to the complainant in the court below, the balance in his hands of money of the estate of the said Andrew, with interest at the same rate, from the day it was *demanded by the said complainant. 3d. That the complainant, after giving credit for the sum that shall be thus paid him [*45 by the said defendant, and all other sums received by the said Margaret in her life, or the complainant since her death, from, or on account of, the estate of the said Andrew, as well as the value of any part of the personal residue of the said Andrew's estate, which may have come to their, or either of their, hands, according to the date of such receipts, shall have the aid of the said circuit court to compel these defendants to raise by sale (if sufficient for that purpose) of their respective shares of the real estate of the said Andrew, descended to them, five-sixths of the balance that shall be computed to be due on the said bond, calculated as above directed. And lastly, that the cause be remanded to the circuit court for further proceedings.

Decree accordingly.

Duvall *v.* Craig *et al.*

Abatement.—Covenant by trustee.—Independent covenants.—Covenant against incumbrances.—Profert.

Variances between the writ and declaration are matters pleadable in abatement only, and cannot be taken advantage of, upon general demurrer to the declaration.[1]

A trustee is, in general, suable only in equity; but if he chooses to bind himself by a personat covenant, he is liable at law, for a breach thereof, although he describe himself as covenanting as trustee.

*Where the parties to a deed covenanted severally against their own acts and incumbrances, and also to warrant and defend against their own acts, and those of all other [*46 persons, with an indemnity in lands of an equivalent value, in case of eviction; it was held, that these covenants were independent, and that it was unnecessary to allege in the declaration, any eviction, or any demand or refusal to indemnify with other lands, but that it was sufficient to allege a prior incumbrance, by the acts of the grantors, &c., and that the action might be maintained on the first covenant, in order to recover pecuniary damages.

Where the grantors covenanted generally against incumbrances made by them, it may be construed as extending to several, as well as joint incumbrances.

No *profert* of a deed is necessary, where it is stated only as inducement, and where the plaintiff is neither a party nor privy to it.

An averment of an eviction under an elder title, is not always necessary, to sustain an action on a covenant against incumbrances; if the grantee be unable to obtain possession, in consequence of an existing possession or seisin, by a person claiming and holding under an elder title, it is equivalent to an eviction, and a breach of the covenant.[2]

Error to the Circuit Court for the district of Kentucky. The *capias ad respondendum* issued in this case was as follows:

"The United States of America, to the marshal of the Kentucky district, greeting: You are hereby commanded to take John Craig, Robert Johnson and Elijah Craig, if they be found within your bailiwick, and them safely keep, so that you have their bodies before the judge of our district court, at the capitol, in Frankfort, on the first Monday in March next, to answer

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[1] Nor under the general issue. Chirac *v.* Reinecker, 11 Wheat. 280. And see How *v.* McKinney, 1 McLean 319; Elliott *v.* Holmes Id. 466; McKenna *v.* Fisk, 1 How. 247.

[2] Peters *v.* Bowman, 98 U. S. 59.

William Duvall, a citizen of the state of Virginia, of an action of covenant; damages fifty thousand dollars; and have then and there this writ. In testimony whereof, Harry Innes, Esq., judge of our said court, hath caused the
*47] *seal thereof to be hereunto affixed, this 22d day of January 1804, and of our Independence the 28th.

THOMAS TURNSTALL, C., D. C."

