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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—Mr. Justice Holmes, Collected Legal Essays, p. 269.

The University of Missouri School of Law regrets to announce the death of Judge John D. Lawson. Judge Lawson died Friday, October twenty-eighth, in Chicago and was buried in Columbia, Mo. Judge Lawson came to the University of Missouri in 1891 as professor of Contracts and International Law. In 1903 he was made Dean of the School of Law and continued in this capacity until 1912. At that time he was compelled to resign on account of his failing health. He was greatly beloved by all the students who came to this school while he was connected with it. He had great capacity for inspiring the students and has made marked contributions to legal literature. It is not too much to say that his name is familiar to every lawyer in the United States.

NOTES ON RECENT MISSOURI CASES

MORTGAGES—VALIDITY OF DEED OF TRUST GIVEN TO SECURE THE DEBT OF A THIRD PARTY. *Finnerty* v. *Blake Realty Co.*[1] Plaintiff brought an action to restrain foreclosure, under a power of sale, of a deed of trust, which was given by plaintiff and her husband, Thomas Finnerty, to secure payment of their recited joint note

1. (1918) 276 Mo. 332, 207 S. W. 772.

for $6,000 dated April 1st, 1908, and payable to one Willemsen three years from date. As a matter of fact no such note was ever executed by plaintiff. She never intended to execute such a note, or that the deed of trust should secure any obligation whatever to Willemsen, or to anyone else. So far as plaintiff was concerned, apparently she only gave the deed of trust to help her husband in his business if such aid could be given without the deed's serving as security for any real debt. Thomas Finnerty, however, at the time that the deed was executed, did, without plaintiff's knowledge or consent, give his own individual promissory note to Willemsen for $6,000 together with the deed of trust, intending that it should secure any obligation that might arise from the note, and Willemsen, without giving value to Thomas Finnerty, endorsed the note in blank, without recourse, and delivered it with the deed of trust back again to Thomas Finnerty.

Thomas Finnerty then recorded the deed of trust and kept it and the note, which it was intended to secure, in his possession until its maturity at which time the note was extended by Willemsen for a period of five years and left with the deed of trust in Finnerty's keeping. Thereafter, Thomas Finnerty purchased some property from one Crebs, giving Crebs purchase money notes in payment of the same, and depositing with Crebs as collateral security for the payment of these notes, the Willemsen note and deed of trust. Still later Crebs sold the purchase money notes, and assigned along with them the Willemson note and deed of trust to Blake Realty Co. After the Blake Co. had purchased these notes, Thomas Finnerty defaulted in the payment of the same, and the Blake Co. duly foreclosed the pledge, purchasing itself the Willemsen note and deed of trust. The Blake Co., having thus become the owner of the deed of trust and the note secured thereby, caused a foreclosure sale to be commenced at the proper time, and at this point plaintiff brought this action, claiming that the deed was not valid as to her interest in the property because she had not made the conveyance to secure *any debt whatsoever.* The Circuit Court issued an injunction restraining foreclosure of the deed as to plaintiff's interest and upon appeal the Supreme Court affirmed the decree.

The Supreme Court held that the deed of trust so far as plaintiff was affected thereby was a nullity. In this connection the court said: "A conveyance of real property by a mortgage or deed of trust in the nature of a mortgage can only be effective as such when given to secure a pre-existing, then created or after-arising obligation, or the performance of some duty entailing a pecuniary liability. Absent therefore, the existence of a debt, and the necessary consequent relation of debtor and creditor between the grantor and the grantee there can be no mort-

gage or deed of trust. (*Sheppard* v. *Wagner* 240 Mo. l. c. 433.)"[2] The court then found that plaintiff had incurred no indebtedness in any of the above enumerated transactions, and accordingly held that the deed as to plaintiff was not a valid security. The court also suggested that even conceding that Thomas Finnerty might be indebted under the Willemsen note, and the deed effective to cover his interest in the land conveyed, still this fact would not affect plaintiff's rights because the deed, to pass her interest as security would have to secure *her* debt. Said the court: "Therefore whatever binding force the conveyance had in securing the payment of the debt evidenced by the note, was limited to his (i. e. Thomas Finnerty's) interest in the real estate described and not to that of the respondent (i. e. plaintiff's). This because it was not her debt * * *."[3]

Whenever a mortgage is given and it secures no obligation whatever, it cannot be foreclosed and the plea that there was no debt secured will defeat an action of foreclosure. Indeed the mortgagor can show, under such a plea by parol evidence that the debt recited as secured never did exist, and that no debt at all was intended to be secured or was secured. Equity has always regarded a mortgage as being merely incidental to the debt, and it is always provable that no debt existed.[4] Now in the instant case apparently there never was any debt which was to be secured by plaintiff's deed and therefore the result of the decision was probably correct.[4a] It is not, however, the purpose of this note to discuss this problem, but rather to inquire into the soundness of the general rule stated by the court to the effect that there never can be a valid mortgage or deed of trust unless the same is given to secure the debt or obligation of the the *mortgagor* or *grantor*. Must there, as the court argues in the principal case, be a debtor-creditor relation between the grantor and the grantee? Suppose that A desires to aid B in borrowing money from C, and in order to accomplish this result he gives to C a mortgage or deed of trust to secure money loaned by C to B at his, A's, request. Is it possible that upon foreclosure, in the event of B's default, that A can defeat the action by showing that he, A, is not the principal debtor and that he did not incur any debt himself? If such is the rule, it should be distinctly understood by the business community, as it would seem to go contrary to the normal con-

2. (1918) 276 Mo. l. c. 338, 207 S. W. 772.

3. (1918) 276 Mo. l. c. 338, 207 S. W. 772.

4. *Harwood* v. *Toms* (1895) 130 Mo. 225, 32 S. W. 666; *Lappin* v. *Crawford* (1909) 221 Mo. 380, 120 S. W. 605; *Schaeppi* v. *Glade* (1902) 195 Ill. 62, 62 N. E. 874; *Fisher* v. *Meister* (1872) 24 Mich. 447. See also *Crews* v. *Lombard* (1916) (Mo. App.) 182 S. W. 825.

4a. See *infra* note 11.

ception as to the nature and functions of a mortgage. Moreover, it should be pointed out that such a rule will lead directly to the proposition that every time a married man procures his wife to join in a mortgage to secure merely *his* debt, or obligation, the wife's dower rights will not be affected by the mortgage, or pass as security, "this because it was not her debt" [5] that was secured.

"A mortgage is a security for the performance of an agreement, which is usually to pay a sum of money. Leaving out of view other agreements than those for the payment of money, it is essential that there be an agreement, either express or implied, on the part of the mortgagor, *or some one in whose behalf he executes the mortgage, to* pay to the mortgagee a sum of money. If there is no debt there is no mortgage."[6] The requirement of a debt is fundamental, because, if there is nothing to secure, the mortgage can have no purpose for existing, but it is one thing to say that there must be a debt, and another to say that the debt must be that of the mortgagor. Why cannot a mortgagee buy security from the mortgagor to secure the debt of another, and why cannot the extension of credit to that other be the consideration furnished for the security given by the mortgage?[7] It is believed that as a matter of principle and justice that this ought to be possible and there is authority so holding.

