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Quitable Servitudes - The Running of Covenants in Equity - Mckenrick V. Savings Bank of Baltimore

Comments and Casenotes

EQUITABLE SERVITUDES — THE RUNNING OF COVENANTS IN EQUITY

McKenrick v. Savings Bank of Baltimore[1]

Plaintiff by written agreement sold to the defendant a lot of ground 100 by 160 feet at the southeast corner of Reisterstown road and Slade Avenue in Baltimore. The vendor agreed to convey the property by a "good and merchantable" title, the defendant refused to perform, maintaining that the land was encumbered by restrictions. A common grantor formerly owned land on both sides of Slade Avenue of which this lot was a part. Over a period of years, he had made the following conveyances: North of Slade Avenue (1) a lot to W. with restrictions which would "apply to the whole tract of land" owned by the vendor north of Slade Avenue; (2) A conveyance to L. with additional restrictions; (3) A grant to F. with some similar and some different restrictions. South of Slade Avenue he had made: (1) A conveyance to N. which the parties agreed would run with the land conveyed; (2) A conveyance to Leys with similar restrictions; (3) A grant to M. with restrictions which differed from those of the N. and Leys grants. *Held*: The plaintiff's lot was unencumbered, and specific performance should be granted. (1) The prior grants do not show the existence of any uniform plan of development; (2) The only restrictions which apply to any of the land south of Slade Avenue are those in the grants to the south; (3) These deeds show an intention on the part of the grantor to confine the restrictions to the lots actually conveyed by him.

In considering the various perplexing problems relating to covenants running with the land, a distinction must be made between covenants which are said to run with the land at law, and those restrictive agreements which will be enforced in equity.

Legal covenants may be divided into those between lessor and lessee, and those created incidentally to conveyances in fee. As the name implies, covenants are basically contractual obligations under seal. Although no specific words are necessary for their creation, a seal is indispensable in

[1] McKenrick v. Savings Bank of Baltimore, 197 Atl. 580 (Md. 1938).

those jurisdictions which have not abolished its use.[2] In the majority of jurisdictions today, when the grantee accepts a sealed instrument signed by the grantor, he impliedly accepts the seal of the grantor and the covenants contained therein.[3] On the other hand, a few jurisdictions including Maryland require the instrument to be signed and sealed by both parties. Thus a deed poll, is ineffectual to bind the grantee[4] to covenants the burden of which rests on such grantee.

The rules regulating the running of covenants at law were enumerated in *Spencer's* case,[5] wherein three fundamental requirements were set out: (1) There must exist "privity of estate" between the covenantor and covenantee; (2) the covenant must touch and concern the land; and (3) if the covenants relates to something not in existence, it must expressly bind the assigns. The vagueness of these criteria has led to many conflicting opinions in their application. Each will be treated here in the order set out above.

The lessor-lessee relationship presents no problem of "privity of estate". This continuing tenure relationship produces a constant privity. The burden attaches to the leasehold estate, and the benefit to the reversion, or the converse may be true. In conveyances in fee, the continuing tenure is absent. Although meeting this requirement was originally attended with difficulty, most jurisdictions have held that an instantaneous privity exists between the grantor and grantee when the conveyance is made, and that if the covenants are created at that time, they simultaneously attach to that privity and enure to subsequent assignees.[6] Covenants created several days later have been held not to attach.[7]

When does a covenant "touch and concern" the land? This presents a problem difficult to determine, and impossible of solution unless the nature of the rights of the covenantee and the obligations of the covenantor are kept clearly in mind. These rights and obligations can be divided into two groups: Those relating to contract rights, and

[2] Tiffany, Outline of Real Property, 349.

[3] Ibid; Midland Ry. Co. v. Fisher, 125 Ind. 19, 24 N. E. 756 (1890); Sexauer v. Wilson, 136 Iowa 357, 113 N. W. 941, 14 L. R. A. (N. S.) 185 (1907).

