NOTES AND COMMENTS

COVENANTS

Running of a Covenant to Pay Assessments on Other Lands of the Grantor

The plaintiff's grantor, Michael Maher, conveyed a thirty-foot strip of land in the rear of his property to the grantor of the defendant. The consideration recited in the deed was two dollars and a covenant, "As part of the consideration of this deed, said grantee agrees to protect and save harmless the grantor from all assessments for the opening of Storer Avenue . . . as to said grantor's adjoining or abutting property." The defendant's deed to the land contained the clause, "and being the same land and subject to the same conditions contained in the deed from Michael Maher to the Farmers' and Drovers' Stockyards Co." The street was laid by the city. The defendant refused the demand of the plaintiff that the assessments be paid. The court ordered the defendant to pay the city of Cleveland the assessments levied on the plaintiff's land for the opening of the street. *Maher* v. *Cleve. Union Stockyards Co.*, 55 Ohio App. 412, 9 N.E. (2nd) 995 (1937).

The theory upon which the court bases its decision is that the covenant to pay assessments on other lands of the grantor is one running with the land; that is, the right to take advantage of the covenant will pass with a conveyance of the covenantee's estate, and the liability for its performance will pass to a subsequent grantee of the covenantor by a mere conveyance of the land of the convenantor.

To determine whether a particular covenant runs with the land, it may be necessary to examine its form and character as well as the intention of the parties. *Spencer's Case,* decided in 1583, laid down a rule as to the form of running covenants which has been referred to by many courts. According to the rule in *Spencer's Case,* 5 Coke, 16 A, 77 Eng. Rep. 72 (1583), if the covenant relates to a thing *in esse,* the word "assigns" need not be used in order for the covenant to run, but if it relates to a thing not in being, "assigns" must be named in the instrument of conveyance. *Maryland & P. R. Co.* v. *Silver,* 110 Md. 510, 73 Atl. 297 (1909); *Duester* v. *Alvin,* 74 Ore. 544, 145 Pac. 660 (1915). This technical rule has been abrogated by many courts. "The use of the words 'assignees' or 'heirs and assigns' is not necessary or

essential to create a covenant running with the land, and in determining whether a covenant will run the material inquiries are whether the parties intended to impose such burdens on the land and whether it is one that may be imposed consistently with principle and equity." *Johnson* v. *American Gas Co.*, 8 Ohio App. 124 (1917); *Masury* v. *Southworth*, 9 Ohio St. 34 (1859); *Frederick* v. *Callahan*, 40 Iowa 311 (1877); *Eche* v. *Fetzer*, 65 Wis. 55, 26 N.W. 266 (1886).

A covenant will not run with the land unless it "touches and concerns" the lands, its use, occupation, or enjoyment. The covenant must attach to the land or to some interest therein granted. *Whalen* v. *Baltimore & Ohio Ry. Co.*, 108 Md. 11, 69 Atl. 390 (1908); *Muscogee Mfg. Co.* v. *Eagle & Phenix Mills*, 126 Ga. 210, 54 S.E. 1028 (1906); *Northern Ohio Traction & Light Co.* v. *Quaker Oats Co.*, 114 Ohio St. 685 (1926); *Easter* v. *Little Miami Ry. Co.*, 14 Ohio St. 48 (1862); Tiffany, *Real Property*, 2nd Ed., sec. 392. "Covenant to run with the land must respect realty demised and have for its object something annexed to, inherent in, or connected with the land, and its performance or nonperformance must affect the nature, quality, value, or mode of enjoyment of the demised premises." *Epting* v. *Lexington Water Power Co.*, 177 S.C. 308, 181 S.E. 66 (1935). No specific standard can be set for determining when a covenant "touches and concerns" or is "inherent in or connected with" the land conveyed. In general, if a covenant deals with what might be termed the normal attributes of ownership, it can be said to "touch and concern" that estate; for example, (1) covenants to pay taxes on premises granted, *Post* v. *Hearney*, 2 N. Y. 394, 51 Am. Dec. 303 (1849); (2) covenants to erect and maintain fences, *Hickey* v. *Lake Shore, etc., R. R. Co.*, 51 Ohio St. 40, 36 N.E. 672 (1894); (3) and clearly those covenants which affect the actual physical use of the land granted such as restrictions on the type of structure which may be erected. *Booth* v. *Knape*, 225 N.Y. 390, 122 N.E. 202 (1919).

If the covenant is of such character that it can run with the land, the intention of the parties is a controlling factor in determining whether or not it does run in a particular case. *Sexauer* v. *Wilson*, 136 Iowa 357, 113 N.W. 941 (1907); *Milliken* v. *Hunter*, 80 Ind. 149, 100 N.E. 1041 (1913); *Pittsburg, C. & St. L. Ry.* v. *Bosworth*, 46 Ohio St. 81, 18 N.E. 533 (1888). The expressed intention that the covenant is not to run will prevent a covenant which would otherwise do so from running with the land. *Wilmurt* v. *McGrane*, 16 App. Div. 412, 45 N.Y. Supp. 32 (1897); *Masury* v. *Southworth*, *supra*. The converse, however, is not true, for the intentions of the parties cannot con-

vert a personal obligation into a real covenant. *Masury* v. *Southworth, supra; Consolidated Arizona Smelting Co.* v. *Hinchman*, 212 Fed. 813 (1914); *Calif. Packing Corp.* v. *Grove*, 51 Cal. App. 203, 196 Pac. 891 (1921). "Intention of original parties to the contract alone cannot create a covenant running with the land, but the nature of the covenant and its relation to the estate must in addition be such that the law will permit the intention to be effectual." *Lingle Water Users' Ass'n.* v. *Occidental Bldg. & Loan*, 43 Wyo. 41, 297 Pac. 385 (1931).

If the requirement of "touching and concerning" the estate granted is to have any meaning, an agreement to pay assessments on other lands of the grantor cannot be said to "touch and concern" the estate granted. It in no ordinary way affects the nature, quality, or value of the thing demised, nor does it affect the mode of enjoying the premises. The covenant is comparable to a stipulation providing for the means of paying the purchase price of the land, and the mere fact that the covenant was expressed in the deed as part of the consideration does not make it run with the land. *City of Richmond* v. *Bennett*, 33 Ky. Law Rep. 279, 109 S.W. 904 (1908); *Ft. Smith Gas Co.* v. *Gean*, 55 S.W. (2nd) 63 (1932); *Epting* v. *Lexington Water Power Co., supra.* "So a covenant to pay for the land in a particular way, as by paying off certain judgments against the grantor . . . is a covenant personal and not real." *Wells* v. *Benton*, 108 Ind. 595, 8 N.E. 444, rehearing 9 N.E. 601 (1886).

To further support its conclusion, the Ohio court applies the theory of assumption of the obligation by the defendant upon its taking the land "subject to the same conditions contained in the deed from Michael Maher." In a mortgage situation, in order for the personal obligation to pay the debt to pass with the land, the transferee must assume the liability, and the words "taking subject to" the mortgage are insufficient to render him personally liable, and the mortgagee can look only to the land which carries with it the debt. *Shepherd* v. *May*, 115 U.S. 505, 29 L. Ed. 456 (1885); *Tiffany, Real Property* (2d ed.) sec. 622. If the clause "taking subject to" is also inadequate to amount to an assumption when used in a case involving a personal covenant, the grantee should not be held liable on the covenant. On the other hand, if the words are to be given more weight when used under these facts, since the burden could not attach to the land, then the defendant had by their use simply contracted to assume the liability and there was no need for discussing the running of the covenant.

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