Whereupon, the plaintiff declared against John Craig, Robert Johnson and Elijah Craig, in covenant, for that whereas, on the 28th day of February 1795, &c., the said John, and the said Robert and Elijah, as trustees to the said John, by their certain indenture of bargain and sale, &c., did grant, bargain, sell, alien and confirm unto the said plaintiff, by the name of William Duvall, of the city of Richmond and state of Virginia, his heirs and assigns for ever, a certain tract of land, lying and being in the state of Kentucky, &c., together with the improvements, water-courses, profits and appurtenances whatsoever, belonging, or in any wise appertaining; and the reversion, and remainder and remainders, and profits thereof; and all the estate, right, title, property and demand of them, the said John Craig, and Robert Johnson and Elijah Craig, trustees for the said John Craig, of, in and to the same: to have and to hold the lands thereby conveyed, with all and singular the premises, and every part and parcel thereof, to the said William Duvall, his heirs and assigns for ever, to the only proper use and behoof of him, the said William, his heirs and assigns for ever: and the said John Craig, and Robert Johnson and Elijah Craig, trustees to the said John Craig, for themselves, their heirs, executors and administrators, did covenant, promise and agree to and with the said William Duvall, his
*48] heirs and assigns, that the premises before mentioned, *then were, and for ever after should be, free, of and from all former and other gifts, bargains, sales, dower, right and title of dower, judgments, executions, titles, troubles, charges and incumbrances whatsoever, done or suffered to be done by them, the said John Craig and Sarah his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, as by the said indenture will more at large appear. And the said William, in fact, saith, that the premises before mentioned were not, then and there, free, of and from all former gifts, grants, bargains, sales, titles, troubles, charges and incumbrances whatsoever, done and suffered to be done by the said John Craig and Sarah his wife, and Robert Johnson and Elijah Craig, trustees to the said John Craig; but on the contrary, the said John Craig and Robert Johnson, theretofore, to wit, on the 11th day of May 1785, assigned the place and certificate of survey of said land to a certain John Hawkins Craig, by virtue of which said assignment, Patrick Henry, governor of the commonwealth of Virginia, granted the said land to said John Hawkins Craig, and his heirs for ever, by letters-patent, dated the 16th day of September 1785, and now here shown to the court, the date whereof is the day and year aforesaid, which said patent to the said John Hawkins Craig, on the day and year first aforesaid, at the district aforesaid, was in full force and virtue, contrary to the covenant aforesaid: by reason of which said assignment, patent and incumbrance, the said William hath been prevented from
*49] having and enjoying all or any part of the premises above mentioned. *And thereupon, the said William further saith, that the defendants

aforesaid, although often requested, have not kept and performed their covenant aforesaid, &c. To which declaration, there was a general demurrer, and joinder in demurrer, and a judgment thereupon, in the circuit court, for the defendants.

The indenture referred to into the plaintiff's declaration was in the following words:

"This indenture, made this 28th day of February 1795, between John Craig and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, all of the state of Kentucky, of the one part, and William Duvall, of the city of Richmond, and state of Virginia, of the other part, witnesseth, that the said John Craig, for and in consideration of the sum of two thousand pounds, current money of Kentucky, to him, the said John Craig, in hand paid, the receipt whereof they do hereby acknowledge, and for ever acquit and discharge the said William Duvall, his heirs, executors and administrators, have granted, bargained and sold, aliened and confirmed, and by these presents, do grant, bargain and sell, alien and confirm, unto the said William Duvall, his heirs and assigns for ever, a certain tract of land, lying and being in the state of Kentucky, and now county of Scott, formerly Fayette, on the waters of the Ohio river, below the Big Bone lick creek; it being the same lands that the said John Craig covenanted, by a writing obligatory, sealed with his seal, and dated the second day of December 1788, to convey to Samuel McCraw, of the city of Richmond, *and which said writing the said Samuel McCraw, on the back there- [*50
of, indorsed and transferred the same, on the 27th day of February 1789, to William Reynolds, and which is bounded as follows: beginning at a poplar and small ash, corner to William Bledsoe, about thirty miles nearly a south course from the mouth of Licking; thence S. 15° E., 520 poles, with the said Bledsoe's line, crossing four branches, to an ash and beech; thence S. 75° W., 150 poles, to a hickory and beech; thence S. 15° E., 400 poles, crossing a branch, to a sugar tree and beech, near a branch; thence S. 75° W., 87 poles, to three beeches, corner to Robert Sanders; thence with his line, S. 15° E., 600 poles, crossing two branches, to a poplar and sugar tree; thence S., 60 poles to a sugar tree and beech; thence west 2174 poles, crossing five branches, to a large black walnut; thence north, 1580 poles, crossing a large creek and four branches, to a sugar tree and ash; thence E., 2006 poles, crossing five branches, to the beginning; containing twenty thousand four hundred and forty acres: together with the improvements, water-courses, profits and appurtenances whatsoever to the same belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, and profits thereof, and all the estate, right, title, property and demand of them, the said John Craig and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, of, in and to the same; to have and to hold the land hereby conveyed, with all and singular the premises, and every part and parcel thereof, to the said William Duvall, his heirs and *assigns for ever, to the only proper use and behoof of [*51
him, the said William Duvall, his heirs and assigns for ever. And the said John Craig and Sarah his wife, and Robert Johnson and Elijah Craig, trustees to the said John Craig, for themselves, their heirs, executors and administrators, do covenant, promise and agree, to and with the said William Duvall, his heirs and assigns, by these presents, that the premises

