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TITLE COVENANTS FOR THE IOWA HOMEOWNER—SOME GOOD NEWS AND MUCH BAD NEWS

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I. INTRODUCTION

The purchase of a house is no insignificant event in the lives of most homeowners. It usually involves an investment of most of one's liquid or near-liquid life savings. In addition, the purchase is usually coordinate with the incursion of significant debt for which the purchaser most often has personal liability.[1] It is, therefore, small wonder that the home buyer is concerned over what assurances he will receive that the title to his new house is a good title, and, in the event that the title should subsequently prove defective, what remedies will be available to him to recoup his lost investment. The degree to which our legal *system* of conveyancing satisfies these concerns will be the basic measure by which the layman will judge the adequacy and even the legitimacy of the *system*.

Nationally, two methods of title assurance predominate—abstract-title opinion,[2] and title insurance.[3] In Iowa only the former is available, the latter being effectively prohibited.[4] Thus, the prime sources of title assurance to an Iowa

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1. It is commonplace to find purchase money indebtedness on Iowa homes to be in the vicinity of 75% to 80% of the purchase price; and it is not unheard of for the indebtedness to reach 95% or even 100% of the purchase price.

2. Depending upon the local practice this method has several variations. P. BASYE, CLEARING LAND TITLES § 3, at 13-14 (2d ed. 1970).

3. *Id.* § 3; Fiflis, *Land Transfer Improvement: The Basic Facts and Two Hypotheses for Reform*, 38 U. COLO. L. REV. 431, 439 (1966).

4. IOWA CODE § 515.48(10) (1973) prohibits any company authorized to do business in Iowa from issuing title insurance. In fact, Iowa is the only state prohibiting title

homeowner are the skill with which the abstracter searches the relevant records and the expertise with which the conveyancing lawyer examines the abstract.[5]

Unfortunately, however, a defect in title is not always discovered by the abstracter and/or the attorney. The cases are legion in which some title defect, which was not discovered at the time of conveyance, came back to haunt the purchaser. Indeed, the failure to discover these defects is not always due to any oversight on the part of the abstracter or attorney. For example, there is no way to determine from the face of a document that it has been forged, that its execution was procured by fraud, or that it was never delivered.[6]

To the extent to which title should prove defective (whether it be a defect resulting in a complete failure of title, or merely in an encumbrance) the homeowner will be disillusioned (to say the least) with our system of conveyancing. His main concern at that point will be to recoup his losses and start afresh. In a system of conveyancing such as is in effect in Iowa, the purchaser's prime source of recoupment will be under warranty deeds executed by his immediate grantor and remote grantors.[7]

A warranty deed will contain up to six covenants of title:[8] (1) seisin; (2) right to convey; (3) freedom from encumbrance; (4) warranty; (5) quiet enjoyment; and (6) further assurances.[9] If the defect in title results in a breach of one of these covenants, the purchaser may be able to obtain indemnity for his loss from the one executing the deed. If the rules of law relating to recovery under these covenants should deny the homeowner recoupment of his losses, he will, most likely, have to bear the loss himself. In such a situation, the home-

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insurance. *See* Fiflis, *supra* note 3, at 441 n.46. It should be noted that this statute does not prohibit the insurance of titles from without the state by a company not authorized to do business in the state. As a matter of fact, it has been brought to the author's attention that a fair amount of such title insurance is written.

It may also be interesting to note that the Iowa prohibition on title insurance did not find its way into the statutes until 1947 as Chap. 258, § 5 of Iowa Acts, Reg. Sess. (52 G.A.). A general bill to provide additional kinds of insurance was introduced by the Senate Insurance Committee. 1947 Sen. Jour. 482. An amendment thereto was proposed by Senator Faul for purposes of prohibiting title insurance. After the amendment was approved, the bill was passed by the Senate by a vote of 47-0. *Id.* at 924. (With such unanimity one might question how much notice the amendment or the bill actually received.)

5. Fortunately, many possible risks are also minimized by marketable title legislation. *See, e.g.*, IOWA CODE §§ 614.17, .24, .29-.38 (1973).

6. "[T]here are a number of these matters which bind a purchaser the same as though he had knowledge of them but as to which it is impracticable to make investigation." R. PATTON, IOWA LAND TITLE EXAMINATIONS § 300, at 511 (1929).

7. In an appropriate circumstance damages may also be available from the abstractor or examining attorney. See Roady, *Professional Liability of Abstracters*, 12 VAND. L. REV. 783 (1959).

8. *See, e.g.*, Iowa State Bar Assoc., Official Form 1.1, Warranty Deed, which contains the first four hereinafter described covenants.

9. The covenants of seisin and right to convey, although often separately stated in a deed, are often treated as but one covenant (seisin) for all practical purposes. *See* W. BURBY, REAL PROPERTY § 125, at 314 (3rd ed. 1965). The covenant of quiet enjoyment is generally thought to be duplicative of the covenant of warranty, which may be viewed as embracing the two. 7 G. THOMPSON, REAL PROPERTY § 3175, at 225 (1962 Replacement). The covenant for further assurances does not appear to be in general use in this country. W. BURBY, *supra* at 316.

owner's mere disillusionment upon the failure of his title may, with justification, turn into outright rage.

Unfortunately for the homeowner, the law relating to covenants of title is of ancient origin[10] and is riddled with exceptions, provisos, and pitfalls. The object of this article is to try to respond to one simple question: How valuable, as a tool of recoupment, are covenants of title to the average Iowa homeowner? On reflection it appears that while there is *some* good news in that the Iowa supreme court has set aside some of the ancient restrictive doctrines limiting recovery, the Iowa homeowner nonetheless appears to stand a high chance of being unable to effectively recoup his loss should his title prove defective.