In *Herron* v. *Stevenson*[8] a mortgagor gave a mortgage to secure a note upon which her three sons were liable as endorsers, but with which note she had no connection whatever. The court held that the mortgage was valid and this although the mortgagor secured no pecuniary advantage as a result of the transaction. The case of giving a mortgage to secure the debt of another has arisen most frequently where a wife has conveyed her property to secure the obligation of her husband. Such a mortgage is generally held to be valid and the cases in Missouri are in accord. In *Johnson* v. *Franklin Bank*[9] it was held that a wife could validly give a deed of trust on her separate property to secure the pay-

5. 276 Mo. l. c. 338. The quotation is from the opinion in the principal case.

6. *Henley* v. *Hotaling* (1871) 41 Cal. 22, p. 28.

7. As a matter of simple equity the mortgagee ought to succeed. A man who has advanced money on the faith of security may well lose "his all" if his security is denied him. For this very reason equity has always specifically enforced contracts to give a mortgage if the plaintiff's side of the agreement has been executed. *Hermann* v. *Hodges* (1873) L. R. 16 Eq. 18; *Irvine* v. *Armstrong* (1883) 31 Minn. 216; *Dean* v. *Anderson* (1881) 34 N. J. Eq. 496. The mortgagee's "equity" is just as great in a case where the credit to be secured is extended to a third party as where it is extended to the mortgagor and the same principles should govern.

8. (1918) 259 Pa. St. 354, 102 Atl. 1049.

9. (1903) 173 Mo. 171; 73 S. W. 191.

ment of her husband's note, although she received no benefit from the transaction.[10] It is urged that the rule embodied in the decisions, last cited, are in direct conflict with that stated in the case under review, but because there were other grounds on which the decision in the principal case might have been rested, it is not believed that the former cases are necessarily overruled. The matter, however, at this time is in doubt, and it is to be hoped that the Supreme Court may have an early opportunity to explain the exact holding in the *Finnerty* case, and settle the question as to the functions of a mortgage.[11]

It is to be noted that the court in the instant case cited *Sheppard* v. *Wagner*[12] to support the proposition that the validity of a mortgage or deed of trust depends on the relation of debtor and creditor between the parties to the instrument. In that case the question for determination was whether or not the transaction between the parties was a mortgage or a conditional sale. The court, quoting from *Bobb* v. *Wolff*[13] said: "While the courts have applied many tests to disclose the true nature of the transaction, whether an absolute deed or a mortgage, the one sure test, and essential requisite has ever been 'the continued existence of a debt' from the grantor to the grantee in the deed. If there is no debt, the instrument cannot be a mortgage whatever else it may be, but if the investigation develops an existing indebtedness by the grantor to the grantee * * * the courts have with great unanimity construed the deed to be only a mortgage." [14]

In the connection in which the quoted statement was made it was sound and proper. If a real mortgage is disguised as a conditional sale,

10. See accord *Jones* v. *Edeman* (1909) 223 Mo. 312, 122 S. W. 1047. In *Schneider* v. *Stahr* (1855) 20 Mo. 269, a wife mortgaged her separate property to secure her husband's obligation. It was held that but for the wife's minority, she electing to avoid the mortgage, that it would have been valid and enforceable. See *accord Hagerman* v. *Sutton* (1887) 91 Mo. 519, 4 S. W. 73; *Rines* v. *Mansfield* (1888) 96 Mo. 394, 9 S. W. 798; *Barrett* v. *Davis* (1891) 104 Mo. 549, 16 S. W. 377; *Ferguson* v. *Soden* (1892) 111 Mo. 208, 19 S. W. 727; *Hach* v. *Hill* (1891) 106 Mo. 18, 16 S. W. 948; *McCollum* v. *Boughton* (1895) 132 Mo. 601, 30 S. W. 1028. See also *Wilcox* v. *Todd* (1877) 64 Mo. 388; *Thornton* v. *Bank* (1879) 71 Mo. 221; *Melcher* v. *Derkum* (1891) 44 Mo. App. 650; *Bell* v. *Bell* (1908) 133 Mo. App. 570, 113 S. W. 667.

11. In *Graham* v. *Finnerty* (1921) 232 S. W. 129, the same transaction as in the principal case was again before the Supreme Court. The court stated (232 S. W. l. c. 130) that its former decision, i. e., the one under review, held the deed of trust void as to plaintiff because it was given as security without her authority. The court did not refer at all to the proposition here under discussion to the effect that a deed of trust must secure the grantor's debt. A discussion of this point was unnecessary to its decision. There has therefore been no direct repudiation of this proposition.

12. (1911) 240 Mo. 409, 144 S. W. 394.

13. (1898) 148 Mo. 335, 49 S. W. 996.

14. 240 Mo. l. c. 433.

the apparent seller or grantor has a right to prove this fact, have the instrument reformed and to redeem.[15] Naturally, the way to prove that the transaction was in reality a mortgage was to show that there was a debt between the parties and that the conveyance was given to secure that debt, and if there was no debt proven to exist the grant could not have been considered a mortgage. Moreover, as the only debt which the plaintiff claimed to exist was one alleged to be due from the grantor to the grantee, it was natural and proper for the court to say that in that case there would have to be found to be a debt due from the former to the latter. In *Bobb* v. *Wolff*[16] the question before the court was similar to that in the *Sheppard* case, namely, whether a deed absolute on its face was to be construed as a mortgage, and the court again held that it could not be so construed unless it was shown that there was a debt intended to be secured from the grantor to the grantee. This also was a correct decision, and as again the only debt, which it was asserted existed was one stated to be due from the grantor to the grantee the court said that the obligation had to run from that person. But suppose that in either of these cases the absolute grant had been made by the grantor, not to secure his own debt, but that of another person. It is believed that the decision under these conditions could and should have been the same, because there was a debt, and an intention to give the land as security.[17]

In other words, the emphasis in the above discussed cases is not to be laid especially on the fact that the *grantor* owed money and secured the same, but on the fact that there was *some debt* (which happened in both of the cases mentioned to be that of the grantor) to secure which the conveyance was made by the grantor. It is believed that the *Sheppard* and *Bobb* cases do not stand for the proposition that in all cases a mortgage or deed of trust to be valid must secure the debt of the mortgagor, or grantor, but merely hold that without a debt there cannot be a mortgage. Accordingly, it would seem that neither case sustains the rule for which it was cited in the *Finnerty* case.

P. M. M.

PRACTICE—DIRECTION OF VERDICT FOR THE PARTY HAVING (a) THE BURDEN OF PROOF AND (b) THE DUTY OF GOING FORWARD WITH THE EVIDENCE. *Downs* v. *Horton*.[1] Attention should be called to an error in a note on this subject in the

15. *Sheppard* v. *Wagner, supra,* note 12. *Bobb* v. *Wolff, infra,* note 16. See generally L. R. A. 1916 B. 18, note.

16. 148 Mo. 335, 49 S. W. 996.

17. See *Villa* v. *Rodriguez* (1870) 12 Wall. (U. S.) 323, *accord* with suggestion.

1. (1921) 230 S. W. 103.

last issue of the Law Series. It was there incorrectly stated that *Quisenberry* v. *Stewart*[2] is the *last* case in Missouri holding that the court will not direct a verdict for the party having the burden of proof where there is no contradictory evidence.

