interest in divested and she has apparently no right in the proceeds as against her husband.[10] J. W. L.

The Nature of Restrictive Covenants — Enforcement by Covenantee Who No Longer Owns Land in the Community

A recent Ohio decision[1] involves the nature of restrictive covenants and the theories of their enforcement. A corner lot which had been part of a testamentary estate was transferred by a deed containing a restrictive clause forbidding the use of the premises for other than residence purposes. The restriction was stated to be for the benefit of certain named devisees and also to and for the benefit of the present and future owners of the real estate which the testator had owned on a particular street. An owner of property on the adjoining street joined with one of the named covenantees in seeking to enforce the covenant by injunction against a successor in title to the lot in question. Enforcement was denied on the grounds that no one on the designated street was objecting and that the covenantee who no longer owned land in the community would not "benefit" from enforcement of the restriction.

The character of the remedy sought indicates that the theory of the plaintiff's case was based on equity doctrines. A substantial reason for appealing to equitable jurisdiction is the specific nature of the remedy which equity affords. More often than not the party seeking to enforce a restrictive covenant is more interested in insuring the continuance of the limitation than in obtaining monetary compensation. Such a desire has been especially evident in the field of building restrictions in the development of residential subdivision plans and recourse to equity has been most frequent in this area.

When there is an attempt to enforce covenants by and against successors to the original covenating parties there are further advantages in the equitable approach. Many of the strict and rigid requirements,[2] like the necessity of privity, which were incident to the common law devices of easements and real covenants are relaxed or avoided in equity. The leading case[3] using the equity approach made the equitable doctrine

[10] *Weaver* v. *Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355 (1856). Also see *Long* v. *Long*, 99 Ohio St. 330, 124 N.E. 161, 5 A.L.R. 1343 (1920). Also see Tiffany, Real Property, 2d ed., vol. 1, sec. 230, p. 801.

[1] *Taylor* v. *Summit Post No. 19, American Legion, Inc.*, 60 Ohio App. 201, 27 Ohio L. Abs. 582, 13 Ohio Op. 215, 20 N.E. (2d) 267 (1938).

[2] *Hurd* v. *Curtis*, 19 Pick. (Mass.) 459 (1837); *Burbank* v. *Pillsbury*, 48 N.H. 475, 97 Am. Dec. 633 (1869); *Lingle Water Users' Ass'n* v. *Occidental Bldg and Loan Ass'n*, 43 Wyo. 41, 297 Pac. 385 (1931); note (1937) 4 O.S.L.J. 93; 1 Tiffany, Real Property, (2d Ed., 1920) sec. 54 (d).

[3] *Tulk* v. *Moxhay*, 2 Phil. (Eng. Ch.) 774 (1848).

of notice the basis for relief. The rule was said to be that a taker of land with notice of a restriction upon it cannot in good conscience be permitted to violate the terms of the limitation.

In the main, there are two principal theories as to the application of this equitable doctrine. One view treats the restrictions as contracts relating to the enjoyment of land;[4] the other treats them as creating interests in the land itself,[5] substantially like easements at common law.

An attempt to make the result conform to one or the other of the two theories may make a difference in the outcome in some situations. If the contract theory is adopted, it does not afford a very satisfactory explanation of the termination of the right by a change in the character of the neighborhood. The property theory, however, can justify the result as analogous to the doctrine of abandonment which was well developed for legal easements at the common law.[6]

Another instance where the result may be affected by the underlying theory is on the question of whether compensation has to be given to adjacent owners entitled to enforce the restrictions in cases where the property subject to the restrictions is taken by eminent domain.[7] The contract theory easily explains a refusal of compensation by construing the contract as one not binding upon the state in its sovereign capacity. The equitable easement doctrine logically leads to a contrary result: that the vested equitable interest in the land belonging to the owner of the

[4] 2 TIFFANY, *op. cit.*, p. 1437; Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 18 Col. L. Rev. 291 (1918) and 19 *id.* 177 (1919) discussing various theories; AMES, LECTURES ON LEGAL HISTORY, 381 (1913); C. I. Giddings, *Restrictions on the Use of Land*, 5 Harv. L. Rev. 274 (1892).