II. The Good News

A. *Assignability of First Triad Covenants*

The first triad of covenants, *i.e.*, seisin, right to convey, and freedom from encumbrances, has traditionally been considered to guaranty the status of the title at the time of the conveyance and is, thus, broken, if broken at all, immediately upon conveyance. As a result any breach instantaneously creates a cause of action in the immediate grantee and the covenants cannot run for the benefit of remote grantees.[11] On the other hand, the second triad of covenants, *i.e.*, warranty, quiet enjoyment and further assurances, is considered a guaranty that the purchaser (immediate or remote) will not be evicted, and thus is not breached until such future time as an eviction might occur. As a result those covenants in the second triad do run with the land and may be invoked by the grantee (immediate or remote) upon eviction by one with a paramount title.[12]

Under the general rule then, if the purchaser's title should prove defective, and he has no effective cause of action against his immediate grantor,[13] and if a claim against a remote grantor may not be based upon the second triad of covenants,[14] he would have no cause of action against the remote grantor based upon the first triad of covenants, since the covenants do not run with the land. However, the Iowa cases are clearly to the contrary. While it may be technically correct that the first triad of covenants is breached, if at all, upon conveyance, nevertheless, the cause of action arising therefrom is assigned to each successive grantee and may be enforced by him.

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10. G. Thompson, *supra* note 9, at 221.
11. W. Burby, *supra* note 9, § 126, G. Thompson, *supra* note 9, § 3176; Note, *Liability of Original Grantor to Remote Grantee on the Usual Covenants When First Grantee Received Neither Title Nor Possession*, 8 Iowa L. Bull. 259 (1923) [hereinafter cited as Note].
12. Authorities cited note 11, *supra*.
13. He may have no effective cause of action against his immediate grantor either because the immediate grantor is judgment proof, etc., as hereinafter discussed, or because his immediate grantor executed a special warranty deed which effectively limited a claim against him based on any of the covenants of the deed to defects in title arising by, through or under him.
14. He may lack a claim based upon the second triad of covenants because the deed of the remote grantor contained a covenant of special warranty which was interpreted

> [T]he covenant of seisin runs with the land, and is broken the instant the conveyance is delivered, and then becomes a chose in action held by the covenantee in the deed; and . . . a deed by said first covenantee operates as an assignment of such chose in action to a remote grantee, who can maintain an action thereon against the grantor in the original deed.[15]

As a result, if the remote grantee in the above example were an Iowa homeowner, he would be able to enforce the first triad of covenants against a remote grantor, thereby increasing the probability of his recovery.

B. *Grantor Need Not Be Seized*

A second problem in this respect may present itself, however. Will any of the six covenants run with the land if, in fact, the remote grantor never had any estate in the land at all together with which the covenants might run? To answer this question in the negative would seem absurd, for the nonexistence of the very estate which the remote grantor covenanted did exist, relieves the grantor from liability. Nevertheless, Lord Coke managed to pull it off. He successfully argued that a lessor had no liability under his covenant of quiet enjoyment to an assignee of a lease when the lessor never had any estate in the land purportedly leased.[16]

While the Common Law rule does not seem to have been accepted wholesale in this country, the general rule appears to be that the remote grantor must have some interest in the land which he can convey and with which the covenants may run; and it appears that if the grantor was in possession at the time of the deed, his conveyance of the possessory right is sufficient.[17] Under such a rule, however, no recovery would be available to a homeowner against a remote grantor, if the remote grantor never had possession.[18]

However, the Iowa supreme court, in *Rockafellor v. Gray*,[19] established that in order for the covenant of seisin to run it is not necessary that the grantor had been in possession.[20] Since (as stated above)[21] the cause of action upon breach of the covenant of seisin is deemed to run with each successive deed

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as only limiting claims based on the second triad to defects arising by, through or under him, but not affecting claims based on the first triad. *See* Morrison v. Morrison, 38 Iowa 73 (1874).

15. Rockafellor v. Gray, 194 Iowa 1280, 1282, 191 N.W. 107, 108 (1923). *Accord*, Barker v. Kuhn, 38 Iowa 392 (1874); Schofield v. Iowa Homestead Co., 32 Iowa 317 (1871). *Accord* as to covenant against encumbrance, Knadler v. Sharp, 36 Iowa 232 (1873).

16. Noke v. Awder, Cro. Eliz. 373 (1595).

17. Beddoe's Exec. v. Wadsworth, 21 Wend. 120 (N.Y. 1839); Tillotson v. Pritchard, 60 Vt. 94, 14 A. 302 (1888).

18. Some courts have improved the rule somewhat for the average homeowner by holding that the covenant will run if the grantee takes possession, even if the grantor did not have possession. Wead v. Larkin, 54 Ill. 489 (1870); Mecklum v. Blake, 22 Wisc. 495 (1868).

19. 194 Iowa 1280, 191 N.W. 107 (1923).

20. Nor is it necessary that the grantee had been in possession. *Id.* at 1285-86, 191 N.W. at 109.

21. *See* text accompanying note 15, *supra.*

rather than with the land, possession of the land is irrelevant. "Obviously, covenants of warranty would be governed by rules at least as liberal, for covenants of seisin have, from the first, been the more strictly regulated of the two."[22] Thus, an Iowa homeowner, in order to recover from a remote grantor need not have concern as to whether that remote grantor ever was in possession.

C. *Statute of Limitations*

In a third way, the Iowa supreme court has improved the ability of the Iowa homeowner to recoup his losses upon the failure of his title. As stated above, the covenants in the first triad are breached, if breached at all, immediately upon conveyance. Thus, in the application of normal principles, the statute of limitations would begin to run immediately and, if such were the case in Iowa, would expire 10 years[23] after conveyance.