Just before the note was written, the decision in *St. Louis Trust Company* v. *Hill*[3] was handed down in accord with the *Quisenberry* case. Since that time two decisions, *Lafferty* v. *Kansas City Casualty Company*[4] and *Foster* v. *Metropolitan Life Insurance Company*,[5] have been given which are in full accord with the rule announced in the *Quisenberry* case.

There have been other recent decisions, said to be in accord with the above general rule, which should be considered. They are especially interesting in the study of the question of directing the verdict for the proponent of an issue. These are bills and notes cases where plaintiff claims to be a *bona fide* purchaser for value before maturity and defendant pleads fraud in the inception and knowledge by plaintiff as the defense. It has recently been held by the Supreme Court that where the holder of the instrument shows by uncontradicted testimony that he is the holder in good faith for value before maturity, and the maker offers no evidence of knowledge upon the part of plaintiff, the alleged *bona fide* purchaser for value before maturity, of the fraud the plaintiff —the holder—is entitled to a directed verdict.[6]

The decision in these cases turned upon the meaning of Section 854 R. S. Mo. 1919, which states, "- - - but where it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title in due course, - - -". It might seem from that statute that the burden of proving no knowledge of the fraud is upon the plaintiff. It was so held in the early decisions[7] under the statute and the courts refused to direct a verdict for the holder. *Hill* v. *Dillion*,[8] decided by the Springfield Court of Appeals, in 1913, was authority for holding that the burden was on the holder, and that the court could not direct a verdict for him. The court there stated that though it would have been proper to direct the verdict in such a case prior to the passing of this section in 1905, it would not now be proper

2. (1920) 219 S. W. 625, 22 Law Series p. 46.
3. (1920) 223 S. W. 434.
4. (1921) 229 S. W. 750.
5. (1921) 233 S. W. 499.
6. *Downs* v. *Horton* (1919) 209 S. W. 595.
7. *Link* v. *Jackson* (1911) 158 Mo. A. 63, 139 S. W. 588; *Johnson County Savings Bank* v. *Mills* (1910) 143 Mo. A. 265, 127 S. W. 425.
8. (1913) 176 Mo. App. 192, 161 S. W. 881.

to direct for the holder, he being made the proponent by the statute. But other decisions[8a] were made which held that the term *burden* in the statute did not mean burden of proof, but burden of evidence, or as it is more commonly called, the burden of going forward, and that under the statute the defendant, the maker of the instrument, held the burden of proving that plaintiff knew of the fraud. Under this reasoning, it was held, the verdict could be directed for the holder of the note without violating the general rule, that a verdict cannot be directed in favor of the party having the burden of proof.

In the recent case of *Downs* v. *Horton*,[9] the Springfield Court reversed its ruling in the *Hill* v. *Dillion, supra,* and held that the statute in question only placed the burden of going forward on the holder after proof of fraud in the inception and it was not only proper, but that it was the duty of the trial court to direct a verdict for the holder, if the plaintiff-holder showed by uncontradicted testimony that he was a holder in due course for value before maturity and the maker offered no evidence of knowledge of the fraud. This decision was affirmed by the Supreme Court in a very able and lucid opinion written by Ragland, C. The learned writer of the opinion called attention to other Missouri decisions, not bills and notes cases, which had held that a verdict should be directed by a trial court against the party having the duty of going forward with the evidence, who fails to go forward.[10] The decision was later followed by the St. Louis Court of Appeals in *Ensign* v. *Crandall*,[11] and is now without doubt, the law in the state on this point.

It is submitted that this is a sound decision as a matter of principle and highly desirable. The refusal to direct in such cases frequently resulted in destroying the rule as to *bona fide* purchasers of commercial paper. In cases where the maker has been defrauded, and failed to receive value for his note, juries were strongly inclined against returning verdicts in favor of holders in due course. Verdicts for defendants frequently rendered by juries, in cases of this type, would without doubt in time seriously affect the prime object of the law of negotiable paper, viz, that negotiable paper shall have as nearly as possible the attributes of currency.

A review of the cases will demonstrate that whether a verdict could be directed for the holder in a bills and notes case before and after the section in question (which is a part of the N. I. L.) was passed in 1905

8a. *Reeves* v. *Letts* (1910) 143 Mo. App. 196, 128 S. W. 246; *Bank* v. *Railroad* (1913) 172 Mo. App. 662, 155 S. W. 1111.

9. (1919) 209 S. W. 595.

10. *Morgan* v. *Durfee* (1879) 69 Mo. 469, 33 Am. Rep. 508; *Rubcottom* v. *Telegraph Co.* (1916) 194 Mo. App. 234, 186 S. W. 749.

11. (1921) 231 S. W. 675.

was in a state of confusion and uncertainty.[11a] Why then, we are inclined to ask, should the courts be bound, hard and fast, by a rule forbidding the direction in favor of the proponent? It is submitted that these cases involve the same principles as the cases where a party has the burden of proof and there is no contrary evidence. The court is deciding that certain evidence is true, and is not permitting a jury to pass upon the credibility of witnesses who are not impeached and whose testimony is not improbable, when it decides that the burden of going forward has not been met and directs a verdict. The sole reason assigned why it has not the power to direct a verdict for the party with the burden of proof is that to do so is to deprive the jury of its power to decide whether the oral evidence of the witnesses is worthy of belief. In neither case, it is thought, is there an invasion of the province of the jury because in each instance there is no *issue of fact* for the jury to decide. The reasons for this position, viz, that there is no *issue of fact* to be decided and therefore nothing to go to the jury, will not again be set forth here as they have been fully set forth in the previous note mentioned at the outset of this note.[12]

P. M. P.

EVIDENCE—PRESUMPTIONS NOT EVIDENCE. *Stack* v. *General Baking Co.*[1] In the above case James Carroll testified that he had never been convicted of petit larceny. He was shown a record of conviction of James Carroll for petit larceny. The witness explained that the James Carroll mentioned in the record was his uncle. The court excluded the record. The appellant argued that there was a presumption of identity of persons from identity of names. The Supreme Court of Missouri did not question the presumption but held that it disappeared as soon as the witness testified as above set forth, and affirmed the judgment of the trial court.

The soundness of this decision, it is believed, cannot be questioned successfully. However, there appears to have been considerable confusion in other opinions of the Missouri courts in dealing with presumptions. In *Gitt* v. *Watson*,[2] a contest over the legal title to certain land, the rule was thus stated: "Both plaintiff and defendant claimed under Shaver. If there was a want of identity between the Shaver named by

11a. *Johnson* v. *Grayson* (1910) 230 Mo. 380, 130 S. W. 673; *Hamilton* v. *Marks* (1876) 63 Mo. 167; *Johnson* v. *McMurry* (1880) 72 Mo. 278; *Wright Inv. Co.* v. *Friscoe Realty Co.* (1903) 173 Mo. 72, 77 S. W. 296; *Bank* v. *Hammond* (1907) 124 Mo. A. 177, 101 S. W. 677.

12. 22 Law Series, p. 46.

1. (1920) 223 S. W. 89.

2. (1853) 18 Mo. 274.

the defendant in deducing his title, with the Shaver who owned the certificate of location, the burden of proof was on the plaintiff. The names being identical, *prima facie* they are the same person, and it rests with the plaintiff to show that they are not the same."

The opinion in *Flournoy* v. *Warden*[3] except for one statement that may be construed as stating that a presumption is a rule of evidence seems sound in maintaining that a presumption results from identity of names.