[4] Dawson v. Western Maryland Ry. Co., 107 Md. 70, 68 Atl. 301, 14 L. R. A. (N. S.) 809, 126 Am. St. Rep. 337 (1907). As shall be noted later, this is not essential for equitable relief.

[5] Spencer's Case, 5 Coke 16; Glenn, Ex'r., v. Canby, 24 Md. 127 (1866): but see Union Trust Co. v. Rosenburg, 171 Md. 409, 416, 189 Atl. 421; noted (1937) 1 Md. L. Rev. 320.

[6] (1937) 1 Md. L. Rev. 320.

[7] Wheeler v. Schad, 7 Nev. 204 (1871).

those which exist because they attached to the privity of estate. These can be illustrated by a recognized and commonplace covenant—the covenant of the lessor to convey to the lessee upon the fulfillment of specified conditions. The contract right is apparent. A duty exists on the part of the lessor which creates a right in the lessee. How does this touch and concern the land? The contract duty creates a burden on the lessor's reversionary estate as it is subject to divestment. Correspondingly, the right created in the lessee operates as a benefit to the leasehold estate because it can be enlarged. Thus it can be seen that the burden "touches and concerns" the reversionary estate while the benefit "touches and concerns" the leasehold estate.

The burden or the benefit may run independently of the other. The burden may be in gross, while the benefit runs with the land or vice versa.[8] This proposition is illustrated by covenants on the part of the grantee not to engage in a competing business. The burden has been held to run with the land conveyed, while the benefit remains in gross. It has been reasoned that the benefit remains personal inasmuch as it touches only the financial and not the physical advantage of the land.[9] Maryland in a similar case has taken the contrary and more sound view that both may run with the land.[10]

Whether a covenant "touches and concerns" the land is determined in Maryland by the following test laid down in *Glenn v. Canby*,[11] " . . . a covenant to run with the land must extend to the land so that the thing required to be done will affect the quality, value or mode of enjoying the estate conveyed, and thus constitute a condition annexed or appurtenant to it . . ." In *Whalen v. Baltimore & Ohio R. R.*[12] this rule was construed, without discussion, to allow to run a covenant to maintain a railroad siding and one to take up and set down passengers, but a covenant to set off railroad cars for the purposes of unloading was held not to run. A covenant to maintain a public station was held not to run because the advantage to the land was merely incidental.[13]

The third rule of *Spencer's* case, that if the covenant relates to something not *in esse*, it must expressly bind the

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[8] Clark, Covenants and Interests Running With the Land, 80.
[9] Shade v. O'Keefe, 260 Mass. 180, 156 N. E. 867 (1927).
[10] Clem v. Valentine, 155 Md. 19, 141 Atl. 710 (1928).
[11] Supra, note 5, 24 Md. 127, 130.
[12] 108 Md. 11, 69 Atl. 390, 129 Am. St. Rep. 423, 17 L. R. A. (N. S.) 130 (1908).
[13] Md. and Pa. R. R. Co. v. Silver, 110 Md. 510, 73 Atl. 297 (1910).

"assigns", has lost much of its importance. A number of jurisdictions have expressly failed to recognize it, while others have minimized its effect by holding that, if upon the face of the whole agreement the intent is to bind the assigns, the court will give it that effect. The rule has met with favor in Maryland at law; and, as will be noted later, under some circumstances in equity. However, a definite modification is seen in *Union Trust Co. v. Rosenburg*.[14]

If both the burden and benefit of a covenant run with the land, the rights and liabilities of the parties are easily seen. As the covenantor's obligation is contractual, he always remains liable for any breaches whenever they occur. The assignee of the covenantor is liable only for breaches occurring during his ownership of the estate. After he has assigned, there no longer exists privity of contract or estate upon which to attach his liability. The covenantee can enforce the obligations for breaches occurring only while he owns an estate in the land. After he assigns the land, his contract rights pass to the assignee.[15]

Restrictive agreements may be divided into three groups: First, those enforceable both at law and in equity; second, those enforceable only at law;[16] and, third, those enforceable only in equity.