However, it has been held in Iowa that if the purchaser has taken possession,[24] he can have no recovery under the covenant of seisin, other than nominal damages, until there has occurred to him substantial loss.[25] As a result the statute of limitations does not begin to run against a claim based upon the covenant of seisin until there has been an eviction, either actual or constructive.[26] In general, the same rule applies to the covenant of freedom from encumbrances; that is, until the covenantee has incurred substantial loss he may recover nominal damages only, and, as a corollary thereto, the statute of limitations does not run until substantial loss occurs.[27] This rule has the result of allowing a homeowner to sue either his immediate grantor or his remote grantor on their respective first triad covenants even though the limitations period, as normally calculated, would have expired.[28]

III. The Bad News

While, as indicated above, the Iowa decisions have improved somewhat the lot of the Iowa homeowner in his attempt to recoup his losses by recovery on covenants of title, he may still have significant pitfalls to bypass, as will be indicated hereafter.

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22. Note, *supra* note 11, at 261.
23. Iowa Code § 614.1(5) (1973).
24. In Sturgis v. Slocum, 140 Iowa 25, 116 N.W. 128 (1908) it was held that, where the remote grantor had neither title nor possession and his grantee did not go into possession, nor did plaintiff (remote grantee) go into possession, the plaintiff had an immediate cause of action for substantial damages.
25. Boon v. McHenry, 55 Iowa 202, 7 N.W. 503 (1880); *see* Foshay v. Shafer, 116 Iowa 302, 89 N.W. 1106 (1902).
26. *Id.* It is not necessary for an eviction that the purchaser be physically evicted from the premises. *See generally*, G. Thompson, *supra* note 9, § 3196, at 355.
27. McClure v. Dee, 115 Iowa 546, 88 N.W. 1093 (1902).
28. In commenting upon the Iowa rule, it was said in Annot., 61 A.L.R. 10, 50: [T]he statement for the basis of the rule limiting recovery to nominal damages would seem to be a departure from the general rule on the subject, and to ignore any distinction between covenants operating in praesenti and those operative in futuro.

A. *The Homestead Exemption*

It is submitted that, by far, the majority of homes purchased in Iowa, as well as across the nation, are purchased from prior homeowners. Thus, let us assume homeowner *A* ("*A*") owns home number one ("#1"). At some point in time homeowner *B* ("*B*") will come along and purchase #1 from *A*. *A*'s deed to *B may*[29] be a warranty deed and if so, it will contain certain covenants of title. Upon delivery of the deed to *B*, *B* will pay *A* the purchase price. If *B*'s title should prove defective and he were instantaneously evicted, *B* might very well be able to get back his purchase price. But such is not normally the case; if title should be defective, eviction of *B* by one with a paramount title may not occur for some time, perhaps even a few years. What effect might such a delay on *B*'s eviction have upon his recovery of his purchase price?

To answer this question we must consider what *A* will do with the purchase money. If *A* is like most homeowners on the sale of a prior residence, he will take the purchase money and use most or all of it to purchase a new home (home number two ("#2")). In fact the closing on the purchase of #2 is likely to be within a matter of hours or days after the closing on the sale of #1. Thus, *A* has reinvested the purchase money received from *B* in a new home. It is this fact of reinvestment of the purchase price into a new home which will cause *B* much grief, if title to #1 should prove defective.

Home #2 purchased by *A* will most likely fall within the definition of a homestead.[30] A homestead, to the extent that it does not exceed one-half acre in a city or town or forty acres elsewhere,[31] is exempt from execution.[32] If *A*, as many homeowners do, has most of his assets tied up in the homestead and if no way can be found for *B* to reach the homestead, *B* will be, as a practical matter, denied recoupment of his losses.

On first glance, there does appear to be one way by which *B* may reach the homestead. Section 561.21 of the *Iowa Code* provides that the "homestead may be sold to satisfy debts . . . : 1.) . . . contracted prior to its acquisition . . . ." Thus, it must be determined whether *A*'s debt to *B*, based upon the covenants contained in the deed delivered to *B*, were contracted prior to *A*'s acquisition of home #2.

No doubt the deed to *B* was delivered prior to the acquisition of home #2. As previously stated, the first triad of covenants is breached immediately upon delivery of the deed, albeit a mere technical breach.[33] In such event, it might be argued, that the debt was incurred immediately upon the breach and that having occurred prior to the acquisition of the new homestead by *A*, the new

29. If *A*'s deed to *B* is not a warranty deed of some type, then *B* will be simply out of luck for he will have no one against whom to make a claim, except perhaps the abstractor or examining attorney. *See* note 7, *supra.*

30. IOWA CODE § 561.1 (1973).

31. IOWA CODE § 561.2 (1973). There is no maximum dollar amount on the exemption. Thus, whatever the value of the homestead, it is exempt.

32. IOWA CODE § 561.16 (1973).

33. *See* text at notes 11 and 15, *supra.*

homestead is not exempt from execution to pay the debt. There is only one problem with such an argument—the Iowa supreme court has decided to the contrary.[34]

As previously stated, in Iowa the general rule is that, although the covenants of seisin and freedom from encumbrances are breached immediately upon conveyance, no recovery, other than nominal damages, may be obtained until the purchaser has suffered substantial loss; nor will the statute of limitations begin to run until such latter time.[35] Thus, which event will control the date of contracting the debt for purposes of the above statute? Will it be the date of delivery of the deed and occasion for a technical breach of the covenants, or will it be the date upon which substantial recovery became available to the grantee thereby causing the statute of limitations to start running?

