BIRD *vs.* SMITH.

Five years is the limitation to actions of covenant upon the warranty of title in the grantor in a deed of bargain and sale —— the 11th sec. of ch. 91, Rev. Stat., and not the 31st. sec. of same act, being applicable to such actions.

A plea, averring the consideration upon which a deed was executed, to be other than that contained in the deed, without averring it to be in writing, is bad.

A covenant of *warranty* is not broken without eviction by title paramount. An eviction, however, is not necessary to sustain an action for the breach of the *covenat of seizin* in a deed of bargain and sale, created by the words "grant, bargain, and sell," under 1st and 2d secs. ch. 31, Rev. Stat.; want of title being a sufficient breach of the covenant.

A plea of general performance is no answer to an action for the breach of a covenant of seizin: the plea must show a performance of the covenant, by setting out a good title.

Writ of Error to the Circuit Court of White county.

This was an action of covenant, brought by Washington Smith, against James Bird, and determined in the Circuit Court of White county, on the 13th day of October, 1846, before the Hon. WILLIAM H. FEILD, Judge.

The declaration sets out an indenture entered into on the 9th Sept.

1839, whereby, in consideration of four hundred dollars, paid by the plaintiff to the defendant, the said defendant bargained, sold, and granted, unto the plaintiff, his heirs, &c., a certain tract of land, described as, &c., and did covenant and agree to and with the plaintiff, that he, the said defendant, would and did warrant and defend forever, the title of said land, &c., to said plaintiff; breach that, at the time of the execution of the indenture, containing the covenant of warranty of title, the defendant had no title whatever to the said tract of land. The defendant filed four pleas: 1st. That the cause of action had not occurred within five years; 2d. That the consideration of the indenture was to save the plaintiff harmless, as security of the defendant; 3d. That plaintiff had never been evicted by title paramount; 4th. That there is no covenant of warranty, &c. and that defendant has well and truly performed, fulfilled, and kept according to the true intent, &c. The plaintiff demurred to the pleas, and the court sustained the demurrer. The cause was submitted to the court, by consent of parties, for the assessment of damages.

The defendant sued out a writ of error, and has brought the case into this court for revision.

JORDAN, for plaintiff.

WATKINS & CURRAN, for defendant. The only question in this case, as we conceive, arises on the 1st plea, which sets up the limitation of five years; and, as the cause of action commenced at the date of the deed, if the plea be good in law, the plaintiff below was in fact barred, and the judgment will have to be reversed. In the construction of our statutes, there are but few questions involving to a greater extent than this, the rights of property. We had no statute limiting actions on writing obligatory, previous to the act of Dec. 14th, 1844, which fixed the limitation at ten years, except the common law presumption, arising from lapse of time, which, by statute, is reduced to ten years. As this provision (sec. 31) is in effect a limitation, applying to a particular class of cases, we think, upon a fair construction of the whole statute, it ought not to be controlled by the antecedent sec. 11, which provides, in general terms, "that all ac-

"tions, not included in the foregoing provisions, shall be commenc-"ed within five years after the cause of action shall have accrued." In *Dickerson* v. *Morrison,* 1 *Eng.* 266, the first case deciding this point, the court appear to have assumed the whole question, i. e. that the limitation was five years on a writing obligatory; and so the court seems to have taken it for granted in the next case of *Davis* v. *Sullivan,* 2 *Eng.* 452. The 11th section obviously applies to forms of action, and not to causes of action. In this particular case we admit that covenant as a form of action comes within the 11th section, and would be barred in five years, were it not for other provisions in the act. As ten years is the limitation in ejectment, it could not, we think, have been the intention of the Legislature to limit the grantee to five years, when he is liable, for ten years, to an outstanding dormant title. We regard the act of Dec. 14th, 1844, as a legislative interpretation of the statute, since it does nothing more than substitute a limitation of ten years, in lieu of the presumption of ten years, contained in the 31st section, which it repealed.