In this discussion only the third type will be considered. This type of restrictive covenant or agreement concerns itself principally with the intent of the parties, as it is usually obvious that the covenant does touch and concern the land. The question of privity of estate in the technical and legal sense is absent, since the doctrine is well established that equity is not fettered by the technical requirements which beset courts of law in giving effect to covenants affecting land.[17] This principal is aptly phrased in the leading case of *Tulk v. Moxhay*[18] wherein it is stated " . . . The question is not whether the covenant runs with the land, but whether a party shall be permitted to use the

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[14] *Supra*, note 5. The Court cites with approval from 15 C. J. 1244: "The rule which now seems sustained by the better reasoning, as well as by the weight of authority, is that where a covenant is of such nature and character that it may run with the land, the words 'heirs and assigns' are not controlling if it can reasonably be inferred from the language of the instrument that the parties intended that the covenant should run with the land."

[15] As to the necessity of bringing suit in equity if the covenantee-assignee fails to bring suit until after he has assigned, see Donelson v. Polk, 64 Md. 501, 2 Atl. 824 (1885); and a criticism (1937) 1 Md. L. Rev. 320.

[16] *Supra*, note 12.

[17] Newbold v. Peabody Heights Co., 70 Md. 493, 17 Atl. 372, 3 L. R. A. 579 (1888).

[18] 2 Phillips 774 (1848).

land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased."

Several theories have been advanced by courts of equity in enforcing restrictive agreements which will not sustain a suit at law. The view most widely adopted is that such restrictions are equitable easements or servitudes.[19] The extent to which equitable easements are in the strict sense interests in land is questionable. Some jurisdictions have held oral as well as written agreements are enforceable in equity. This view would probably not be followed in Maryland. Agreements restricting the use of land have been held in Maryland to be within the scope of the provisions of our recording statute.[20] Recording is not essential if there be actual notice, and, unless the restrictions are incorporated into the deed, there is no provision for their separate recording. Yet, it is well settled that memorandum independent of the deed is sufficient to impose the restrictions if the purchasers take with notice.[21] It also seems that equitable easements are enforceable in the absence of the grantee's signature. If a purchaser takes with notice, restrictions will be enforceable against him "however created."[22]

Whether equitable easements are property interests requiring compensation for their violation in condemnation proceedings has not been uniformly decided. New York has held such interests are property rights[23] entitled to compensation, while Ohio and California[24] have considered them mere contract rights, and not within the purview of constitutional provisions providing compensation for seizure of private property for public use. The New York view, sounder in theory, may be less desirable on the grounds of public policy. That an electric railroad company by running cars over one corner of a large subdivision should compensate every owner, however remote, does not seem desirable.

However the majority of the cases confronting the courts have not concerned the quality of the interest created. Most of the problems resolve around the questions of who may create the covenants, who may be bound by them, and what is essential that they be enforceable *inter sese* by subsequent grantees. A grantor may convey property and impose

[19] Thruston v. Minke, 32 Md. 487 (1870).
[20] Art. 21, Sec. 1. Lowes v. Carter, 124 Md. 678, 93 Atl. 216 (1915).
[21] Newbold v. Peabody Heights Co., *supra*, note 17.
[22] Ringgold v. Denhardt, 136 Md. 136, 110 Atl. 321 (1920).
[23] Flynn v. N. Y., W. & B. Ry. Co., 87 N. Y. 311, 119 N. E. 913, Ann. Cas., 1918B, 584 (1916).
[24] Doan v. Cleveland Short Line Ry., 92 Oh. St. 461, 112 N. E. 505 (1915).

restrictions on the part conveyed without imposing similar restrictions upon himself in such manner as not to bind the land retained. On the other hand, he may bind both the land conveyed and that retained in such manner that the mutual benefits and obligations will be enforceable between subsequent grantees.[25]

