warranty. Now either the true owner or the grantee himself can bring an action to litigate title, and a resulting adverse judgment can

²⁹ Specific reference was made to the citation of *Shuford v. Phillips*, 235 N.C. 387, 70 S.E.2d 193 (1952). As pointed out earlier in this comment *Shuford* was distinguishable on the facts and really did not support the majority opinion. Judge Haymond emphasized that the court in *Shuford* said that the mere existence of a better title without possession and without ouster or disturbance of the possession of the plaintiff did not constitute a breach of warranty.

³⁰ *Smith v. Parsons*, 33 W. Va. 644, 11 S.E. 68 (1890). As a general rule, the proper measure of damages for the breach of a covenant of warranty will include such damages as the vendee may have paid, or may be shown to be clearly liable to pay, to the person who evicted him except for treble damages under W. VA. CODE ch. 61, art. 3, § 48a (*Michie* 1966); *Threlkeld v. Fitzhugh*, 2 Leigh 451 (Va. 1833).

serve the grantee as a basis for alleging constructive eviction. The *Brewster* court also indicated (by dicta?) that if the grantee can prove that an outstanding paramount title existed, he can properly allege a constructive eviction. The decision was equitable to the parties involved. In effect, the decision even worked to the benefit of the defendant. If the situation had been allowed to continue as it was, more damages could have occurred to the freehold, possibly making his liability substantially greater. The court saw an inequity and tried to remedy it. Unfortunately case law did not support its position. Keeping in mind the aphorism by Judge Haymond that "hard cases make bad law," it can be said that the result reached by the court was the correct one, but that the use of judicial legislation in reaching that result was unwise. Perhaps the court should have left the solution to this glaring inequity in covenant to the legislature.

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Taxation—The Office-in-Home Deduction

Petitioners Marvin and Marjorie Dietrich filed a joint federal income tax return for the year 1967. Marvin was a first-year resident physician and his duties included teaching as well as patient care. His wife, Marjorie, was a registered nurse and instructor. In the basement of their home they maintained a small office used for preparing and grading lessons, professional reading, paying personal bills, and treating an occasional patient without charge. Neither of the taxpayers was required by his employer to maintain the office. They claimed a deduction on their return for the office-in-home expenses. The Commissioner challenged the deduction arguing that the expenses of an office in an employee's home may not be deducted unless he is required to maintain the office as a condition of his employment. The tax court *held*, petitioners were entitled to the deduction since the "expenses were 'ordinary and necessary' and proximately related to their work." *Marvin L. Dietrich*, 1971 P-H Tax Ct. Mem. ¶71,159 at 718.

Many taxpayers maintain some type of office in their home to perform employment-associated work during the evenings or on weekends. The degree of sophistication of an office-in-home can vary from a simple lamp and table in a corner of the dining room to