before mentioned now are, and for ever after shall be, free of and from all former and other gifts, grants, bargains, sales, dower, right and titles of dower, judgments, executions, title, troubles, charges and incumbrances whatsoever, done or suffered to be done by the said John Craig and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig. And the said John Craig and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, and their heirs, all and singular the premises hereby bargained and sold, with the appurtenances, unto the said William Duvall, his heirs and assigns, against him the said John Craig and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, and their heirs, and all and every persons whatsoever, do and will warrant and for ever defend, with this warranty, and no other, to wit, that if the said land, or any part thereof, shall, at any time, be taken by a prior legal claim or claims, that then and in such case, they, the said John Craig and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, and their heirs, shall make
*52] good to the said William Duvall *and his heirs, such part or parts so lost, by supplying to his, the said William Duvall's, use, other lands, in fee, of equal quantity and quality, to be adjudged of by two or more honest, judicious, impartial men, mutually chosen by the parties for ascertaining the same. In witness whereof, the said John Craig and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, have hereunto set their hands and seals, the date first in this indenture written.

Signed, sealed and delivered in presence of,
Charles W. Byrd,
T. S. Treshly,
Thomas Corneal,
Christopher Greenup,
Robert Saunders,
James Taylor,
Jos. Wiggleworth,
George Christy."

John Craig, (L. S.)
Sarah Craig, (L. S.)
Robert Johnson,
Trustee for John Craig, (L. S.)
Elijah Craig,
Trustee for John Craig, (L. S.)

B. Hardin, for the plaintiff, made the following points: 1. That the variance between the writ and declaration, as to the description of the par-
*53] ties, *was immaterial. Naming two of the defendants as trustees, is only *descriptio personæ*, and could not alter the nature of the covenant. 2. Judgment was rightly rendered against the defendants in their individual capacity. 3. It was unnecessary to aver a demand and refusal of other lands of equivalent value as an indemnity, this covenant not being sued upon; and the action might be maintained upon the first covenant against incumbrances, by the parties to the deed. 4. That the breach alleged in the declaration was sufficient. 5. That it was unnecessary to make *profert* of the assignment described in the breach.

Talbot, contrà.—1. The variance between the writ and declaration is a substantial variance, and is, therefore, available, on general demurrer. The parties, Robert Johnson and Elijah Craig, are not sued in their fiduciary character; but they are declared against as trustees to the said John, who is the *cestui que trust*, and could not be joined in an action at law with the

trustees. They covenanted as trustees, and a court of equity is the proper *forum* in which they ought to be sued. 2. Having covenanted as trustees, no individual judgment could be rendered against them. 3. Supposing the trustees to be liable in their individual capacity, the two covenants in the deed are to be construed in connection; the clause as to an indemnity with other lands of an equivalent value, ought to be applied to both; and the declaration is fatally defective, in not alleging a demand and refusal to indemnify with other lands. 4. The covenant, *on which the breach is assigned, is against the joint and not the several incumbrances of [*54 the parties to the deed; the incumbrance alleged is the act of two of the parties only. 5. There is no *profert* of the assignment to John Hawkins Craig, by which the incumbrance was created; nor is it shown to have been made for a valuable consideration. 6. There is no averment of an eviction of the plaintiff, under the assignment, which was absolutely necessary to sustain the action on the covenant against incumbrances.

M. B. Hardin, in reply.—1. The variance between the writ and declaration could only be taken advantage of by a plea in abatement. 2. As between a trustee and the *cestui que trust*, a court of chancery is the only jurisdiction; but trustees may bind themselves individually, so as to be amenable at law. The present case is not that of a covenant binding the trustees, only as to the trust-fund in their hands; but they covenant for themselves, their heirs, executors, &c.. The mere description as trustees, therefore, becomes immaterial. 3. The covenants are independent, and the action may be maintained to recover pecuniary damages, without alleging an eviction and demand of other lands of equivalent value. 4. Where there is any doubt, a covenant is to be construed most strongly against the covenantors; and in a case of this nature, the law considers an act done by one or more of the covenantors as a breach of the covenant. 5. No *profert* of the assignment was necessary, because the action was not founded *upon it, nor [*55 was the plaintiff a party or privy to it; and the omission of *profert* was ground of special demurrer only.

March 1st, 1817. Story, Justice, delivered the opinion of the court.—Several points have been argued in this case, upon which the opinion of the court will be now pronounced. In the first place, it is stated, that a material variance exists between the writ and declaration, of which (being shown upon *oyer*) the court, upon a general demurrer to the declaration, are bound to take notice; and if so, it is fatal to the action. The supposed variance consists in this, that in the writ, all the defendants are sued by their Christian and surnames only; whereas, in the declaration, the deed on which the action is founded is averred to be made by the defendant, John Craig, and by the other defendants, Robert Johnson and Elijah Craig, "as trustees to the said John," and the covenant on which the breach is assigned, is averred to be made by the said John Craig, and Robert Johnson and Elijah Craig, "trustees to the said John." The argument is, that the writ is founded upon a personal covenant, and the declaration upon a covenant *en auter droit*, upon which no action lies at law; or if any lies, the writ must conform in its language to the truth of the case. It is perfectly clear, however, that the exception, even if a good one, cannot be taken advantage of upon general demurrer to the declaration, for such a demurrer is in bar to the action;

whereas, variances between the writ and declaration are matters pleadable in abatement only.