The fact that a covenant may be a benefit or a restriction upon adjoining land is alone not sufficient to bind subsequent grantees of the adjoining tracts. A clear intent must be shown that the restrictions are intended not merely for the benefit of the immediate parties, but for the benefit of the land itself.[26] Intention is a matter of fact to be proved by the rules of evidence, and the intention of the parties will not be presumed.[27] The soundness of this rule is not open to question, and the importance of intention becomes even more essential when considering enforcement *inter sese* among a number of lot owners. However, this emphasis on intention may be reflected in two ways. The first relates to the intention of the parties as to whether the burden or benefit is meant to attach to the land at all. This aspect seems to be the controlling feature in the Maryland cases. The second theory, the one which seems to be the fundamental, necessary, and practical one, emphasizes intent to show what land the restriction is meant to "touch and concern". This necessity arises only where the grantor conveys a part of the land, and retains a much larger tract of land, or where the grantor owns several disconnected tracts of land in the same vicinity as the part conveyed. Intention looms large here as a practical matter. The benefit or burden may be such that in its nature it touches and concerns all the land, and unless the intention can be ascertained, the restriction must, of necessity, be held to be in gross. Where a grantor, owning only two lots which adjoin, conveys one of them with mutual restrictions which *inter sese* benefit and burden the respective lots, the question of intent should be absent.

One of the clearest and most unmistakable ways of showing intent is by the wording of the instrument itself. The most appropriate method of showing intention in this jurisdiction is by stating that the restrictions or benefits therefrom are to bind the "assigns". This principal is reflected throughout the Maryland cases, and it has been stated that where assigns did not appear it was apparently

[25] Wood v. Stehrer, 119 Md. 143, 86 Atl. 128 (1912).
[26] Summers v. Beeler, 90 Md. 474, 45 Atl. 19 (1899).
[27] Sowers v. Holy Nativity Church, 149 Md. 434, 131 Atl. 785 (1926).

deliberately omitted.[28] In the opinion of the writer the Maryland court has overemphasized the importance of the word "assigns." A number of cases have stated that if it be the intention to bind the assigns, it must be so stated, or that the intention must be shown from the instrument itself.[29] Despite the statement of this inflexible rule, other methods are recognized in this state—as shall be noted later, surrounding circumstances may be an important factor. The fact that a restriction "touched and concerned" the land would seem in itself an indication that the land, and not the individual was intended to be benefited.

If the second theory of showing intention, that it is necessary to determine what land will be benefited or restricted, be the correct theory, it is hard to realize how the word "assigns" is any key to the intent of the parties in this respect. "Assigns" might go to show that some land would be bound, but does not help determine whether all the land in the vicinity owned by the grantor, whether connected or separate from that conveyed, will be restricted or benefited, or whether the restriction is to apply only to the adjoining land.

The conclusion of our court is an application of the third rule in *Spencer's* case which early became firmly imbedded in the Maryland law. This requirement is deemed by many writers and a number of jurisdictions to be due to an incorrect report of the case, and which if given effect is more properly a technical requirement of the law courts. In *Halle v. Newbold*[30] the court said "that a grantor may impose a restriction in the nature of a servitude or easement, upon the land that he sells or leases, for the benefit of the land he still retains; and if that servitude is imposed upon the heirs and *assigns* of the grantee, and in favor of the heirs and assigns of the grantor, it may be enforced by an assignee of the grantor against the assignee (with notice) of the grantee". The inference which has subsequently been drawn from that statement is that the heirs and assigns must be expressly designated.

The theory that intention is necessary to determine what land is to be bound rather that whether any land is to be restricted or benefited is further evidenced by allowing parties who purchase from a uniform subdivision to enforce the agreements of their common grantor *inter sese*

[28] Wood v. Stehrer, *supra*, note 25, 119 Md. 143, 149.

[29] Ross v. McGee, 98 Md. 389, 56 Atl. 1118 (1904); Halle v. Newbold, 69 Md. 265, 14 Atl. 662 (1888); Md. & Pa. R. R. Co. v. Silver, 110 Md. 510, 73 Atl. 297 (1910).

[30] *Supra*, note 29.

whether or not the "assigns" are designated. The existence of a uniform subdivision shows what land is intended to be restricted, so that a purchaser may feel reasonably sure that for a number of feet or blocks he will not be disturbed by any business enterprises, that all the houses in his block conform to a certain pattern or that he will have an unobstructed view within certain territorial limits. The emphasis seems to be on what land the restrictions and benefits are to apply.