In *State* v. *Moore*[4] it was stated that "identity of name is *prima facie* evidence of identity of person" and in reality it could have been decided that there was a presumption which prevailed since there was no evidence to the contrary. In *State* v. *McGuire*[5] the presumption was properly handled. In *Geer* v. *Lumber and Mining Company*[6] it was stated: "We think, therefore, the practicable rule should be that when the names of the grantor and grantee are the same and the land conveyed is identical, the proof of identity is *prima facie* sufficient." There seems to be no objection to such a statement.

Bland, J., in *Produce Exchange Bank* v. *North Kansas City Development Company*, by way of dictum, suggests that there is a "presumption of law that identity of name is evidence of identity of person."[7] This declaration may be questioned. The matter may be stated in this fashion. John Jones may be shown to be grantee in deed "A" and grantor in deed "B". Such a showing may be said to constitute evidence of identity of person.[7a] Whether any presumption will arise upon such a showing is an entirely different matter.[8] If it does arise, the presumption is not itself evidence.[9]

How is a jury to weigh a rule of law, a presumption, with items of evidence? The significant effect of a presumption is to throw on the party against whom it operates the burden of *going forward* with the evidence.[10] In fact, presumptions are a part of the substantive law and

3. (1853) 17 Mo. 435.

4. (1875) 61 Mo. l. c. 279.

5. (1885) 87 Mo. 642. In *Long* v. *McDow* (1885) 87 Mo. 197 there is *dictum* that identity of name is *prima facie* evidence of identity of person. See *Jones* v. *Lumber Co.* (1920) 223 S. W. 63, l. c. 69.

6. (1895) 134 Mo. 85, 34 S. W. 1099. *Keyes* v. *Munroe* (1915) 266 Mo. 114, 180 S. W. 863 affords no basis for the position that the presumption of identity of person from identity of names is an item of evidence. See *Hunt* v. *Searcy* (1901) 167 Mo. 158, 67 S. W. 206.

7. (1919) 212 S. W. (Mo. App.) 899.

7a. See instruction three for plaintiff in *LaRiviere* v. *LaRiviere* (1883) 77 Mo. 512, 514. Compare *Stack* v. *General Baking Co.*, note 1, *supra*.

8. 4 Wigmore on Evidence, sec. 2529. *Huston et al* v. *Graves* (1919) 213 S. W. 77.

9. Hinton's Cases on Evidence, pp. 79-80.

10. Thayer's Preliminary Treatise on Evidence, pp. 563, 575; 4 Wigmore on Evidence, sec. 2491.

do not properly belong to the law of evidence.[11] In considering the particular presumption in the above cases, it is a matter of common reasoning among men that if one meets one James Carroll he is probably the same James Carroll of whom he has heard. Such facts so often repeat themselves that the process of reasoning is cut short and a rule of substantive law is laid down, to the effect that where there is an identity of name it will be presumed there is an identity of person. Any evidence to the contrary, however, will render the presumption unsafe to rely upon. The result is that it vanishes immediately upon the introduction of contrary evidence. The presumption itself is not and cannot be evidence and it has no probative force. If the party against whom the presumption operates fails to bring forward evidence the case will be settled by virtue of the presumption. It is not settled that way because the presumption is evidence, but since there is no evidence at all, the case is to be so decided according to a rule of substantive law resulting from the identity of names. Nevertheless, there are too many courts which assert that a presumption is evidence or has probative value.[12] It is not believed that this point of view is either theoretically sound or a satisfactory rule from practical considerations.

The opinions in Missouri with reference to the presumption arising from identity of names have been fairly uniform. There is no attempt here to consider many other presumptions. A few decisions, however, which throw light on the major subject are worthy of attention.

In *State* v. *Shelley*[13] Sherwood, P. J., uttered a dictum that the presumption of innocence "in every case is to be regarded by the jury as *matter of evidence* to the benefit of which the party is entitled." This is *stated* to be erroneous in *State ex rel* v. *Ellison*[14] where Blair, J., wrote a commendable opinion.[15] It is not only *stated* that: "The presumption itself is not evidence," but it is held that it is erroneous in a civil case upon an insurance policy, the defense being arson, to give an instruction that there is a presumption of innocence of a person alleged to be guilty of a crime "just as in the trial of a person charged with crime."

11. Thayer's Preliminary Treatise on Evidence, p. 326-327.

12. See for example *Graves* v. *Colwell* (1878) 90 Ill. 612; *Clifford* v. *Taylor* (1910) 204 Mass. 358, 90 N. E. 862; *Barber's Appeal* (1893) 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90 (the reasoning as to the nature of a presumption seems clouded. Compare *Wheeler et al* v. *Rockett et al* (1917) 91 Conn. 388, 100 Atl. 13, a well reasoned opinion stating that the presumption of sanity would have no probative force. See Thayer, Preliminary Treatise, p. 564, n. 1.); *Hawkins* v. *Grimes* (1852) 52 Ky. 257; 8 Col. L. R. 127 (Confused discussion. Compare 9 Col. L. R. 435; 15 Col. L. R. 457.)

13. (1901) 166 Mo. 616, 66 S. W. 430.

14. (1916) 268 Mo. 239, 187 S. W. 23.

This is the correct position though it is admitted by Blair, J., that the contrary practice has been followed very often in Missouri without disapproval.

In *State* v. *Kennedy*[16] it was held not to be error to refuse an instruction upon the presumption of innocence. The court, however, did not base its holding upon the proposition that a jury has nothing to do with a presumption. Rather the court concluded that an instruction on reasonable doubt was the legal equivalent of an instruction on presumption of innocence and that the evidence of guilt in the case was too clear to warrant a reversal of the judgment even if the instruction should have been given. It was also suggested that it is better practice to give such an instruction. Sherwood, J., concurred in the opinion reluctantly and because the evidence satisfactorily demonstrated the defendant's guilt.[17] This probably explains his remark in *State* v. *Shelley, supra.*

The contrary point of view was ruled by Lamm, J., in *Cornelius* v. *Cornelius.*[18] It was there held that it was error to refuse to instruct the jury that "the law presumes" that counsel given by a father to his son is in good faith. It was stated that the argument upholding the trial court "pressed home would overturn the necessity of giving the rule of law in criminal cases of a presumption of innocence." Apparently the ruling in *State* v. *Kennedy, supra,* was not in the mind of the writer. In any event it would seem as if there is very little left of this particular part of *Cornelius* v. *Cornelius* after *State ex rel* v. *Ellison, supra.*

In *Reynolds* v. *Casualty Co.*[19] Brown, C., for the majority, discussed the existence of a presumption in case of a death either accidental or suicidal. It is not clear that he thought that a presumption should be considered an item of evidence. The gist of his opinion on this point seems to be that in determining the nature of the death "the unreasonableness of the theory of suicide must receive due consideration in weighing it against the more reasonable and natural theory of accident." There seems to be no particular objection to that proposition which certainly is not a declaration that a rule of law known as a presumption has of itself evidentiary value.

Faris, J., dissented in a brilliant opinion, in which Bond and Wood-

15. It would have been better, however, if the opinion had not attempted to follow a lot of useless terminology concerning presumptions. See 4 Wigmore on Evid., secs. 2490-2493 inclusive.

16. (1899) 154 Mo. 268, 55 S. W. 293.