*56] *But there is nothing in the exception itself. A trustee, merely as such, is, in general, only suable in equity. But if he chooses to bind himself by a personal covenant, he is liable at law, for a breach thereof, in the same manner as any other person, although he describe himself as covenanting as trustee; for, in such case, the covenant binds him personally, and the addition of the words "as trustee" is but matter of description, to show the character in which he acts, for his own protection, and in no degree affects the rights or remedies of the other party. The authorities are very elaborate on this subject. An agent or executor who covenants in his own name, and yet describes himself as agent or executor, is personally liable, for the obvious reason, that the one has no principal to bind, and the other substitutes himself for his principal.(*a*)

(*a*) Where a person acts as agent for another, if he executes a deed for his principal, and does not mean to bind himself personally, he should take care to execute the deed in the name of his principal, and state the name of his principal only, in the body of the deed. White *v.* Cuyler, 6 T. R. 176. Wilkes *v.* Black, 2 East 142. The usual and appropriate manner is to sign the deed, "A. B., by C. D., his attorney," If, instead of pursuing this course, the agent names himself in the deed, and covenants in his own name, he will be personally liable on the covenants, notwithstanding he describes himself as agent. There are numerous cases to be found in the books illustrative of this doctrine decided in the text. Thus, in Appleton *v.* Birks, 5 East 148, where the defendant entered into an agreement, under seal, with the plaintiff, by the name of T. B., of &c., "for, and on the part and behalf of the right honorable Lord Viscount Rokeby," and covenanted for himself, his heirs, executors, &c., "on the part and behalf of the said Lord Rokeby," and executed the agreement in his own name, it was held, that he was personally liable on the covenant. So, where a committee for a turnpike corporation contracted under their own hands and seals, describing themselves as a committee, they were held personally responsible. Tibbetts *v.* Walker, 4 Mass. 595. So, where a person signed a promissory note in his own name, describing himself as guardian, he was held bound to the payment of the note in his personal capacity. Thatcher *v.* Dinsmore, 5 Mass. 299; Foster *v.* Fuller, 6 Id. 53; Chitty on Bills (Story's ed.) 40, and note. So, where administrators of an estate, by proper authority from a court, sold the lands of their intestate, and covenanted in the deed, "in their capacity as administrators," that they were seised of the premises, and had good title to convey the same; that the same were free of all incumbrances, and that they would warrant and defend the same against the lawful claims of all persons; it was held, that they were personally responsible. Sumner *v.* Williams, 8 Mass. 162; Thayer *v.* Wendall, 1 Gallis. 37.[1] In respect to public agents, a distinction has been long asserted, and is now generally established; and therefore, if an agent of the government contract for their benefit, and on their behalf, and describe himself as such, in the contract, he is held not to be personally responsible, although the terms of the contract might, in cases of a mere private nature, involve him in a personal responsibility. Macbeath *v.* Haldimand, 1 T. R. 172; Unwin *v.* Wolseley, 1 Id. 674; Myrtle *v.* Beaver, 1 East 135; Rice *v.* Shute, Id. 579; Hodgdon *v.* Dexter, 1 Cranch 363; Jones *v.* Le Tombe, 3 Dall. 384; Brown *v.* Austin, 1 Mass. 208; Freeman *v.* Otis, 9 Id. 272; Sheffield *v.* Watson, 3 Caines 69.[2]

[1] One who signs and seals an instrument is bound, though in the body of it, he is named as agent of another person. Quigley *v.* De Haas, 82 Penn. St. 267; Ulam *v.* Boyd, 87 Id. 477; Lutz *v.* Linthicum, 8 Pet. 185; Stone *v.* Wood, 7 Cow. 753; Kiersted *v.* Orange and Alexander *v.* Railroad Co., 69 N. Y. 343.

[2] Parks *v.* Ross, 11 How. 362; Crowell *v.* Crispin, 4 Daly 100.

*The reasoning upon this point disposes, also, of the second made at the argument, viz., that the covenant being made by Robert Johnson and Elijah Craig, as trustees, no individual judgment can be rendered against them. It is plain, that the judgment is right, and, indeed, there could have been no other judgment rendered, for at law a judgment against a trustee in such special capacity is utterly unknown.

