PROVISIONS IN A DEED TO BUILD AND MAINTAIN FENCES AS COVENANTS RUNNING WITH THE LAND.

Various attempts have been made to divide all covenants into two classes, real and personal, in such a manner that the definition of real covenants would include all those that concern the realty and run with the land, while all covenants enforceable only against the promisor or his estate would fall within the definition of personal covenants.[1] In a few familiar cases, as where there is a covenant against waste, or one to maintain fences already built, or on the other hand where there is a covenant for quiet enjoyment or of warranty, there is no difficulty in determining that the covenant runs with the land, for it must do so to be effectual. "Such covenants, and such only," says Mr. Washburn, "run with the land as concern the land itself, in whatsoever hands it may be and become united with, and form a part of the consideration for which the land or some interest in it is parted with between covenantor and covenantee."[2] Mr. Tiedman describes a covenant running with the land as one which must "bear an intimate relation with, and concern the estate or lands conveyed. · It runs with the land when the performance of it is expressly or by implication made a charge upon the land."[3] Again in Vyvyan vs. Arthur, Justice Best said: "If the performance of the covenant be beneficial to the reversioner in respect to the lessor's demand, and to no other person, his assignee may sue on it, but if it be beneficial to the lessor without regard to his continuing owner of the estate, it is a mere collateral subject upon which the assignee cannot sue."[4] Finally, Justice Gould says that covenants run with the land where "the covenants are in the very conveyance by which the covenantor acquired the land, the performance of such coveyants plainly forming a part of the consideration without which the conveyance would not have been made."[5]

It would appear that to some minds the principal question to be determined is whether the subject matter of the covenant

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[1]7 R. C. L. Covenants, sec. 27.
[2]11 Washburn on Real Prop., p. 263.
[3]Tiedman on Real Prop., Sec. 626.
[4]Vyvyan vs. Arthur, I. B. and C 410.
[5]Van Rensselaer vs. Smith, 5 B and Ald. I.

forms a part of the land or relates to the realty, while in the minds of others the principal question is one of consideration,—whether in assigning the land the covenant was part of the consideration. It would seem however, that this difference is mostly in point of view, and that both the statements mean practically the same thing, since to be a part of the consideration, when the land is the consideration, it must also be a part of the land. However, no one of these definitions covers all the requisites of a covenant running with the land. In order that a covenant shall run with the land there must be a privity of estate between covenantor and covenantee, but this relation need not be that of landlord and tenant. An interest in the nature of an easement in the land which the covenant purports to bind, whether already existing, or created by the very deed which contains the covenant, constitutes a sufficient privity of estate to make a burden of the covenant to do certain acts upon the land, for the support and protection of that interest, run with the land.[6]

The covenant to build and maintain fences, found very frequently in America, has caused the courts considerable difficulty. While the well-known decision in Spencer's Case goes on a general principle now well established both in America and in England —that when a covenant relates to a thing not in being the covenant must expressly be on the part of the covenantor, his assigns or successors, in order that the covenant shall run with the land and bind the covenantor's assignee, but the particular conclusions have not proven in accord with modern public policy. In this case Spencer and his wife sued the final assignee of their lessee who had agreed on behalf of himself, his executors and administrators, that a wall would be built on part of the land demised. The court held that when the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the land demised, and shall go with the land and bind the assignees, although they be not named in express words, but if the thing is to be newly built thereafter it shall bind the covenantor, his administrators or executors, but not his assignee, for the law will not annex the covenant to a thing not in being. On the other hand they held that if the lessee had covenanted for himself and his assigns that they would build the wall, that since it was to be built on the very land demised, the assignee would be bound. In other words the court held that since

[6]Bronson vs. Coffin, 108 Mass. 175; Boyley vs. Tamlyn, 6 B and C, 329; Hazlett vs. Sinclair, 76 Ind. 488.

the demise concerned a thing not in being when the demise was made, and the word assigns did not appear in the covenant, that the covenant did not run with the land so as to bind Clark, the defendant assignee.

The decision in Spencer's case has been freely criticized by both in England and in this country, and the courts in considering covenants for fencing and keeping the fences in repair, have either ignored the decision or said that it did not apply. There is a tendency to resort to the probable intention of the parties to the deed when there is any possibility for doubt. In a case where there was a covenant to build and maintain perpetually, for instance, the word "perpetually" was held to mean that the parties to the deed intended the covenant to run with the land. Another rule of construction which has been adopted is to construe the covenant as in accord with "public policy." There are a number of clear decisions to the effect that a provision to maintain fences is a covenant running with the land and not a personal covenant, and in some of these cases the fences were not built. The attempts of such courts to reconcile their decisions with the principle of law above stated, —that unless a thing is in being at the time of making the deed the covenant will not bind the assignee, unless he be expressly named, have caused conflicting rules of law. Of the decisions, Sexaner vs. Wilson,[7] (Iowa), and Kellog vs. Robertson,[8] (Vermont), appear to be the clearest cases, the judges in these cases dealing with provisions to maintain fences as well as provisions to build and maintain. While it would appear that a fence to be built must be considered as a thing not in being, the courts nevertheless say that since such a provision relates to the land, and the land is in being, and the fence when built must become part of the land, that the rule concerning things in being need not be applied. In the Iowa case the court says that the maintenance of fences being undoubtedly necessary to the enjoyment of the estate, that the important test, whether the covenant concerns the land or not,—being satisfied, the presence of the word "assigns," in the deed becomes unnecessary. Yet another theory has been advanced which undoubtedly sup-

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[7]Harting vs. Witte, 59 Wis. 294; Hansem vs. Meyer, 81 Ill. 31; Tallmany vs. Coffin, 4 N. Y. 131; Woodruff vs. Trenton Water Power Co., 10 N. S. Eq. 506.

[8]Kellog vs. Robinson, 6 Vt. 276; Hazlett vs. Sinclair, 76 Ind. 488; Brown vs. Southern P. Co., 47 L. R. A. 409; Easter vs. Little Miami R. R. Co., 14 Ohio St. 48; Borbank vs. Pillsbury, 48 N. H. 475; Bronson vs. Coffin, 108 Mass. 175; Sexauer vs. Wilson, 136 La. 357, 142 R. A. ns. 185; 7 Ruling Case Law Covenants, Sec. 24; 11 Ruling Case Law,Fences, Sec. 14; Bally vs. Wells, 3 Wils, 25.

ports the enforcement of covenants to maintain fences not in being at the time of the demise. It is said that if the fence be erected subsequently, then the provision to maintain or repair relates to something then in being and runs with the land.

Taking the other side of the controversy the court in Hartung vs. Witte,[9] refused to follow these theories and held that a provision to build a fence was similar to a provision to built a house, and could not run with the land because the thing was not in existence, conceding however, that a provision to maintain a fence after it should be built would not be open to the same objection.

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[9]Hartung vs. Witte, 39 Wis. 285.