17. The Supreme Court of Missouri refused to follow the unfortunate opinion of Mr. Justice White in *United States* v. *Coffin* (1895) 156 U. S. 432, 15 U. S. Sup. Rep. 394. See Thayer's Preliminary Treatise on Evidence, p. 551. Compare 9 Harv. L. R. 144.

18. (1910) 233 Mo. l. c. 36, 135 S. W. 65.

19. (1917) 274 Mo. 83, 201 S. W. 1128.

son, JJ., concurred. In this opinion we believe that the true nature of a presumption is stated by Faris, J., as follows: "The moment explanatory evidence comes into the case the presumption dissolves into thin air and becomes as wholly non-existent as though it never had had existence."[20]

It seems to follow therefore that a presumption is not itself evidence and it should follow that a jury or trier of fact should not be instructed in terms of presumptions,[21] for example, that certain presumptions exist which should be considered and weighed with the evidence in deciding questions of fact.

P. M. M.

EQUITABLE RESTRICTIONS UPON THE USE OF LAND—EMINENT DOMAIN—RIGHT OF COVENANTEE TO COMPENSATION. *Peters* v. *Buckner, et al.*[1] Applications were made for writs of prohibition and mandamus. By the first writ it was sought to prevent the taking of property, through condemnation proceedings, for school purposes without allowing to plaintiffs the value of a restrictive covenant, which would be violated by the use to which the land taken was to be put. The object of the second writ was to compel the assessment of these damages in the condemnation proceedings. Meadow Park Land Company for purposes of sale had laid out into lots a new district in Kansas City. A plat of the addition had been recorded. On this certain building lines had been marked and other restrictions had been noted. These restrictions forbade the erection of buildings for other than residential purposes and fixed a minimum value of the houses thus to be built. Some of the lots within the addition had been conveyed by the

20. One may wholly agree with Faris, J., in his incisive analysis of presumptions and yet not agree with his conclusion as to the facts. It is also possible that one may disagree with both opinions as to the conclusions reached as to the nature of the death. The plaintiff had the burden of *convincing* that death was accidental; defendant had the burden of *convincing* that death was suicidal. One may not be convinced as to either proposition but find himself unable to come to any satisfactory conclusion. In that event the defendant should have had judgment. See for a similar situation *Winans et al. v. Attorney General,* House of Lords (1904) App. Cas. 287, opinion by Earl of Halsbury, L. C.

21. *McKenna* v. *Lynch* (1921) 233 S. W. 175 held the following instructions erroneous: "You are further instructed that the burden of proving contributory negligence on the part of the deceased, Michael McKenna, is upon the defendant, the presumption is that the deceased was in the exercise of ordinary care for his own safety at the time of his death, and this presumption continues until overthrown by a preponderance of greater weight of the evidence." Compare instruction number four for plaintiff in *La Riviere* v. *La Riviere* (1883) 77 Mo. 512.

1. (1921) 232 S. W. 1024.

land company, and each deed contained provisions, in the form of covenants, restricting the use of the land as mentioned. The deeds gave to each owner a right to enforce the restrictions as against all owners in the addition and stated that the covenants were made for the benefit of the grantor "and its past or future grantees of other lands" in the addition. Proceedings were instituted by the local school district to take land in this addition for the purpose of erecting thereon a school house. It was conceded that the construction of the building would be a violation of the restriction, if done by a grantee under the land company. Plaintiffs were owners, under the land company, of a lot adjacent to the land which the school district was seeking to condemn, and the land so to be taken was admitted by all concerned to be subject to the burdens in favor of plaintiffs.

The question in the condemnation proceedings was whether plaintiffs were entitled to compensation for the destruction of the restriction. The circuit court held that they were not because the restriction was not property within the meaning of the constitution. The Supreme Court granted the two writs and required the circuit court to allow damages to plaintiffs. All of the judges who concurred in the decision of the court considered plaintiff's right, as a covenantee, a property right,[2] an easement. One judge, over the dissent of the others, suggested that in any event plaintiffs should be compensated for the collateral damage that would result to them from such a use of the land.[3]

In 1848 the decision of Lord Cottenham in *Tulk* v. *Moxhay*[4] introduced a new kind of burden on the land of another. In that case plaintiff sold certain lands to one Elms, requiring of him an agreement in the deed that a certain part of the parcel conveyed should always be kept as a garden. The purpose of the covenant was to benefit other lands of plaintiff, and to enable plaintiff's tenants in the enjoyment of this other land to have the use and the benefit of the garden on this adjacent land granted to Elms. Elms conveyed the land to defendant, who had notice of the agreement. Defendant threatened to violate the restrictions but a court of equity enjoined the contemplated breach. Had plaintiff brought his action at law upon the covenant, judgment would have been for defendant since law courts deny that burdens of this nature run with the land.[5] English law, as distinguished from equity, has recognized for the most part two types of incorporeal rights which attach to ownership of land and pass with it into the hands of whomsoever it may

2. (1921) 232 S. W. l. c. 1027.
3. (1921) 232 S. W. pp. 1028, 1029.
4. (1848) 2 Philips 774.
5. *Brewster* v. *Kidgill* (1763) 12 Mod. 166; *Austerberry* v. *Oldham* (1885) 29 Ch. 750; *West Virginia Trans. Co.* v. *Pipe Line Co.* (1883) 22 West Va. 600, 46 Am. Rep. 527; *Brewer* v. *Newbold* (1868) 19 N. J. Eq. 344.

come:[6] (1) covenants running with the land, which operate within a very narrow field,[7] and (2) rights, which are easements—true property rights in the land of another—, burdens imposed on one estate for the benefits of another.[8] But again the creation of easements are restricted to a very narrow field and only such easements can be created as have been immemorially recognized and sanctioned by law.[9]

The general rule in equity where one agrees with another that his property shall be subject to certain burdens for the benefit of property belonging to his promisee, is that the agreement is specifically enforceable.[10] It should be clear in such a case that damages for a breach of the agreement will not afford an adequate remedy. This is so because the acts which the covenantor agreed to are to be done on the covenantor's land which is beyond the control of the covenantee. The latter cannot take money awarded as damages and purchase the burden. The burden is unique because it is associated with the *covenantor's* land.

If it is once conceded that the covenantee is entitled to specific relief from his covenantor, it will follow that the covenantee will be entitled to the same relief against anyone claiming under the covenantor with notice of the agreement. It is accordingly well established that the covenantee can enforce the burden as against all claiming under the covenantor, who are not *bona fide* purchasers for value.[11] But a *bona fide* purchase will cut off the right of enforcement, which would seem to indicate quite clearly that the covenantee's right is merely an *equity*, and not a right legal in its nature.[12] Because the subject matter of the agreement is land, it might be argued that these burdens should be kept within definite and defined limits, and some courts have refused to enforce them unless they "touch and concern the land,"[13] thereby affording an apt illustration of the application of the maxim that "equity follows the law." But for the most part such has not been the rule and the covenant has

6. Holmes, The Common Law, chap. XI.

7. Tiffany, Real Property, 2d ed., secs. 344-346.

8. On this distinction, see Holmes, The Common Law, chap. XI.

9. *Hill* v. *Tupper* (1863) 7 H. & C. 121.