Having answered these minor objections, we may now advance to the real controversies between the *parties. It is contended, that the two covenants in the deed are so knit together, that they are to be construed in connection, so that the clause as to an indemnity with other lands, in case of an eviction by a prior legal claim, is to be applied as a restriction to both covenants; and if so, then the action cannot be sustained, for the declaration does not allege any eviction, nor any demand or refusal to indemnify with other lands. There is certainly considerable weight in the argument. It is not unreasonable to suppose, that when the parties had provided a specific indemnity for a prior claim, they might mean to apply the same indemnity to all the other cases enumerated in the first covenant. But something more than the mere reasonableness of such a supposition must exist, to authorize a court to adopt such a construction. The covenants stand distinct in the deed, and there is no incongruity or repugnancy in considering them as independent of each other. The first covenant being only against the acts and incumbrances under the parties to the deed, which, they could not but know, they might be willing to become responsible to secure its performance by a pecuniary indemnity; the second including a warranty against the prior claims of strangers also, of which the parties might be ignorant, they might well stipulate for an indemnity only in lands of an equivalent value. The case ought to be a very strong one, which should authorize a court to create, by implication, a restriction, which the order of the language does not necessarily import or justify. It ought to be one in which no judicial doubt could *exist of the real intention of the parties, to create such a restriction. It cannot be pronounced, that such is the present case; and this objection to the declaration cannot, therefore, be sustained. [*58 [*59

The remaining objections turn upon the sufficiency of the breach alleged in the declaration. It is contended, that the covenant on which the breach is assigned is against the joint, and not the several acts and incumbrances of the parties to the deed, and that, therefore, the breach, which states an assignment by John Craig and Robert Johnson only, is wholly insufficient. It is certainly true, that, in terms, the covenant is against the acts and incumbrances of all the parties, and the words "every of them" are not found in the deed. Some of the incumbrances, however, within the contemplation of the parties are not of a nature to be jointly created; as, for instance, the incumbrance of dower and title of dower. This very strongly shows that it was the intention of the parties, to embrace in the convenant several as well as joint acts and incumbrances. There is also a reference in the premises of the deed to a covenant for a conveyance previously made by John Craig to Samuel McCraw, against which it must have intended to secure the grantees; and if so, it fortifies the construction already stated. If, therefore, the point were of a new impression, it would be difficult to sustain the reasoning, which would limit the covenant to the joint acts of

all the grantors ; and there is no authority to support it. On the contrary, *Meriton's case*, though stated with some difference by the several reporters, *60] seems to *us completely to sustain the position that a covenant of this nature ought to be construed as including several as well as joint incumbrances, and has certainly been so understood by very learned abridgers. *Meriton's Case*, Noy 86 ; s. c. Poph. 200 ; Latch 161 ; Bac. Abr. Covenant, 77 ; Com. Dig. Condition, E. This objection, therefore, is overruled.(*a*)

*61] *Another exception is, there is no *profert* of the assignment described in the breach, nor is it shown to have been made for a valuable consideration. Various answers have been given at the bar to this exception ; and without deciding on others, it is a sufficient answer, that the plaintiff is neither a party nor privy to the assignment, nor conusant of the consideration upon which it was made, and therefore, is not bound to make a *profert* of it, or show the consideration upon which it was made.

The last exception is, that the breach does not set forth an entry or eviction of the plaintiff, under the assignment and patent to John Hawkins Craig. Assuming that an averment of an entry and eviction under an elder title be, in general, necessary to sustain an action on a covenant against