[5] Pound, *Progress of the Law*, 33 Harv. L. Rev. 813 (1892); A. W. Scott, *The Rights of the Cestui Que Trust*, 17 Col. L. Rev. 269, 281, 285 (1917); 2 TIFFANY, *op. cit.*, pp. 1434, 1435; C. E. CLARK, REAL COVENANTS AND INTERESTS RUNNING WITH LAND (1929) p. 153 *et seq.*; *Town of Stamford* v. *Vuono*, 108 Conn. 359, 143 Atl. 245 (1928).

[6] The Ohio cases in this area are reviewed in *Kokenge* v. *Whetstone*, (C.P.) 11 Ohio Op. 213, 26 Ohio L. Abs. 398 *aff'd* in 60 Ohio App. 302, 20 N.E. (2d) 965, 14 Ohio Op. 137, 28 Ohio L. Abs. 148, motion to certify overruled April 19, 1939. Waiver of the restrictions was claimed in the *Kokenge* case. On appeal, the restriction was upheld for the reasons: (1) that enforcement was still of substantial value to property owners in the subdivision; (2) that the intended purpose of the covenants could still be fulfilled; and (3) that in equity the restriction created easements on each lot in favor of every other lot creating the relation of dominant and servient estates.

[7] The rule in England is that payment must be made to the person otherwise entitled to enforce the restriction. *Re Simeon* (1937) Ch. 525, reviewing other cases. The majority rule in this country seems to be in agreement. *Peters* v. *Buckner*, 288 Mo. 618, 232 S.W. 1024, 17 A.L.R. 543 (1921); *Ladd* v. *Boston*, 151 Mass. 585, 21 Am. St. Rep. 481, 24 N.E. 858 (1890); *Flynn* v. *New York, W. & B. R. Co.*, 218 N.Y. 140, 112 N.E. 913, Ann. Cas. 1913B, 588 (1916); *Johnstone* v. *G. H. & M. R. Co.*, 245 Mich. 65, 222 N.W. 325, 67 A.L.R. 373 (1928). *Contra, Herr* v. *Bd. of Education*, 82 N.J.L. 610, 83 Atl. 173 (1912); *Doan* v. *Cleveland Shortline R. Co.*, 92 Ohio St. 461, 112 N.E. 505 (1915). *Cf., Kuebler* v. *Cleveland Short Line Ry Co.*, 10 Ohio N.P. (N.S.) 385, 20 Ohio Dec. (N.P.) 525 and memorandum opinion by Supreme Court in 84 Ohio St. 463, 95 N.E. 1145 (1911).

dominant estate because of its nature as a property right cannot be taken without compensation.

It is doubtful if the contract theory employed in the solution of the problem of the principal case materially affected the result. The same conclusion could have been reached under an easement theory. Under either approach, the problem should be resolved on the basis of the intention of the original parties. In a case of this kind, the court will be influenced not only by the surrounding circumstances and the terms of the instrument as a whole but also by its feeling as to the reasonableness of the alternative constructions.[8]

The occasions where the parties would actually desire to have the benefit of such a covenant enjoyed independent of the ownership of land actually affected in value by its enforcement, assuming they had in fact thought about the question, are probably rare. This fact coupled with a more or less articulate policy against encumbrances on fee interests in land[9] is enough to lead to a conclusion that the benefit of the restriction is appurtenant to the dominant land or is for the convenantee only in his capacity as owner. A different conclusion is justified only when there is a clear showing that the benefit of the covenant was intended to be in gross and enforceable regardless of whether the covenantee continues to own land affected by the enforcement.

Several courts have gone to the length of saying as a rule of law that the benefit of such a restrictive covenant cannot remain in gross when the burden is one running with the land.[10] This view is that no action to enforce a restrictive covenant may be maintained unless some elements of an equitable servitude are present. The minority position has been vigorously asserted in an Illinois decision[11] which has been supported by eminent authority[12] but criticised as well by numerous writers.[13] While the principal case contains language which could be interpreted as assuming this point against the plaintiff, the court does not discuss the problem.[14] In related fields there has been some tendency to make the

[8] see note 16, *infra.*

[9] See *Hitz* v. *Flower*, 104 Ohio St. 47, 57, 135 N.E. 450 (1922).