In *Anderson v. Kyle*,[36] a case involving suit by an immediate grantee to subject his grantor's new homestead to execution under the predecessor of section 561.21, the court found that no debt was contracted until the latter date when the damages became substantial and thus a fixed obligation:

> That a remote or contingent liability attaches to the execution and delivery of a deed in view of a possible failure of title is very true. But . . . the promise to repay or reimburse which arises out of a deed covenant has relation to the time when, if ever, such covenant shall be broken by eviction or otherwise. Such is quite a different thing from a specific debt contracted and agreed to be paid. And it is a debt contracted—that is, a *fixed obligation* subject to enforcement by the processes of the law—that the statute authorizes to be satisfied by execution sale of a homestead. (emphasis added).[37]

Since the date upon which the grantee incurred substantial damages, and thus a fixed obligation, was after the date upon which the grantor had acquired the new homestead, the new homestead was exempt from execution and the grantee was not able to recoup his losses suffered upon failure of title.[38]

Thus, while the concept of nominal damages works to the homeowner's benefit by delaying the running of the statute of limitations, it has here become a double edged sword and has caused greater injury to the homeowner than the benefits it has produced.[39]

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34. Anderson v. Kyle, 126 Iowa 666, 102 N.W. 527 (1905).
35. *See* text at notes 26-27, *supra.*
36. 126 Iowa 666, 102 N.W. 527 (1905).
37. *Id.* at 668, 102 N.W. at 528.
38. It should be noted that under the facts of *Anderson v. Kyle* it was a remote grantee who was evicted by a paramount title. He collected his damages from his grantor (plaintiff), the grantee of the defendant. Both the eviction of the remote grantee and his payment by plaintiff occurred after defendant acquired the homestead. The court stated: "[N]o debt enforceable in law or in equity arose in favor of plaintiff as against defendant . . . until after he (plaintiff) had been called upon to reimburse his grantee . . . in the amount necessary to buy in the outstanding title . . . ." *Id.* at 668-69, 102 N.W. at 528.
39. To a certain extent this problem might be easily remedied. Enactment of a maximum amount for the homestead exemption would make the grantor's equity in the new homestead, which is in excess of the maximum exempted amount, subject to execution for payment of debts. However, some problems might still remain. In order to

B. *The Ever-Present Mortgagee*

The homeowner seeking to recoup his losses on failure of title faces still other obstacles—his own mortgagee and the mortgagee of the grantor's new home. Even assuming, contrary to the above discussed decision, that *B* were able to obtain execution against *A*'s new home, *B* will, most likely, not be able to recoup his losses.

In purchasing his new home, *A* will, more than likely, finance the acquisition with a loan secured by a purchase money mortgage. Thus, *A*'s mortgagee will immediately have a lien upon *A*'s new homestead, home #2.[40] However, *B* will have no lien directly against home #2 until he has suffered substantial loss, brought an action, and obtained judgment.[41] Since *B*'s lien upon home #2 will have been acquired with constructive notice of the mortgagee's lien,[42] the mortgagee will have priority over *B* as to the proceeds.[43] As a result, the execution will yield to *B* a sum which may very well be inadequate to compensate for *B*'s failure of title. For example, assume that home #2 has a value of $40,000 and is subject to a $30,000 mortgage. If *A* has no other assets of substance,[44] the judgment against *A* will yield *B* $10,000 in proceeds (*A*'s mortgagee taking the first $30,000 to satisfy its mortgage). If the purchase price of house #1 which *B* acquired from *A*, the title to which has proved defective, was $30,000, *B*'s collectible damages may prove to be as high as $30,000.[45] The recovery of the $10,000 will hardly prove to be adequate.

Nor are *B*'s woes likely to end there. If, as assumed above, the purchase price of *B*'s house were $30,000, a considerable portion of this acquisition was probably financed by a loan which is secured by a purchase money

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satisfy his debt, the executing creditor will cause a sale of the homestead. But in most cases it will be impossible to set off the exempted portion of the homestead and still have a saleable entity. Thus, the sale, if it is to occur, must be of the entire homestead. After such a sale, will the exempted portion of the homestead continue exempted in the proceeds? If not, the homestead exemption will be for naught, for simply by forcing the sale, the creditor can destroy the entire exemption.

If the exemption continues in the proceeds up to the maximum exempted amount, the grantee who is seeking recoupment from his grantor might have problems. A mortgagee of the new homestead will have first claim upon proceeds of the homestead and, unless the owner's equity in the new homestead exceeds the exempted amount, the grantee might still be prevented by the homestead exemption statute from recovering his losses. For a further development of a related problem, *see* text at note 40, *infra*.

40. *See* IOWA CODE §§ 558.41 and 558.11 (1973).

41. Assuming that the action is brought in the county where the real estate lies. IOWA CODE § 624.24 (1973). If the real estate should lie elsewhere, the lien "will not attach until an attested copy of the judgment is filed in the office of the clerk of the district court of the county in which the real estate lies." *Id.*

42. IOWA CODE § 558.11 (1973).

43. IOWA CODE § 558.41 (1973). Of course, in the event that the mortgagee should decide not to foreclose immediately, house #2 will have to be sold subject to the mortgage in which event the sale should yield not in excess of *A*'s equity therein.

44. To the extent that *A* has other nonexempt assets, *B*'s recovery will be improved.

45. Not all title defects show a complete lack of seisin. To the extent that there is only a partial failure of seisin or the existence of an encumbrance, *B*'s damages may be less than $30,000. But, as indicated in the text the recovery will be first applied to satisfy *B*'s own mortgagee and only in the event that *B* should recover damages in an amount equal to the actual loss will *B* fully recoup his losses.

mortgage. The loan will be evidenced by a note which will undoubtedly contain a promise to repay regardless of the status of the title. Also, the mortgage will almost invariably contain covenants of title whereby the mortgagor warrants the title of the premises to the mortgagee.[46] Thus, upon failure of title, *B* will have an obligation to apply the proceeds of any recovery from *A* in satisfaction of his debt to his mortgagee.[47] In the event that his recovery from *A* should be less than is due under the note to his mortgagee, *B* will not only be unable to recoup his investment, but he will also have to pay out more money to satisfy a debt incurred on a house to which he does not have good title. For example, if *B* incurred a purchase money indebtedness of $22,500 on the acquisition of his $30,000 home, and if, as hypothesized above, his recovery from *A* is a mere $10,000, *B* will not only have to pay over this $10,000 recovery to his mortgagee, but he will have an obligation to pay over another $12,500. In addition, *B* will lose his $7,500 savings invested in the premises. With such a result, *B* is, with justification, going to be incensed and outraged with the legal system.