10. *Tulk* v. *Moxhay, supra,* note 4; *Franklyn* v. *Tuton* (1821) 5 Maddock 469; *Manners* v. *Johnson* (1875) 1 Ch. 673; *Hood* v. *Ry. Co.* ( ) 8 Eq. 666; *Prospect Park etc. R. R.* v. *Coney Island etc. R. R.* (1894) 144 N. Y. 152, 39 N. E. 17. See also *Stevens* v. *Realty Co.* (1902) 173 Mo. 511, 73 S. W. 505; *Sharp* v. *Cheatham* (1885) 88 Mo. 498; *Keating* v. *Korfhage* (1885) 88 Mo. 524; *St. Louis etc. Co.* v. *Kennett Estate* (1903) 101 Mo. App. 370, 74 S. W. 474.

11. *Coughlin* v. *Barker* (1891) 46 Mo. App. 54 (*dictum*); *Rodgers* v. *Hosegood* (1900) L. R., 1900, 2 Ch. 388. See also *Sharp* v. *Cheatham, supra,* note 10.

12. *Carter* v. *Williams* (1870) 9 Eq. 678; *Wilson* v. *Hart* (1866) 1 Ch. App. 463; *London Co. v. Gomm* (1881) 20 Ch. 562, p. 583.

13. *Norcross* v. *James* (1885) 140 Mass. 188, 2 N. E. 946.

been enforced against all grantees under the covenantor with notice, unless of course the court in a particular case has inclined to the opinion that the particular burden imposed is contrary to some policy of one kind or another.[14] These rights have usually been described as restrictions, because the covenants are usually of a negative character, but this is accidental, it would seem, and a covenant imposing affirmative action on the covenantor should be and has been recognized as enforceable.[15]

Who may enforce these rights? It is certain that if the parties to the original agreement intend that the burden shall be for the benefit of the covenantee alone, he alone will have the right to enforce it.[16] But suppose that it is the intention of the parties that the benefit shall run with the land of the covenantee. If this really is the purpose of the parties the benefit ought to run and the cases so hold.[17] Indeed, it has been held that a subsequent grantee of the favored land may enforce the covenant even though he did not know of the existence of the covenant at the time he acquired title.[18] The theory, apparently, is that the equitable right is appurtenant to and a part of the legal title. This, of course, is not literally the case.

In cases where there is an express statement that the benefit of the covenant is to pass with the land, there is no difficulty in determining the rights of subsequent grantees of the covenantee. The only matter that will usually prevent the running of the benefit is a *bona fide* purchase of the servient estate, a release or a waiver by the covenantee or one of his

14. *Robinson* v. *Webb* (1880) 68 Ala. 393; *Frye* v. *Partridge* (1876) 82 Ill. 267; *Stines* v. *Dorman* (1874) 25 Ohio St. 580; *American Co.* v. *Paper Co.* (1897) 83 Fed. 619.

15. *Merlin* v. *Cock* (1868) 6 Eq. 252; *Sharp* v. *Cheatham* (1885) 88 Mo. 498; *Carsen* v. *Percy* (1879) 57 Miss. 97. If performance of the contract involved continuous activity by the covenantor or his successors in title, a court could refuse specific performance on the ground that equity will not supervise performance of such an agreement. See *Beck* v. *Allison* (1874) 56 N. Y. 366. But apparently this difficulty has not as a rule deterred the courts from granting relief in this class of cases. See *Jones* v. *Parker* (1895) 163 Mass. 564, 40 N. E. 1044; *Lane* v. *Newdigate* (1804) 10 Vesey 192. In the case last cited the decree of the court was negative in form, *i. e.* the court forbade the defendant to break his agreement, but this in truth, it is submitted, is the same as enforcing specifically the covenant.

16. *Keats* v. *Lyon* (1869) 2 Ch. 218; *Clark* v. *McGhee* (1896) 159 Ill. 518, 42 N. E. 965; *Haines* v. *Einwachter* (1903) 55 Atl. (N. J.) 38; *Clapp* v. *Wilder* (1900) 176 Mass. 332, 57 N. E. 692.

17. *Nottingham Brick etc. Co.* v. *Butler* (1901) 16 Q. B. 261; *Coughlin* v. *Barker, supra,* note 11; *Coudert* v. *Sayre* (1890) 46 N. J. Eq. 386, 19 Atl. 190; *Bower* v. *Smith* (1909) 76 N. J. Eq. 456, 74 Atl. 675; *Lattimore* v. *Livermore* (1878) 72 N. Y. 174. See also *Baker* v. *St. Louis* (1879) 7 Mo. App. 429, aff'd. 75 Mo. 671.

18. *Rodgers* v. *Hosegood, supra,* note 11; but see *contra DeGray* v. *Monmouth Beach etc. Co.* (1892) 50 N. J. Eq. 329, 24 Atl. 388 (*dictum*).

grantees.[19] Often the intention is not expressed. The rule, however, is clear. It is a problem of ascertaining the intention and it will have to be discovered in the circumstances accompanying the covenant.[20] It seems safe to say, however, that the courts are prone to impute an intention to benefit the land of the covenantee, if only the nature of the burden imposed is such as will be calculated to enhance the value of the land as *land*.[21]

Sometimes covenants are expressly or by implication exchanged between the parties with the end in view of imposing burdens on the land of each of the covenantors in favor of the land of the other and it may be the intent of the covenantors that the benefit of the covenant shall run with the land. In this case there is no objection to the benefit running and, as in the case of a single covenant, if the intention is present, it will run.[22] Mutual covenants are usually found in cases similar to the one under review, where a large tract of land is divided for sale into lots, all of which are subject to the same restrictions. Because the owner in such a case plans to sell the lots, it is usually held that the sole purpose of the imposition of the burden is to benefit all the lots in any buyer's hands.[23] It would seem under these facts that no other intent with respect to the burden could be found. Therefore, all grantees ought

19. Where the covenants are mutual, and burdens are imposed on both parties a substantial breach by one will prevent his enforcing the restriction as against the other. See *Compton* v. *Strauch, infra,* note 23. That a breach by one may amount to a wavier, see *Scharer* v. *Pantler* (1907) 127 Mo. App. 433, 105 S. W. 668. As a waiver, see *Fete* v. *Foerstel, infra,* note 23. If the restriction has lapsed before the trial of the action, obviously no specific relief will be given. *Sanders* v. *Dixon* (1905) 114 Mo. App. 229, 89 S. W. 577. It has been held that if the plaintiff's interest is too remote as to vesting in possession specific performance will be denied. *Johnston* v. *Hall* (1865) 2 Kay & Johnson 414 (plaintiff a reversioner, following a long term.) As a general rule the courts are not deterred from giving relief merely because no great damage is caused the plaintiff as a result of the restriction's violation. See cases cited *infra* note 23. But see *Forsee* v. *Jackson* (1915) 192 Mo. App. 408, 182 S. W. 783, where the court denied relief because the *violation* of the restriction was trivial and the damage resulting negligible.

20. *Coughlin* v. *Barker, supra,* note 11; *Kenwood Land Co.* v. *Hancock etc. Co.* (1913) 169 Mo. App. 715, 155 S. W. 861; *Clapp* v. *Wilder* (1900) 176 Mass. 332, 57 N. E. 692; *Hemsley* v. *Marlborough etc. Co.* (1904) 68 N. J. Eq. 596, 61 Atl. 455; *Clark* v. *Martin* (1865) 49 Pa. 289; *Ball* v. *Millikin* (1910) 31 R. I. 36, 76 Atl. 789.