The case of *Wood v. Stehrer*[31] presents an insight into the emphasis on "assigns". The grantor conveyed a lot 150 by 90 feet covenanting that he would not convey his remaining land of equal size except subject to the same restrictions. The grantor died without conveying. His heirs conveyed without imposing the restrictions. The court held, and correctly so, that the land was not restricted.

One of the reasons given by the court was the failure of the grantor to bind his "assigns". An examination of the wording of the agreement irrespective of the use of the word "assigns" shows that it purported to be a personal undertaking. In other words, the covenant did not "touch and concern" the land. It did not purport to impose a burden upon it at that time, but created a personal agreement on the part of the grantor that he would burden his land if and when he conveyed. If a burden is an equitable servitude it must in the nature of its terms create a servitude and the words heirs and assigns cannot accomplish that effect. Assuming that the covenant had been such as to create an equitable servitude, the first grantee might have gone to considerable trouble and expense carrying out the servitude which had been imposed by the grantor upon the grantee's land, only to find that grantor had conveyed the remaining lot without imposing the restrictions, leaving the first grantee without an equitable remedy against the purchaser of the remaining lot because the grantee had failed to require that the assigns be designated.

In *Ringgold v. Denhardt*[32] the grantor had subdivided her land and built a number of houses according to a plan imposing in the deeds a covenant against building out-buildings, but did not designate the benefit to be for her "assigns". She sold a lot to the defendant subject to the restrictions. Other lots of the grantors were sold free from restrictions. There was not sufficient evidence of a general

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[31] *Supra*, note 25.
[32] *Supra*, note 22.

plan. The grantor died, the son either by inheritance or purchase became the owner of the remaining lots. Held, the benefit was in gross, the son could not restrain because "assigns" had not been designated. The conclusion was correct, but could not the result have been placed upon the ground that there was no showing of an intent on the part of the grantor as to which of her land was to be benefited. Had a number of other purchasers whose land was not restricted built according to their own desires, could it be contended that the mere use of "assigns" gave the son a right to restrain the sole owner whose land was restricted? It would seem not. There was no way of showing what remaining land was intended to be benefited—therefore, the benefit was intended to be in gross.

From surveying the Maryland cases one gets the impression that the court is prompted by sound public policy in construing covenants strictly, and in requiring intent to be clearly shown in order to bind subsequent grantees. The court reasons that a grantor may by omitting the word "assigns" intend only to bind himself so as not to hinder him from disposing of his remaining property, since he wishes only to benefit himself as he no longer has an interest to protect after he has conveyed. This policy of equity exists to keep the land as free and unencumbered as possible in favor of future purchasers. This is reflected in the principal case wherein the court quotes from *Himmel v. Hendler*. After stating that restrictive covenants are in derogation of the natural right which the owner of the property has to use as he sees fit, the court adds: "Therefore, one of the cardinal canons of construction when dealing with such covenants is to construe them strictly against the person in whose favor they are made, and liberally in favor of the freedom of the land."

A definite public policy is further reflected by the fact that technical requirements are not essential to show intent when the rights of purchasers in a uniform subdivision are involved. Restrictions are more favored here because purchasers expect to benefit by the uniformity of the plan. Where there is no uniformity of plan the court is induced to keep the land as free and unencumbered as possible by making the technical requirements for the creation of equitable easements more strict.

Maryland follows another sound policy in holding that once the grantor has divested himself of all interest in the remaining land, he no longer has sufficient interest in the covenants he has imposed to give him standing in a court of

equity to procure their enforcement[33] However, from this, it could well be argued that the benefit, provided it touched and concerned the land, would therefore cling to the land even though the assigns were not bound. It seems an anomaly to hold a benefit enforceable only while the grantor remained on the land, and to treat that benefit as a personal one only.