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(*a*) It may not, perhaps, be useless to the learned reader, to state the substance of Meriton's case as given in the various reporters. In Noy's reports 86, the case is thus succinctly given: "A. and B. lease to M. for years, and covenant that he may claim without disturbance, interruption or incumbrance by them, and an obligation was made for performance, &c. ; A. makes another lease to C., who enters, and M. brought debt, &c. (on the obligation) ; and by the court, it is well, for the covenant is broken, and '*them*' shall not be taken jointly only, but severally also." In Latch 161, the case stands as follows : "Debt upon an obligation. Two make a lease for years, by indenture, and covenant that the lessee should not be disturbed, nor any incumbrance made by them ; one of the lessors made a lease to a stranger, who disturbed, &c. The condition was to perform covenants. And it was agreed by Dodderidge, Jones and Whitelock to be a breach of the condition, for '*them*' shall not be taken jointly ; but if either of them disturb the lessee, it is a breach of the condition." The case, therefore, as stated in both of these reports, is substantially the same. But in Popham's reports 200, it is reported somewhat differently. It is there stated, to be an action of covenant, upon a covenant in an indenture between the plaintiffs and their lessors, whereby the lessors covenant to discharge them of all incumbrances done by them or any other person, and the plaintiffs assign for breach that one of the lessors had made a lease. It was moved in arrest of judgment, that the breach was not well laid, "because it is only laid to be done by one of them, and the covenant is to discharge them of incumbrances done by *them*, which shall be intended joint incumbrances. Dodderidge, J.— The covenant goes as well to incumbrances done severally as jointly, for it is of all incumbrances done by them or any other person ; and so was the opinion of all the other justices ; and therefore, the exception was overruled." From this last report, it would seem, that the covenant was against incumbrances, not only of the lessors, but of other persons, and it might, at first view, be thought that some stress was laid by the court upon the last words. But upon a careful consideration, even supposing (what may well be doubted) that Popham's is the more correct report, it would not seem, that the latter words, "any other person," could be properly held to embrace the lessees, or either of them ; for "other" is used as exclusive of them ; and therefore, the cause must have turned substantially upon the import of the preceding words, "of them," *i. e.*, whether embracing several as well as joint incumbrances. In this view, all the reports are consistent, and put the case upon the real point in controversy.

incumbrances (on which we give no opinion), it is clear, that it cannot be always necessary. If the grantee be unable to obtain possession, in consequence of an existing possession or seisin by a person claiming and holding under an elder title, this would certainly be equivalent to *an eviction and a breach of the covenant. In the case at bar, the breach [*62 is assigned in a very inartificial and lax manner; but it is expressly averred, that the assignment and patent to John Hawkins Craig was a prior conveyance, which was still in full force and virtue, "by reason of which said assignment, patent and incumbrance, the said William (the plaintiff,) hath been prevented from having and enjoying all or any part of the premises above mentioned." We are all of opinion, that upon general demurrer, this must be taken as an averment, that the possession of the premises was legally withheld from the plaintiff, by the parties in possession under the prior title thus set up.(*a*)

Judgment reversed.

(*a*) The usual covenants in conveyances of real property by the grantor are, that he is lawfully seised in fee of the premises; that he has good right and title to convey the same; that they are free of all incumbrances; that the grantor, his heirs, &c., will warrant and defend the same to the grantee, his heirs, &c., against the lawful claims of all persons. The manner of assigning breaches upon these covenants deserves the attention of all persons who aspire to a reasonable knowledge of the duties of special pleaders. In case of the covenants of seisin, and of good right and title to convey, it is sufficient to allege the breach, by negativing the words of the covenant. Bradshaw's case, 9 Co. 60 *b*; s. c. Cro. Jac. 304; Lancashire *v.* Glover, 2 Show. 460; 2 Saund. 181, note a, by Mr. Sergeant Williams; Greenby *v.* Wilcocks, 2 Johns. 1; Sedgwick *v.* Hollenback, 7 Id. 376; Marston *v.* Hobbs, 2 Mass. 433; Bender *v.* Fromberger, 4 Dall. 436; Pollard *v.* Dwight, 4 Cranch 421. The covenant for quiet enjoyment is not broken, unless some particular act is shown, by which the plaintiff is interrupted; and therefore, it is necessary to set forth in the breach assigned in the declaration, an actual eviction or disturbance of the possession of the grantee. Francis' Case, 8 Co. 91 *a*; Anon., Com. 229; 2 Saund, 181, note; Waldron *v.* McCarty, 3 Johns, 471; Kortz *v.* Carpenter, 5 Id. 120. *And where the eviction or disturbance is by a stranger [*63 it is further necessary to allege that the eviction was by a lawul title. Holden *v.* Taylor, Hob. 12; Foster *v.* Pierson, 4 T. R. 617; Hodgson *v.* East India Company, 8 Id. 281; Greenby *v.* Wilcocks, 2 Johns. 1; Folliard *v.* Wallace, 2 Id. 305; Kent *v.* Welsh, 7 Id. 258; Vanderkaar *v.* Vanderkaar, 11 Id. 122; Marston *v.* Hobbs, 2 Mass. 433. But it is not necessary to allege the eviction to be by legal process. 2 Saund. 181, note; Foster *v.* Pierson, 4 T. R. 617, 620. And where the covenant is, that the grantee shall enjoy, without the interruption of the grantor himself, his heirs or executors, it is held to be a sufficient breach, to allege that he or his heirs or executors entered, without showing it to be a lawful entry, or setting forth his title to enter. Lloyd *v.* Tomkies, 1 T. R. 671, and cases cited; 2 Saund. 181, note; Sedgwick *v.* Hollenback, 7 Johns. 376. The covenant of general warranty is governed by the same rules, for the grantee must assign as a breach, an ouster or eviction by a paramount legal title. Greenby *v.* Wilcocks, 2 Johns. 1; Folliard *v.* Wallace, 2 Id. 395; Kent *v.* Welsh, 7 Id. 258; Sedgwick *v.* Hollenback, Id. 376; Vanderkaar *v.* Vanderkaar, 11 Id. 122; Marston *v.* Hobbs, 2 Mass. 433; Emerson *v.* Proprietors of Minot, Id. 464; Bearce *v.* Jackson, 4 Id. 408. In respect to the covenant against incumbrances, it seemed admitted by Mr. Chief Justice Parsons, in Marston *v.* Hobbs, 2 Mass. 433, that there was no authority directly in point; but he held, that in principle, it was analogous to a covenant for quiet enjoyment; and said, that in the entries, the incumbrance is specially alleged in the count. See also, Bickford *v.* Page, 2 Mass. 455. It does not, however, seem necessary to allege an ouster or eviction, on the breach of a covenant against incumbrances; but only