21. *Doerr* v. *Cobbs* (1909) 146 Mo. App. 342, 123 S. W. 547; *Clark* v. *Martin, Ball* v. *Millikin, supra,* note 20; *Post* v. *Weil* (1889) 115 N. Y. 361, 22 N. E. 145. See also *Coughlin* v. *Barker, supra,* note 11; *Whitaker* v. *Lafayette etc. Co.* (1917) 197 Mo. App. 377, 196 S. W. 109; *Zinn* v. *Sidler* (1916) 268 Mo. 680, 187 S. W. 1172.

22. See *Collins* v. *Castle* (1886) 36 Ch. D. 243; *Hutchinson* v. *Ulrich* (1893) 145 Ill. 336, 34 N. E. 556; *Peabody* v. *Wilson* (1895) 82 Md. 186, 32 Atl. 386. See *Sharp* v. *Ropes* (1872) 110 Mass. 381.

23. *King* v. *Union Trust Co.* (1909) 226 Mo. 351, 126 S. W. 415; *Hall* v.

to be given a right to enforce the covenants, if such right can be given consistently with principles. Suppose that A owns the original tract and sells one lot to B, and there are mutual covenants exchanged that the lot granted and those retained shall be subject to the same burdens. In such a case it would be held, if A sold other lots, that the grantees of such lots could hold B, and those claiming under him with notice, to the burden originally imposed on B.[24] But suppose that A sold a lot to C, after he had sold B his lot, and that C broke his covenant. Could B hold C, or those who claimed under C with notice of the covenant? It is clear that there is no technical privity between B and C, because C never made any agreement whatsoever with B nor could he have, for at the time that B acquired his land, C stood in no relation at all to any of the lots. C, not being at that time an owner, could not have obligated himself with respect to the use that the lots were to be put to. But it is not to be forgotten that A at the time that he granted to B, bound all of the remaining lots for the benefit of B's lot, and it is proper to hold that C took his lot subject to the same burden.[25] It could also be said in B's behalf that the covenant, which A exacted from C, was for the benefit of all prior grantees of other lots and that A ought to have a right as a beneficiary to hold C to his obligation.[26] This theory of C's liability seems unnecessary and strained, but it is understandable and workable, if a court were disposed to allow a beneficiary to sue under a contract made for his benefit. But some courts do not favor this doctrine.

Occasionally there is a subdivision of real estate into lots for purposes of sale and it is announced that the lots sold are to be subject to restrictions. After such an announcement lots may be sold but the convenants contained in the deeds are not mutual but only binding upon

Wesster (1879) 7 Mo. App. 56; *Hirsey* v. *Church* (1908) 130 Mo. App. 566, 109 S. W. 60; *Compton Hill etc. Co.* v. *Strauch* (1911) 162 Mo. App. 76, 141 S. W. 1159; See also *Bub* v. *McFarland* (1917) 196 S. W. 373; *Bolin* v. *Tyrel etc. Co.* (1913) 178 Mo. App. 1, 160 S. W. 558; *Thompson* v. *Lingan* (1913) 172 Mo. App. 64, 154 S. W. 808; *Noel* v. *Hill* (1911) 158 Mo. App. 426, 138 S. W. 364; *Godfrey* v. *Hampton* (1910) 148 Mo. App. 157, 127 S. W. 626; *Kitchen* v. *Hawley* (1910) 150 Mo. App. 497, 131 S. W. 142; *Spahr* v. *Cape* (1909) 143 Mo. App. 114, 122 S. W. 379; *Fete* v. *Foerstel* (1911) 159 Mo. App. 75, 139 S. W. 820; *Plank* v. *Eaton* (1905) 115 Mo. App. 171, 89 S. W. 586; *Doerr* v. *Cobbs, supra,* note 21; *Coughlin* v. *Barker, supra,* note 11. See also accord *Hopkins* v. *Smith* (1894) 162 Mass. 444, 38 N. E. 1122; *Newberry* v. *Barkalow* (1909) 75 N. J. Eq. 128, 71 Atl. 752.

24. *Parker* v. *Nightingale* (1863) 6 Allen (Mass.) 341. See also cases cited *supra* note 23.

25. *Hopkins* v. *Smith* (1894) 162 Mass. 444, 38 N. E. 1122; *Barrow* v. *Richard* (1840) 8 Paige (N. Y.) 351, 35 Am. Dec. 713; *Brower* v. *Jones* (1856) 23 Barb. (N. Y.) 153.

26. *Brower* v. *Jones, supra,* note 25, and see H. F. Stone, Equitable Rights 19 Col. Law Rev. 1. c. 185 *et seq.*

the grantees. In such a case a question might arise whether a subsequent grantee would be bound in favor of a prior grantee who bought his lot with the understanding that all lots were to be burdened. If no convenant was exacted from the subsequent grantee, the only basis for holding him would be that the original owner, when he made his grant to the first taker, under an announcement that all lots were to be restricted, by implication agreed that the lots retained by him would be subject to the same burden as was imposed on the lot granted to the prior grantee. It would seem that such an implied covenant on the part of the original owner would be entirely proper, and if it were implied, a subsequent grantee who took with notice of the burden would be bound whether he expressly covenanted to be so bound or not.[27] This obligation would be on the basis heretofore stated, namely, that as the original owner held the land subject to the burden, all holding under him other than *bona fide* purchasers should be equally bound.[28] If the last suggestion is sound, and a subsequent grantee who takes without a covenant imposing the burden is bound to a prior grantee, it would follow all the more easily that a subsequent grantee, who did covenant that his lot should be burdened would be bound in favor of a prior grantee. In such a case not only would we have the same basis for holding that the original owner by implication bound the lots retained in favor of his first grantee that we had in the first assumed case, but also we would be able to hold that the covenant exacted from the subsequent grantee was taken for the first grantee's benefit.[29]

It has been held that a covenantee may enforce the equitable burden

27. *Maxwell* v. *East River Bank* (1858) 3 Bos. (N. Y.) 124, 16 N. Y. Sup. Ct. 124; *Spicer* v. *Martin* (1888) L. R. 14 App. Cas. 12; *McDougal* v. *Schneider* (1909) 118 N. Y. Sup. 861. See also *Semple* v. *Scwarz* (1908) 130 Mo. App. 65, 109 S. W. 633, where the suggested result was reached but the court did not discuss the problem. See further *Coughlin* v. *Barker, supra,* note 11; *Hirsey* v. *Church* and *King* v. *Union Trust Co., supra,* note 23. In *Doerr* v. *Cobbs, supra,* note 21, it was held that if there had been a building scheme, a prior grantee could have held a subsequent grantee to his covenant.

28. See *supra* note 25.

29. See *supra* note 26 and accord *Merriwether* v. *Joy* (1900) 85 Mo. App. 634. *Cf. Reed* v. *Hazard* (1915) 178 Mo. App. 547, 174 S. W. 111; *Miller* v. *Klein* (1913) 177 Mo. App. 557, 160 S. W. 562.