C. *Grantor's Financial and Legal Status*

There are further considerations relating to the status of the grantor who made the covenants which may have the effect of denying any recovery to the homeowner.

1. First, it may be stated without equivocation that the value of title covenants can rise to no higher level than the solvency of the grantor making those covenants. If the grantor's non-exempt assets[48] should be insufficient to meet his liabilities, the best that the homeowner can probably do is to share in a bankruptcy dividend with the rest of the other unsecured creditors.

2. Another pitfall to recovery may now exist upon the death of the grantor who has made covenants of title. Upon the recent revision of the *Iowa Probate Code*,[49] section 410[50] was enacted, which in some aspects relevant hereto, is a considerable departure from prior Iowa law. It appears, as hereinafter explained, that the grantee, if he might ever expect to recover against the grantor's estate or distributees, must present his potential claim to the clerk of court within six months of the second publication of notice to creditors.

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46. *See, e.g.* Iowa State Bar Assoc., Official Forms 13.1 and 13.2, Real Estate Mortgage, which contain the following provision:

> Said Mortgagors hereby covenant with Mortgagee, or successor in interest, the said Mortgagors hold . . . title in fee simple to said real estate; that they have good and lawful authority to sell, convey and mortgage the same; that said premises are Free and Clear of all Liens and Encumbrances Whatsoever except as may be above stated; and said Mortgagors Covenant to Warrant and Defend the said premises . . . against the lawful claims of all persons whomsoever, except as may be above stated.

47. *Cf.* Bank of Auburn v. Roberts, 44 N.Y. 192 (1870).

48. Section 6 of the Bankruptcy Act provides that the bankrupt's assets exempt under state law (including the homestead exemption) remain exempt in bankruptcy. 11 U.S.C. § 24 (1970).

49. Iowa Code ch. 633 (1973).

50. Iowa Code § 633.410 (1973).

Under prior law, upon the death of a grantor who had made covenants of title, the grantee, in the event of a loss occurring subsequent to the time for presenting claims against the grantor's estate, could recover upon such covenants directly against the heirs, legatees, and devisees to whom the grantor's estate had been distributed,[51] at least to the extent of any assets received by any individual distributee.[52] In the interpretation of statutes existing under prior Iowa law,[53] the cases make a fine distinction. Only those contingent claims which were in existence at the time of the decendent's death were barred by a failure to file with the executor within the time prescribed.[54]

Thus, if the existence of a claim against the estate were certain, but the quantity of that claim were not, then the "contingent" claim had to be presented within the appropriate period or its enforcement would be barred. However, if the "contingent" claim were such that there was a mere possibility of any claim ever coming into existence, then the claim need not be presented to the executor within the prescribed period. It could later be enforced against the executor or distributees if its existence should become absolute.[55] A claim based upon a breach of a covenant of title not being absolute until substantial loss by the grantee,[56] the covenant could subsequently be enforced against the distributees.[57]

Under present section 410 of the *Probate Code*, considerable revision has been made:

> All claims against a decedent's estate, other than charges, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, and the distributees of the estate, unless filed with the clerk within six months after the date of the second publication of the notice to creditors . . . .[58]

This statute, it would seem, on its face, purports to bar not only those claims which are in existence at the decedent's death, but also those claims as to which there is no certainty of eventual existence (including the claim of a homeowner based upon a covenant of title which, at the date of the grantor's death is not yet breached and which was not barred under prior Iowa law).

The statute provides that claims whether "liquidated or unliquidated" must

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51. McClure v. Dee, 115 Iowa 546, 88 N.W. 1093 (1902).
52. Baker v. Baker, 220 Iowa 1216, 264 N.W. 116 (1935).
53. IOWA CODE § 635.60 (1962) provided in pertinent part: "Demands not yet due may be presented, proved, and allowed as other claims." IOWA CODE § 635.61 (1962) provided: "Contingent liabilities must be presented and proved, or the executor or administrator shall be under no obligation to make any provision for satisfying them when they accrue." IOWA CODE § 635.68 (1962) provided in pertinent part: "All claims not filed as hereinbefore provided, within six months from the giving of the notice aforesaid, will be barred. . . ."
54. Nichols v. Harsh, 202 Iowa 117, 209 N.W. 297 (1926); Security Fire Ins. Co. v. Hansen, 104 Iowa 264, 73 N.W. 596 (1897); Wickham v. Hull, 102 Iowa 469, 71 N.W. 352 (1897); Savery v. Sypher, 39 Iowa 675 (1874).
55. Nichols v. Harsh, 202 Iowa 117, 209 N.W. 297 (1926).
56. Anderson v. Kyle, 126 Iowa 666, 102 N.W. 527 (1905) and text accompanying note 36, *supra*.
57. McClure v. Dee, 115 Iowa 546, 88 N.W. 1093 (1902); *cf.* Nichols v. Harsh, 202 Iowa 117, 120 , 209 N.W. 297, 298 (1926) (dictum).
58. IOWA CODE § 633.410 (1973).

be presented. This statement that unliquidated claims must be presented would seem to carry over the prior rule that claims, the existence of which is certain, but the quantity of which is uncertain, must be presented. Indeed, by definition, such a claim is precisely what is meant by an unliquidated claim.[59]

Nevertheless, the statute also provides that all claims whether "absolute or contingent" must be properly presented or else be barred. If the word "contingent" does not mean something other than unliquidated, it is mere surplusage. But it is clear that "contingent" was meant to deal with another concept. By their juxtaposition "absolute" and "contingent" were meant to be dichotomous. An absolute claim is but another way of stating a claim which is certain. By dichotomy, then, a contingent claim is one which is not certain,[60] that is, the type of claim which, under prior law, did not have to be presented to the executor in order to be preserved, and under which a grantee had the right later to recover against the distributees.