to allege the special incumbrance as a good and subsisting one. Prescott *v.* Trueman, 4 Mass. 629. And a paramount title subsisting in a third person, is an incumbrance, within the meaning of the covenant. Prescott *v.* Trueman, 4 Mass. 627. So, a public town-way is, in legal contemplation, an incumbrance on the land over which it is laid. Kellogg *v.* Ingersoll, 2 Mass. 87. See Ellis *v.* Welsh, 6 Id. 246.

There is some diversity of opinion as to the damages recoverable upon a breach of these several covenants. Upon the covenants of seisin, and of good right and title to convey, it is held by the courts of New York and Pennsylvania, that the grantee is entitled to the purchase-money, and interest from *the time of the purchase. Staats *v.* Ten Eyck's Executors, 3 Caines 111; Pitcher *v.* Livingston, 4 Johns. 1; Bender *v.* Fromberger, 4 Dall. 441. The same rule has been adopted in Massachusetts. Bickford *v.* Page, 2 Mass. 455; Marston *v.* Hobbs, Id. 433; Caswell *v.* Wendall, 4 Id. 108. But if the grantee has actually enjoyed the lands for a long time, the purchase-money and interest for a term not exceeding six years prior to the time of eviction is given; for the grantee, upon a recovery against him, is liable to account for the mesne profits, for that period only. Staats *v.* Ten Eyck's Executors, 3 Caines 111; Caulkins *v.* Harris, 9 Johns. 324; Bennet *v.* Jenkins, 13 Id. 50. As to the covenant against incumbrances, it seems generally held, that the grantee is entitled to nominal damages only, unless he extinguish the incumbrance; and if he extinguish it, for a reasonable and fair price, he is entitled to recover that sum, with interest from the time of payment. Delavergne *v.* Norris, 7 Johns. 358; Hull *v.* Dean, 13 Id. 105; Prescott *v.* Freeman, 4 Mass. 627. And the costs, if any, to which he has been put by an action against him on account of the incumbrance. Waldo *v.* Long, 7 Johns. 173. In respect to the covenant for quiet enjoyment and of general warranty, the rule of damages adopted in New York and Pennsylvania is, to give the purchase-money with interest and the costs of the prior suit; but no allowance is made for the value of any improvements. Staats *v.* Ten Eyck's Executors, 3 Caines 111; Pitcher *v.* Livingston, 4 Johns. 1, SPENCER, J., dissenting; Bennet *v.* Jenkins, 13 Id. 50; Bender *v.* Fromberger, 4 Dall. 441. The same rule has been adopted in Tennessee. Talcot *v.* Bedford's Heirs, Cooke 446. But, in relation to covenants of warranty, the courts of Massachusetts have adopted a different rule, and allowed the damages, or, in other words, the value of the property at the time of eviction. Gore *v.* Brazier, 3 Mass. 523. And the same rule appears to be adopted in South Carolina. Liber *v* Parsons, 1 Bay 19; Guerard's Executors *v.* Rivers, Id. 265. And in Virginia. Mills *v.* Bell, 3 Call 326; Humphrey's Administrators *v.* McClenachan's Administrators, 1 Munf. 493. And in Connecticut. Horsford *v.* Wright, Kirby 3. Where there is a failure of title, as to part only of the land granted, it has been held, that the grantee cannot recover back the whole consideration-money. If the title has failed as to an individed part of an entire tract, the grantee is entitled to a like proportion of the consideration; but if it be of a *specific proportion of the tract, the damages are to be apportioned according to the measure of value between the land lost and the land preserved; that is, the portion of the consideration-money to be recovered is to be in the same ratio to the entire consideration, that the value of the part, as to which the title has failed, is to the value of the whole tract. Morris *v.* Phelps, 5 Johns. 49.