The final problem for consideration concerns the rights of grantees of a number of lots to enforce *inter sese* restrictions imposed by their grantor. A sharp distinction must be drawn here between the rights of a prior purchaser against a subsequent purchaser, and the broader rights of a subsequent purchaser against a prior purchaser. In order for the subsequent purchaser to enforce restrictive covenants against a prior purchaser he must show first that the covenant "touches and concerns" his land. Next, he must show that the covenantor and covenantee intended to confer the benefit upon his land. This can be shown by the language of the covenant itself—if the common grantor reserved the benefit to his remaining land, and not merely to himself, a subsequent grantee of all or part of this remaining land can enforce the restriction against the prior grantee. A clear indication that the grantor is reserving the benefit for his land, can best be shown, as already noted, by binding the assigns. However, if a natural interpretation of the language shows that intent, the assigns need not be designated. If the common grantor has failed to make the intent appear in the instrument itself, the subsequent purchaser may still enforce the restriction against a prior purchaser providing the grantor has inserted similar restictions in all of his conveyances of the remaining lots. This shows the intention that all the lots are to be equally benefited and restricted. When a subsequent purchaser of one lot enforces these restrictions against the prior purchaser of another lot the theory is that these benefits were for any subsequent purchaser who purchased with notice, and that the appearance of the restrictions were an inducement to the purchase.

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[33] The following cases deal with the general subject of enforcement inter sese. Halle v. Newbold, *supra*, note 29; Newbold v. Peabody Heights Co., note 17; Summers v. Beeler, *supra*, note 26; Wood v. Stehrer, *supra*, note 25; Lowes v. Carter, *supra*, note 20; Ringgold v. Denhardt, *supra*, note 22; Boyd v. Park Realty Corporation, 137 Md. 36, 111 Atl. 129 (1920); Bealmer v. Tippett, 145 Md. 568; 125 Atl. 806 (1924); Sowers v. Holy Nativity Church, *supra*, note 27; Clem v. Valentine, *supra*, note 10; Kleis v. Katcef, 160 Md. 627; 154 Atl. 558 (1931); Bartell v. Senger, 160 Md. 685, 155 Atl. 174 (1931); Himmel v. Hendler, 161 Md. 181, 155 Atl. 316 (1931).

However, when a prior purchaser attempts to enforce a restriction against a subsequent purchaser another theory must be advanced because it can hardly be said that the future restrictions were an inducement to the prior purchase. Therefore, the prior purchaser must show more than the fact that the agreement between the grantor and the subsequent purchaser were entered into for his benefit before this benefit can enure to his advantage. He has the burden of showing that when he purchased his lot, he had the expectation of having benefits conferred upon him in the future. If at the time the prior grantee purchased his land, the grantor burdened his remaining land, and not merely burdened himself personally, the prior grantee has at hand in the wording of the grant, the proof of his expectation, and any subsequent purchaser of the remaining land will take subject to this restriction if he has notice, either actual or constructive. On the other hand, if the grantor fails to burden his remaining land, the prior grantee has one remaining method of proving this expectation—this can be proved by showing that the land of the grantor was advertised as a restricted uniform subdivision. The mere existence or future development of a subdivision with equal restrictions is not enough to show this expectation.

The holding of the principal case is undoubtedly correct. Any of the other lot holders would be in the position of a prior grantee in attempting to impose restrictions on the plaintiffs' lot. In each of the restrictions placed in the three grants south of Slade Avenue exclusive of the plaintiff's lot, there was no covenant on the part of the grantor to hold the remaining land subject to the same restrictions. The grantor placed a restriction on the lots sold without imposing a reciprocal obligation on the land retained by him. Due to the variations in the restrictions placed upon the three lots sold, there was no evidence of a uniform plan. Had the restrictions been similar in the three lots sold, the prior grantees in order to impose the restrictions on the plaintiff's lot would have to show an expectation to benefit by similar restrictions in subsequent grants. Mere existence or development of the uniform plan would not have been sufficient. A prior grantee must show that he purchased from an advertised uniformly restricted subdivision or that the grantor had imposed reciprocal obligations on the land retained by him. Neither of these elements was present here. At the most the grantor burdened these prior grants, and retained to himself, or the land remaining, a benefit.