There is further evidence that claims, which are presently mere possibilities, must be presented in order to be preserved. *Probate Code* section 424 provides in relevant part:

> Contingent claims which cannot be allowed as absolute debts shall, nevertheless, be filed in the court and proved . . . . *If* such claim shall become absolute before distribution of the estate, it shall be paid in the same manner as absolute claims of the same class. [Otherwise] . . . :
> * * *
> 2. The court may order the personal representative to make distribution of the estate but to retain in his hands sufficient funds to pay the claim *if and when* the same becomes absolute . . . , or
> 3. The court may order distribution of the estate as though such contingent claim did not exist, but the distributees shall be liable to the creditor to the extent of the estate received by them, *if* the contingent claim thereafter becomes absolute . . . .[61]

The statute makes clear that if and when a claim that does not now exist should ever come into existence, the claim will be paid,[62] but only if it was presented to the court under *Probate Code* section 410. Therefore, a claim based upon a title covenant will be paid if and when it comes into existence, but only if it is properly preserved.

The history of *Probate Code* section 410 also makes clear that it was intended to require the presentment of a potential claim (such as a breach of a

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59. *See* Kellogg v. Iowa State Traveling Men's Assoc., 239 Iowa 196, 29 N.W.2d 559 (1947). In *In re* Munsie, 32 F.2d 304, 305 (D. Conn. 1929) the court, quoting from an earlier decision said: "A contingent claim is one as to which it remains uncertain, at the time of the filing of the petition in bankruptcy, whether or not the bankrupt will ever become liable to pay it. If it is certain that he is liable to pay it, although it may be uncertain how much he will have to pay, the claim is unliquidated, but it is not contingent (emphasis omitted)."

60. *In re* Munsie, 32 F.2d 304, 305 (D. Conn. 1929).

61. IOWA CODE § 633.424 (1973) (emphasis added).

62. *See* S. Webster, *Decedents' Estates: Succession and Administration*, 49 IOWA L. REV. 638, 668-69 (1964).

title covenant) even if it may be possible that the claim may never come into existence. The portion of section 410 relevant to the present discussion was taken verbatim from section 135(a) of the *Model Probate Code*.[63] In comment to this section, the authors of the *Model Probate Code* state:

> In the case of the contingent claim . . . the position has been taken that it is unfair to the creditor to compel him to file before he is certain either of the amount or of the existence of his claim. And since the distributee is a donee and not a bona fide purchaser, it is thought that he should be liable whenever the contingent claim becomes absolute . . . . On the other hand, the tendency of modern legislation is definitely to bar contingent claims along with other claims by the operation of the nonclaim statute. . . . If contingent claims are not barred, the distributee can never spend his legacy or his inheritance safely; for he never would know when such a claim would be asserted against him. . . . Death of a debtor is a hazard which all creditors should assume, and if the creditor seeks to avoid it, he can do so by taking security for his claim. The provisions of this section are in accordance with this view, and bar the contingent creditor who does not file.[64]

Thus, it is clear that the authors of the *Model Probate Code*, from which *Probate Code* section 410 was drawn, expressly drafted the provision to require potential, but not yet absolute, claims to be presented.

The *Model Probate Code* provision was adapted,[65] *inter alia*, from the Florida Probate Law,[66] which has provisions analogous thereto. Under the Florida statute there is overwhelming judicial authority to the effect that a contingent claim includes a claim, the actual existence of which is yet uncertain at decedent's death and which may or may not come into being.[67]

Another statute which is similar to the provision of the *Model Probate Code*, and to the *Iowa Probate Code*, is that contained in the *California Probate Code* which provides that "all claims arising upon contract, whether they are due, not due, or contingent" must be presented within a limited time in order to be preserved.[68] In *Tropico Land & Improvement Co. v. Lambourn*,[69] the California supreme court was presented with the question of whether under a prior statute (identical in relevant respect to the present provision) a claim based upon a covenant of warranty must be presented against the estate in order to be preserved. The court stated:

> The claim which the appellant presented originally for allowance by the court in the matter of the estate of the deceased being based upon the covenant of warranty referred to therein was contingent on a breach of the covenant, an event which might never occur, and the only way

63. L. Simes, Model Probate Code § 135(a), at 141 (1946).
64. *Id.* at 142-43.
65. *Id.* at 141.
66. Fla. Stat. Ann. § 733.16 (1964).
67. Furlong v. Leybourne, 171 So. 2d 1 (Fla. 1964); Van Sciver v. Miami Beach First Nat'l Bank, 88 So. 2d 912, 58 A.L.R.2d 1279 (Fla. 1956); Fowler v. Hartridge, 156 Fla. 585, 24 So. 2d 306 (1945); American Surety Co. of N.Y. v. Murphy, 151 Fla. 151, 9 So. 2d 355 (1942).
68. Cal. Probate Code § 707(a) (West Supp. 1973).
69. 170 Cal. 33, 148 P. 206 (1915).

> in which appellant could perpetuate its right to recover damages from the estate of the covenantor in case the breach should occur was by having it allowed and established as a contingent claim against the estate . . . . Unless so presented no action could be maintained thereon.[70]

Thus, it would appear that unless a homeowner makes presentation of his contingent claim based on title covenants within six months after the decease of his grantor, he will not be able to enforce his claim either against the *estate of the grantor* or against the *distributees of the grantor*.[71] Practically speaking, such claims would hardly ever be filed on time; indeed, it is a rare homeowner who even knows whether his grantor is dead or alive. Thus, it would seem that many a homeowner, who purchases a house from an elderly grantor, runs a high risk of not being able to collect on his title covenants.[72]

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70. *Id.* at —, 148 P. at 209. *But see* Nathan v. Freeman, 70 Mont. 259, 225 P. 1015; 41 A.L.R. 138 (1924); *cf.* Hantzch v. Massolt, 61 Minn. 361, 63 N.W. 1069 (1895).

71. Note that IOWA CODE § 633.410 (1973) provides that unless presented the claim may not be enforced "against the estate, the personal representative, and the distributees of the estate. . . ." *Accord*, L. SIMES, MODEL PROBATE CODE 142 (1946).