Suppose that one of the lots sold under a building scheme is subdivided and built upon by both owners, both of whom have taken with knowledge of the restriction. It has been held that if one of the owners violates the restriction the other has no remedy. It is said that the restrictions are imposed not to benefit portions of any one lot but merely to benefit other lots. *King* v. *Dickerson* (1889) 49 Ch. 596. See also Stone, Equitable Rights. 19 Col. Law Rev. l. c. 188. Might not this decision have been the other way? It is suggested that it could have been assumed that the parties intended (as each subdivision was bound for the benefit of other lots) that each subdivision should be bound for the benefit of the other subdivision.

where the servient estate is in the hands of a disseisor.[30] This case with other reasons has led certain scholars to suggest that the nature of the covenantee's right is *in rem.*[31] The underlying reason for such a contention is that the disseisor can in no way be connected with the covenant and that, therefore, the right of the covenantee must be assimilated to legal ownership. It is said that the position of the covenantee is so similar to that of the owner of an easement that the rights of the two parties are practically identical and that both must be classified as rights *in rem.* On the other hand serious exception has been taken to such a contention and it has been denied that the covenantee has anything but a right *in personam.*[32]

In all cases where a person has a specifically enforceable equity there is a right *"in personam ad rem,"* which right will be enforced as against the *res,* through the holder of the same for the time being, whenever it is just that such a duty should be imposed. So, where land is held subject to such an equity, the equity is enforceable not only against the original obligor but against all who claim under him with notice and all who claim under him without notice, not purchasers for value. Suppose that A has a right to a conveyance of land from B and that the land comes into the possession of C, who is either a *mala fide* purchaser or an heir of B, or a donee of the latter. In each case A could compel a conveyance from C. This would not be because A had title to the land but because of A's original equity it would be unjust to permit C to keep the same. So, too, if C had the land by adverse possession a conveyance could be compelled at the instance of A. This being the case it would be correct to say, not that A owned the property but that by reason of his equity he had a right as against an "indeterminate number" of people to prevent interference with his specifically enforceable equity and that if anyone in that class did interfere, to compel a performance of the equitable duty by such an intermeddler.[33] It is submitted that the situation of the covenantee is the same as that of A in the above supposed case. The covenantee has no legal ownership of the burden imposed. He has not an easement but he has a right *"in personam ad rem",* a right to compel any person, who holds the property burdened or owns the same, to perform the burden, unless there is an overpowering equity

Such an assumption would seem to accord with an ordinary man's expectations. The buyer knows that each subdivision is restricted. So does the seller. Does not the buyer reasonably assume that the restriction is for the benefit of his subdivision as well as for the benefit of outside lots?

30. *Re Nisbett and Potts Contract* (1906) 1906 1 Ch. 383.

31. A. W Scott, Nature of the Rights of the Cestui, 17 Col. Law Rev. l. c. 285.

32. H. F. Stone, Nature of the Rights of the Cestui, 17 Col. Law Rev. l. c. 482.

33. H. F. Stone, Equitable Liabilities, 18 Col. Law Rev. p. 299, *et seq.*

in favor of the latter. Normally the only equity of such a nature is that which is possessed by a *bona fide* purchaser for value. In all other cases the holder or owner of the burdened property is either aiding the original covenantor in a breach of his obligation or else is unconscionably but consciously himself interfering with and preventing the convenantee from getting the fruits of his bargain.

It is now proper to determine whether the right of plaintiffs in the case under review was of such a nature as to justify its being classified as property and for the taking of which there should be compensation. Naturally, if we adopt the suggestion that the right is one *in rem*,[34] we should hold that the school district should pay for the value of the restrictions. The principal case is in accord with this proposition, and there are three other decisions known to the writer which take the same position.[35] But even if one were not inclined to go so far as to say that plaintiffs' right is a strict property right, it is not believed that such disinclination ought to lead to a different result. The word "property" in the constitution ought not to be given a narrow and technical meaning but ought to be held to mean every valuable *proprietary interest* which is susceptible of enjoyment. Surely the right of plaintiffs is of such a nature and it seems that courts should protect the same even though it is not a true easement. Some courts, however, have held that the right of a covenantee is not a true property right and that therefore if it is taken by the government no compensation is due. In *U. S.* v. *Certain Lands*[36] the federal government sought to condemn land for coast defense purposes. The land to be taken was subject to restrictions against carrying on any trade thereon and the owners of these restrictive rights claimed compensation. The court held that the erection of the coast defense would not be a violation of the restrictions, as it would not constitute carrying on a trade; but also held that even if the erection would be a violation of the restriction the owners would not be entitled to compensation, because the covenant was against public policy. It was stated that the claimants did not have any property right by virtue of these restrictions as they were given "no right to go on the lands taken or use them";[37] that all the claimants had was an agreement that the lands should not be used in a certain way, which in this *particular* case amounted to an agreement that the federal government should not have the power to take and use the land for proper governmental purposes. Such a contract was said to be against public policy. The decision of the Cir-

34. *Supra*, note 31, and see 17 Col. Law Rev. l. c. 281.

35. *Flynn* v. *R. R. Co.* (1916) 218 N. Y. 140, 112 N. E. 913; *Hays* v. *Waverly* (1893) 51 N. J. Eq. 345, 27 Atl. 648; *Allen* v. *Detroit* (1911) 167 Mich. 464, 133 N. W. 317.

36. (1899) 112 Fed. 622.

37. 112 Fed. l. c. 628.

cuit Court was followed by the Circuit Court of Appeals in the same case[38] and has been adopted by the Supreme Court of Ohio in two similar cases.[39]

It hardly seems possible that the line of reasoning put forward by the learned courts in the above cited cases can be sound and the result seems unjust. In every case where the government exercises a right of eminent domain it is permitting the owner of the property to say: "I have purchased a right to prevent you from exercising your governmental capacities. I cannot prevent this altogether, but I can, because of the constitution, make you purchase this right". In other words, the constitution contemplates that the government shall pay for privileges of this kind which it takes, and the government has no grounds for complaint just because to this extent its activities are hampered and fettered.

Suppose that a man has an easement of light and air; suppose that the government destroys the same by taking the servient estate; it has been held that the government must pay the owner of the dominant estate the value of his easement.[40] Now if the owner of such a dominant estate is allowed compensation, the court awarding the same will be doing just what the court in *U. S.* v. *Certain Lands* says ought not to be done. After all, what is an easement of light and air, aside from technical rules of conveyancing? It is nothing but an agreement that the owner of the servient estate will not build in such a way as to keep out sunlight and air. Is it not an agreement to the effect that the government, if it needs the land, will not take or destroy the right without paying for it? Does not a court which allows damages for such an easement validate the agreement? Of course, it can be said that the owner of the easement has a right *in rem,* although in this case he cannot go on the land of the servient tenement. But even so, this right *in rem* in the way that it operates does not differ materially from the right *in personam,* which the owner of the restrictive covenant has. Each is a valuable right susceptible of proprietory enjoyment and should be paid for, if taken, unless the law of eminent domain is to be based on technicalities and distinctions where there are in truth no substantial differences.[41]

B. E., Jr.

38. (1907) 153 Fed. 876.

39. *Dene* v. *R. R. Co.* (1915) 92 Ohio St. 461, 112 N. E. 505; *Ward* v. *R. R. Co.* (1915) 92 Ohio St. 471, 112 N. E. 507.

40. *Ladd* v. *City of Boston* (1890) 151 Mass. 585, 24 N. E. 858.

41. For two articles dealing with the nature of restrictive covenants, see H. F. Stone, 19 Col. Law Rev. 177, and G. L. Clark, Univ. of Mo. Bull. 16 Law Series 3.