[10] *Dana* v. *Wentworth*, 111 Mass. 291 (1873); *Gaston* v. *Price*, 12 Tenn. App. 543 (1931); *Boyd* v. *Park Realty Corp.*, 137 Md. 36, 111 Atl. 129 (1920); *Formby* v. *Barker* (1903) 2 Ch. (Eng.) 539. Later English cases have followed the rule with some reluctance: see Annotation, 8 Brit. Rul. Cas. 120 (1919). The New York cases bearing on the question are discussed in Note (1938) 13 St. John's L. Rev. 93, 98.

[11] *Van Sant* v. *Rose*, 260 Ill. 401, 103 N.E. 194, 49 L.R.A. (N.S.) 186 (1913). *Cf.*, *Riverbank Improvement Co.* v. *Bancroft*, 209 Mass. 217, 95 N.E. 216 (1911) and *Bessinett* v. *White*, (1926) 1 Dom. L. Rep. 95. The latter is noted in 39 Harv. L. Rev. (1926) at p. 775.

[12] Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 18 Col. L. Rev. 291, 313 (1918).

[13] Collected in C. E. CLARK, *Op. Cit.* at pp. 159, 160.

[14] *Van Sant* v. *Rose* and Dean (now Justice) Stone's views are cited with approval in *Huber* v. *Gugliemi*, 29 Ohio App. 290, 163 N.E. 571 (1928). See also *Burton* v.

question of whether the benefit runs turn on a decision as to the running of the burden. Such a position is undesirable[15] either in the field of restrictive covenants or of easements and profits. Either in equity or law there are two distinct problems. Each involves the determination of a separable intention and distinct considerations of policy.

The result reached in the principal case is believed to fit well into the general scheme of enforcing restrictive covenants whenever their social expediency is sufficiently demonstrated.[16] No substantial reason was presented for permitting this covenantee to enforce the restriction. The case does not hold that the benefit of a covenant cannot be in gross. There may be some situations where such a covenant would be intended and where it would be desirable. A. N. M.

TORTS

Torts — Duty of Baseball Clubs to Provide for Safety of Patrons — Assumption of Risk

Plaintiff, familiar with baseball and the ball park, attended a game at defendant's park on "Ladies' Day." She obtained a seat for ten cents in the unscreened right pavilion more than one hundred feet from the batter. She could have obtained a seat in the screened grandstand by paying an additional twenty-five cents, as there were empty seats there, but she preferred to sit where she did. She was struck by a foul ball during the game. Held: that defendant was not liable for her injury.[1]

Plaintiff was an invitee of the defendant. It is usually said that an invitor is under a duty to use ordinary care to render the premises reasonably safe for his invitees.[2] In actions against baseball clubs, it is often said that the baseball club has discharged its duty to its invitees if it provides a screened section adequate to take care of the demands of the ordinary number of patrons who will desire that extra protection.[3] So where a foul ball curved around the screen and struck a patron sitting

Stapely, 4 Ohio N.P. (N.S.) 65, 17 Ohio Dec. (N.P.) 1, reversed by circuit court in 4 Ohio N.P. (N.S.) 73, which was reversed without opinion in 74 Ohio St. 461, 78 N.E. 1120 (1906).

[15] S. E. Clark, *op. cit.*, p. 80 *et seq.* and authorities there collected.

[16] In determining the validity of a covenant "inquiry should be made concerning the purpose of the same, the object, design, and reasonableness thereof." *Dixon* v. *Van Sweringen Co.*, 121 Ohio St. 56, 60, 166 N.E. 887 (1929).

[1] *Ivory* v. *Cincinnati Baseball Club Co.*, 62 Ohio App. 514 (1940).

[2] *Harriman* v. *Pittsburgh, etc., Ry. Co.*, 45 Ohio St. 11, 12 N.E. 451 (1887); *Flynn* v. *Central Rr. Co. of New Jersey*, 142 N.Y. 439, 37 N.E. 514 (1894).

[3] *Crane* v. *Kansas City Baseball & Exhibition Co.*, 168 Mo. App. 301, 153 S.W. 1076, 22 A.L.R. 633 (1913); *Cates* v. *Cincinnati Exhibition Co., et al.*, 215 N.C. 64, 1 S.E. (2d) 131 (1939).