Perhaps one argument might still be made on behalf of the hapless homeowner. IOWA CODE § 633.410 (1973) continues to provide that "this provision shall not bar claimants entitled to equitable relief due to peculiar circumstances." But to do so the homeowner will have to establish that he acted diligently or establish an acceptable excuse for his lack of diligence. Also he will have to show the peculiar circumstances. Rindfleisch v. Mundt, 247 Iowa 1124, 1128, 77 N.W.2d 643, 646 (1956). Under the cases such a burden would seem difficult to surmount. *Id.*

72. A similar problem to the one discussed in the text may exist when a homeowner purchases a house from a corporation. Corporations, just like individuals, die, and statutes are enacted to deal with the claims against such a "deceased" or dissolved corporation. Under prior Iowa law a grantee was able to bring suit against the stockholders who had received liquidating assets of a dissolved grantor corporation, when, subsequent to the dissolution, the title to the property granted proved defective. *See, e.g.*, Wisconsin & Arkansas Lumber Co. v. Cable, 159 Iowa 81, 140 N.W. 211 (1913). However, in the recent revision of the Iowa corporation law, IOWA CODE § 496A.102 (1973) was enacted which provides in relevant part:

> The dissolution of a corporation or the expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution or expiration, if action or other proceeding thereon is commenced within two years after the date of such dissolution or expiration.

Under this statute it is not entirely clear whether a "claim existing" prior to dissolution includes a contingent claim as discussed in the text. Nevertheless, such is a distinct possibility which has received support in *Bishop v. Schield Bantam Co.*, 293 F. Supp. 94 (N.D. Iowa 1968). In that case Judge McManus decided that there was no liability enforceable against officers and directors of a dissolved corporation based upon a tort occurring 1 1/2 years after dissolution, suit upon which was not filed for 3 1/2 years after dissolution. It was there stated:

> [I]t seems highly untenable that the legislative intent manifest in the inclusion of the last paragraph was such as to allow indefinite continued subjection of the corporation and its officers and directors to litigation. The policies inherent in the dissolution and winding up the affairs of a corporation all dictate to the contrary. . . . There should be a definite point in time at which the existence of a corporation and the transaction of its business are terminated. To allow, as the plaintiff contends, the continued prosecution of lawsuits perverts the definiteness and orderly process of dissolution so as to produce a continuous dribble of business activity contrary to the intent of the winding up provisions of the statute. *Id.* at 96.

Such an argument is hauntingly similar to the rationale given in the comment to MODEL PROBATE CODE; *see* text at note 60, *supra*.

D. *Certain Practical Deficiencies*

In addition to the types of problems discussed above, which are faced by the homeowner when trying to recover on title covenants, the homeowner has to cope with certain deficiencies in the law of covenants of title itself. Thus, even if the homeowner has a grantor who is not impecunious and against whom it may be possible to enter a judgment, he may find that the damages permitted by law are inadequate, or that he has failed to carry the burden as to proof of the damages.

1. The homeowner who has purchased his house just at the beginning of an inflationary spiral may find that in a very few years, the house is, in terms of absolute dollars, worth considerably more. If at this point he should find that his title is defective, in order to recoup his position and acquire new premises of corresponding value, he will have to recover not merely what he paid for the house, but rather the now current value. However, if he has to rely upon his covenants of title for recoupment he will find that his expectations will be dashed.

The general rule is that the damages which the grantee may recover are the lesser of his actual damages incurred or the consideration received by the covenanting grantor; and this is, in general, true whether the covenant is one of seisin,[73] freedom from encumbrances,[74] or of warranty.[75] Thus, to the extent that there has been appreciation in the value of the house since purchase, the homeowner stands to bear the loss. Even greater personal loss may occur when the homeowner finds that his only hope for recovery is against a remote grantor, for there the damages may not exceed the consideration received by the remote grantor,[76] which, in all likelihood, is less than that paid by the homeowner to his immediate grantor.

In addition, in the event that the remote grantor had conveyed other land in addition to that acquired by the homeowner, the damages recoverable from the remote grantor are that proportion of the consideration received by the remote grantor which the premises acquired by the homeowner bears to the entire premises conveyed by the remote grantor.[77]

Various reasons have been given for these rules. It is sometimes explained that it protects the grantor from financial ruination due to increased land values over which he has no control; other times it is said that it provides an easy and certain method for the ascertainment of damages.[78] Whatever the validity

73. Rockafellor v. Gray, 194 Iowa 1280, 191 N.W. 107 (1922); Thomas v. Becker, 190 Iowa 237, 180 N.W. 285 (1920); Norman v. Winch, 65 Iowa 263, 21 N.W. 598 (1884); Swafford v. Whipple, 3 Iowa (Greene) 261, 54 Am. Dec. 498 (1851).

74. Newburn v. Lucas, 126 Iowa 85, 101 N.W. 730 (1904); Knadler v. Sharp, 36 Iowa 232 (1873).

75. Boice v. Coffeen, 158 Iowa 705, 138 N.W. 857 (1912); Alexander v. Staley, 110 Iowa 607, 81 N.W. 803 (1900); Snell v. Iowa Homestead Co., 59 Iowa 701, 13 N.W. 848 (1882); Funk v. Cresswell, 5 Iowa 62 (1857); Brandt v. Foster, 5 Iowa 287 (1857).

76. Rockafellor v. Gray, 194 Iowa 1280, 191 N.W. 107 (1922).

77. Mischke v. Baughn, 52 Iowa 528, 3 N.W. 543 (1879).

78. *See* Note, *Liability of a Grantor to a Remote Grantee on His Covenants for Title*, 25 IOWA L. REV. 340, 343 (1940).

may be of such questionable rationales, they certainly prove inadequate to the homeowner as a means of recovery.