Some of the facts in the case afford excellent opportunity for speculation. In granting the first lot on the north of Slade Avenue the parties covenanted for themselves, their heirs and assigns that the land granted should be subject to certain restrictions, which should "apply to the whole tract of land" north of Slade Avenue. *Quaere,* had the suit involved land north of Slade Avenue, and had the word "heirs and assigns" been omitted would the other terms have been sufficient to establish the burden and the benefit on the remaining land or would they have been held to be in gross? It would seem here that the term to "apply to the whole tract" north of Slade Avenue would have been sufficient expression of intent without the use of the word "assigns."

In conclusion two interesting rules present themselves. In the principal case the Court said: ". . . that where the covenants in a conveyance are not expressly for or on behalf of the grantor, his heirs and assigns, they are personal and will not run with the land, but that, if in such a case it appears that it was the intention of the grantors that the restrictions were part of a uniform general scheme or plan of development and which should affect the land granted and the land retained alike, they may be enforced in equity." If the first part of the rule was intended to be an expression of the Maryland law as laid down in previous cases in regards to covenants running with the land in general, in both law and equity, it would seem somewhat inaccurate. The court says if the assigns are not designated, the covenants will not run with the land. This statement apparently overlooks two angles as developed in former cases. First, if the covenant relates to something *in esse,* it is not necessary to bind the "assigns". Second, in the recent case of *Union Trust Co. v. Rosenburg*[34] a covenant was held to run with the land at law despite the fact that the thing was not *in esse* (a covenant to pay taxes), and despite the fact that the heirs and assigns were not designated. The rule as thus stated can be readily explained. The majority of cases arising in equity have dealt with restrictive covenants wherein the thing concerned was not *in esse,* and the court in mentioning the necessity for "assigns" had no occasion to designate the rule for things which were *in esse;* and, as this case arose in equity, the majority of the cases reviewed by the court were equity decisions.

An excellent statement of what the writer believes to be a summary of the law as laid down in Maryland cases decided both before and since the statement was made, as

[34] *Supra,* note 5.

regards enforcing restrictive covenants in equity, was formulated by Judge Digges in *Clem v. Valentine*,[35] wherein he succinctly stated:

> "As a result of the examination of the many cases involving this question, and the reasons which the courts have assigned for reaching their conclusions, we are of the opinion that the application for relief in such cases is addressed largely to the conscience of the court and is governed by equitable principles; that if the language of the covenant, the respective positions of the parties, and the surrounding circumstances, taken singly or together, show that the covenant was entered into for the benefit of the land retained by the covenantee, creating on equity or right appurtenant to the land, to be exercised by such person as for the time being is the owner thereof, it will be enforced, without regard to whether the covenant does or does not run with the land conveyed, or whether or not it is a general scheme or plan of development of the property in question."[36]

THE DOCTRINE OF IMPLIED WARRANTY BETWEEN RESTAURANT-KEEPER AND GUEST

Child's Dining Hall Co. v. Swingler[1]

Plaintiff-appellee ordered a crabcake sandwich in a restaurant operated by defendant-appellant, and was served it at a table in that restaurant. As she was eating the last remaining small piece of the bread she bit down on a piece of tin which was imbedded in the bread. The piece of tin lodged between her teeth, was later removed, but caused an abscess which necessitated removal of a tooth, and caused severe shock and pain. The suit was originally framed in tort but was amended to assumpsit, alleging an express warranty, and at the trial, to meet the proof, a second amended declaration alleging an implied warranty was filed. The lower court granted plaintiff's implied warranty prayer, and refused defendant's demurrer prayer. From a judgment for the plaintiff, defendant appeals. ***Held,*** two judges dissenting: Reversed and remanded. No im-

[35] *Supra*, note 10, 155 Md. 19, 28.

[36] A collection of excerpts from Maryland cases is found in Best, Restrictions and Restrictive Covenants.

[1] 197 Atl. 105 (Md. 1938).