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In respect to these covenants running with the land, it has been held in New York and Massachusetts, that if the grantor be not seised, at the time of conveyance, the covenant of seisin is immediately broken, and no action can be brought by the assignee of the grantee, against the grantor; for after the covenant is broken, it is a *chose in action*, and incapable of assignment. Greenby *v.* Wilcocks, 2 Johns. 1; Bickford *v.* Page, 2 Mass. 455. But in a recent case in England, a different doctrine was held; and it was adjudged, that such a covenant runs with the land, and though broken in the time of a testator, is a continuing breach in the time of his devisee, and it is sufficient to allege for damage, that thereby the lands are of less value to the devisee, and that he is prevented from selling them so advantageously. Kingdon *v.* Noble, 4 M. &

*Coolidge *et al.* v. Payson *et al.*

Acceptance of bill.

A letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise.[1]

Payson *v.* Coolidge, 2 Gallis. 233, affirmed.

Error to the Circuit Court for the district of Massachusetts. This cause was argued by *Swann*, for the plaintiff in error, and by *Winder*, for the defendant.

February 21st, 1817. Marshall, Ch. J., delivered the opinion of the court.—This suit was instituted by Payson & Co., as indorsers of a bill of exchange, drawn by Cornthwaite & Cary, payable to the order of John Randall, against Coolidge & Co., as the acceptors.

At the trial, the holders of the bill, on which the name of John Randall was indorsed, offered, for the purpose of proving the indorsement, an affidavit made by one of the defendants in the cause, in order to obtain a continuance, in which he referred to the bill in terms which, they supposed, implied a knowledge on his part that the plaintiffs were the rightful holders. The defendants objected to the bill's going to the jury, without further proof of the indorsement; but the court determined, that it should go, with the affidavit, to the jury, who might be at liberty to infer from thence, that the indorsement was made by Randall. To this opinion, the counsel for the defendants *in the circuit court excepted, and this court is divided on the question, whether the exception ought to be sustained? [*67

On the trial, it appeared, that Coolidge & Co. held the proceeds of part of the cargo of the Hiram, claimed by Cornthwaite & Cary, which had been captured and libelled as lawful prize.[3] The cargo had been acquitted in the district and circuit courts, but from the sentence of acquittal, the captors had appealed to this court. Pending the appeal, Cornthwaite & Co. trans-

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S. 53. And see s. c. Id. 355; Chamberlain *v.* Williamson, 2 Id. 408; King *v.* Jones, 5 Taunt. 418; s. c. 1 Marsh. 107.[2]

By the Roman law, and the codes which have been derived from it, in case the vendee is evicted, he has a right to demand of the vendor, 1st. The restitution of the price. 2d. That of the fruits, or mesne profits, in case the vendee has been obliged to account for them to the owner. 3d. The costs and expenses incurred both in the suit on the warranty, and the prior suit of the owner, by whom the vendee has been evicted. 4th. Damages and interest, with the expenses legally incurred. Pothier, *De Vente*, Nos. 118, 123, 128, 130; Code Napoleon, liv. 3, tit. 6, art. 1630, *De la Vente*. The vendee has likewise a right to recover from the vendor, not only the value of all improvements made by the former, but also the increased value, if any, which the property may have acquired, independently of the acts of the purchaser. 1 Domat 77, § 15, 16; Pothier, *De la Vente*, Nos. 132, 133; Code Napoleon, liv. 3, tit. 6, art. 1633, 1634, *De la Vente;* Digest of the Civil Laws of Louisiana 355.

[1] Schimmelpennich *v.* Bayard, 1 Pet. 264; Boyce *v.* Edwards, 4 Id. 111; Wildes *v.* Savage, 1 Story 22; Cassel *v.* Dows, 1 Bl. C. C. 335; Ogden *v.* Gillingham, Bald. 38; Bayard *v.* Lathy, 2 McLean 462. And see McCullough *v.* Taylor, 1 W. N. C. 391; Allentown Bank *v.* Kimes, 35 Leg. Int. 298.

[2] Peters v. Bowman, 98 U. S. 59.

[3] See The Hiram, 8 Cranch 444.