2. When a claim or encumbrance is asserted against the homeowner's title, the most appropriate method for resolution is for the homeowner to "vouch in" his grantor. In such a way the result of any litigation will, for most purposes, be binding upon the grantor.[79] Thus, if an adverse party should sue the homeowner due to, for example, a previously existing mortgage, then the homeowner can "vouch in" his grantor who will then be bound by the result of the litigation.

However, if the adverse claimant has not brought suit, it may not yet be appropriate to "vouch in" the grantor. The homeowner may resolve that it is simply more expedient to purchase the outstanding claim and then obtain recompense from his grantor.[80] However, should he so act "it is at his own risk; and in the suit with his covenantor, he must assume the burden of proof, and rely upon and make out the adverse title to which he has yielded."[81] In any proceeding against his grantor, the homeowner will also have to prove that the amount paid was reasonable.[82] It is thus entirely possible that the homeowner will be unable to prove the third parties' adverse claim or demonstrate the reasonableness of the amount paid to acquire it.[83]

IV. Conclusion

In light of the matters discussed in this article, the answer to the question initially presented, that is, how valuable, as a tool of recoupment, are covenants of title to the average Iowa homeowner, seems clear. The homeowner *may* effectively be able to recover upon his covenants of title, but he runs a serious risk of failure. No matter how infrequent such failure might be, to the homeowner who loses his life savings, or a substantial part thereof, it is of no consolation for his attorney to tell him: "But in the big picture a homeowner often can recover upon his covenants of title."

The person who enters an attorney's office seeking legal assistance in purchasing a home is entitled to something more than apologies. He is entitled to a legal *system* which offers him the assurance that he seeks, that is, that his investment in his new house will not be lost.[84]

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79. Kellar v. Lindley, 203 Iowa 57, 212 N.W. 360 (1927).

80. This expediency may present itself when the adverse claim is discovered just prior to the time when the homeowner is about to convey his title to another. That person may object to the marketability of the title. In order to quickly establish marketability the homeowner may pay what he then considers a reasonable price for purchasing the outstanding interest.

81. Brandt v. Foster, 5 Iowa 287, 298 (1857).

82. Guthrie v. Russell, 46 Iowa 269, 26 Am. Rep. 135 (1877).

83. *See* Ballou v. Clark, 187 Iowa 496, 171 N.W. 682 (1919); Myers v. Munson, 65 Iowa 423, 21 N.W. 759 (1884); Annot., 61 A.L.R. 10, 104-117 (1929).

84. The Iowa legislature has again denied the homeowner a method by which he might possibly acquire such assurance. On March 8, 1973, House Bill 376 was submitted. It would have repealed the prohibition on domestic companies' selling of title insurance in Iowa. *See* note 4, *supra*. The bill was sent to the Commerce Committee, where it died without any action being taken on it.

THE IOWA DRAM SHOP ACT—CAUSES OF ACTION AND DEFENSES

Frank G. Schubert†

I. INTRODUCTION

Iowa is one of nineteen states[1] that have enacted dram shop (civil liability) acts, which allow a statutory remedy in a civil action for money damages against the operator of a tavern who causes or contributes to the intoxication, in one manner or another, of someone who, because of his intoxication, causes injury to either himself or a third person. The original intent of the dram shop act was to overcome the common law requirement of proximate cause, although, to date, it is still a necessary element of proof in some cases. Were it not for the dram shop act, the Iowa supreme court has stated, the proximate cause between the sale of the beverage and the injury caused by the intoxicated person would be too remote.[2] The dram shop act is intended, then, to impose strict liability upon the tavern operator, without regard to his negligence.[3]

This article is directed to certain common situations that give rise to the classical dram shop type action and hopefully will aid in the recognition of such actions.

Dram shop acts, in general, are best exemplified by Illinois' statute[4] which allows recovery against a tavern licensee who causes the intoxication; by the Iowa statute[5] under which the tavern operator, or his agent, must give or sell an intoxicant to a person while he is intoxicated, or serve the person to a point where he becomes intoxicated; and the Minnesota[6] and New York[7] acts which impose liability for the illegal or unlawful selling which causes or contributes to the intoxication.

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1. ALA. CODE tit. 7, § 121 (1958); COLO. REV. STAT. ANN. § 41-2-3 (1963); CONN. GEN. STAT. ANN. § 30-102 (Supp. 1973); DEL. CODE ANN. tit. 4, § 716 (1953); GA. CODE ANN. § 105-1205 (1968); ILL. ANN. STAT. ch. 43, § 135 (Supp. 1973-74); IOWA CODE § 123.92 (1973); ME. REV. STAT. ANN. tit. 17, § 2002 (1964); MICH. STAT. ANN. § 436.22 (Supp. 1973-74); MINN. STAT. ANN. § 340.95 (1972); N.Y. GEN. OBLIGATIONS LAW § 11-101 (McKinney 1969); N.D. CENT. CODE § 5-01-06 (Supp. 1971); OHIO REV. CODE ANN. §§ 4399.01-.02 (1965); OREGON REV. STAT. § 30.730 (1971); R.I. GEN. LAWS ANN. § 3-11-1 (1956); VT. STAT. ANN. tit. 7, § 501 (1972); WASH. REV. CODE ANN. § 71.08.080 (1962) (repealed as of Jan. 1, 1974); WIS. STAT. ANN. § 176.35 (1957); WYO. STAT. ANN. § 12-34 (Supp. 1973).
2. Cowman v. Hansen, 250 Iowa 358, 368, 92 N.W.2d 682, 687 (1958).
3. Williams v. Klemesrud, 197 N.W.2d 614, 617 (Iowa 1972).
4. ILL. ANN. STAT. ch. 43, § 135 (Supp. 1973-74).
5. IOWA CODE § 123.92 (1973).
6. MINN. STAT. ANN. § 340.95 (1972).
7. N.Y. GEN. OBLIGATIONS LAW § 11-101 (McKinney 1969).