OLDHAM, J. The first plea filed by the defendant below, avers that the plaintiff's cause of action did not accrue within five years next before the commencement of this suit. It is insisted, for the plaintiff below, who is defendant in error, that, at the time of the institution of this suit, five years was not the statutory bar to his action. The statute of limitations contained in the Rev. St. ch. 96, after prescribing the limitation in which various actions were to be commenced, enacts, *sec.* 11, "All actions not included in the foregoing provisions, shall be commenced within five years after the cause of action shall have accrued." Covenant is not included in the previous provisions of the act, and is, therefore, necessarily limited to five years, by the 11th section, unless a different time is prescribed by some subsequent provision of the act. The defendant contends, that the 31st section fixes the time to ten years. This section enacts, that "after the expiration of ten years from the time the right of action shall accrue, upon any instrument for the payment of money or the delivery of property, such right shall be presumed to have been extinguished by payment, &c." The deed sued upon in this case is not "an in-

strument for the payment of money or the delivery of property," and consequently does not come within the provisions of this section. The breach complained of is, that the party had no title to the land for which he executed the deed, and of which, by the deed, he covenanted he was seized. Assumpsit and debt upon unsealed instruments are included under this section, yet they are specially limited to three years. The present action is as clearly embraced within the provisions of the 11th section, as it is possible for a general expression to include it.

We see nothing in the argument that leads us to doubt the correctness of the decisions in *Dickerson* v. *Morrison,* 1 *Eng. R.* 264. *Davis* v. *Sullivan,* 2 *Eng. R.* 452. We, therefore, are of opinion that the Circuit Court erred in sustaining the demurrer to the plea.

The second plea avers, that the deed was executed and delivered to the plaintiff, to indemnify him "as the security in bank for the defendant, for some three hundred dollars, and interest thereon." This plea is bad, because it does not show that the agreement was in writing. *Steph. Plead.* 376. If the agreement was merely by parol, there is no principle more universally adopted, by courts of law, than that parol evidence is inadmissible to add to, enlarge or vary the terms of a written contract. If the agreement of the parties as to the conditions, or intentions, upon which the deed was executed, was in writing, it should be shown by the plea; otherwise the deed is conclusive upon that subject. The third plea avers, that the "plaintiff has never been evicted or turned out of possession of said lands and premises." The words, *"grant, bargain, and sell,"* which are used in the deed declared upon, are, by the *Rev. Stat. ch.* 31, *sec.* 1-2, made "an express covenant to the grantee, his heirs and assigns, that the grantor is seized of an indefeasible estate in fee simple, free from incumbrance done or suffered from the grantor, except rents, or services that may be expressly reserved by such deed, as also for quiet enjoyment thereof against the grantor, his heirs and assigns, and from the claim or demand of all other persons whatever, unless limited by express words in such deed, and that the grantee, his heirs or assigns may, in any action, assign breaches as if such covenants were expressly inserted. The breach alleged in the declaration is, that the de-

fendant had no title to the land, which is a breach of the covenant of seizen. To constitute a breach of the covenant of seizen, an eviction is not necessary. *Mitchell* v. *Hayen,* 4 *Conn.* 495. *Pollard* v. *Dwight,* 4 *Cranch,* 430. *Logan* v. *Moulder,* I *Ark. R.* 313. *Tarwater* v. *Davis ex'r.* 2 *Eng.* 153. A covenant of warranty is different, and is not broken without eviction by title paramount to the grantor's, which must be set forth in the declaration. The plaintiff below, however, does not allege a breach of the covenant of warranty, but of the covenant of seizen.

The fourth plea is radically and substantially defective in every particular. It is certainly no response to the breach contained in the declaration. If it was intended as a plea of general performance, such a plea is not admissible as an answer to the declaration. The defendant should show the manner in which he had performed his covenant, by averring his title to the land conveyed. The first plea being a good answer to the declaration, the court erred in sustaining the demurrer to it, and for that reason the judgment must be reversed.