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Wording of the decision in *Matthews v. Forrest*¹⁵ indicates that the court felt that redress should be granted for mental suffering which is certain to follow from the desecration of a grave in plaintiff's burial lot.¹⁶ Thus, with the law remaining as it is today, a daughter would be unable to recover damages actually endured for mental anguish arising out of an indignity to the deceased mother, because her brother, and not she, owned the plot in which the mother was interred.

To overcome inequities such as this, it is submitted that courts forget the requirement of a technical tort and recognize mental anguish as a separate and independent cause of action, where it is serious and intentionally inflicted.

DEANE F. BELL.

Eminent Domain—Violation of Restrictive Covenants Necessity of Compensation

In the recent case of *City of Raleigh v. Edwards*¹ the city instituted special proceedings to condemn certain lots for the erection of a water storage tank. Intervening as omitted claimants, the owners of adjacent lots sought compensation on the ground that the contemplated use by the city was in violation of covenants restricting the use of the property in that area to private dwelling purposes only. Considering this problem for the first time, the North Carolina Supreme Court held that such building restrictions created a vested interest in land in the nature of a negative easement on each lot for the benefit of, and appurtenant to, each other lot in the restricted area.² The court allowed compensa-

to depend upon whether in committing the act the defendant also committed a technical trespass upon the plaintiff's premises, while everybody's common sense would tell him that the real and substantial wrong was not the trespass on the land, but the indignity to the dead."

¹⁵ 235 N. C. 281, 69 S. E. 2d 553 (1952).

¹⁶ *Id.* at 285, 69 S. E. 2d at 557. "The law must heed the realities of life if it is to fulfill its function. As Justice Barnhill so well said in his able opinion in *Lamm v. Shingleton*, 231 N. C. 10, 55 S. E. 2d 810, 'the tenderest feelings of the human heart center around the remains of the dead.' In recognition of this reality we hold compensatory damages may be awarded to a plaintiff for mental suffering actually endured by him as the natural and probable consequence of a trespass to his burial lot, even though his mental suffering may not be accompanied by physical injury."

¹ 235 N. C. 671, 71 S. E. 396 (1952).

² North Carolina has generally adhered to the principle that equitable easements are a property right. *Vernon v. Realty Co.*, 226 N. C. 58, 36 S. E. 2d 710 (1946) (A restrictive covenant is contractual in nature and creates incorporeal property right); *Turner v. Glenn*, 222 N. C. 620, 18 S. E. 2d 197 (1942) (Restrictive covenant creates an interest in land which is within the Statute of Frauds); *Pepper v. West End Development Co.*, 211 N. C. 166, 189 S. E. 628 (1937); *Moore v. Shore*, 208 N. C. 446, 181 S. E. 275 (1935); *Moore v. Shore*, 206 N. C. 699, 175 S. E. 117 (1934); *Davis v. Robinson*, 189 N. C. 589, 27 S. E. 697 (1925) (Building restriction creates negative easement which being an interest in land comes within the Statute of Frauds). *But see St.*

tion declaring that in a constitutional sense the proposed use of the property amounted to a taking of that property right.³

The underlying basis for the enforcement of equitable easements, or interests arising out of promises regarding the use of the land, is the doctrine of equitable notice as set forth in *Tulk v. Moxhay*.⁴ Since these interests originate in promises there has been considerable controversy as to whether they should be treated as mere contractual rights or as interests in the land itself.⁵ In eminent domain situations where a public agency takes restricted property for a purpose inconsistent with restrictive covenants the question concerning the technical nature of the interests in the parties is usually of primary importance in deciding whether compensation should be allowed.

Most of the states in which the condemnation problem has arisen have seen in these interests sufficient property elements to classify them as rights in land.⁶ In these cases, once it is concluded that the proposed

Peter's Church v. Bragaw, 144 N. C. 126, 56 S. E. 688 (1907) where the language used seems to indicate that the court thought a building restriction created a contract right to be enforced in equity.

³ "No person ought to be . . . disseized of his freehold, liberties or privileges . . . or in any manner deprived of life, liberty or property, but by the law of the land." N. C. CONST. Art. I, § 17; ". . . nor shall private property be taken for public use without just compensation." U. S. CONST. AMEND. V.

⁴ 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848). In this case was set forth the principle that a contract of a landowner in which he agrees to abstain from using his land in a particular manner will be enforceable in equity against purchasers and possessors with notice even though the agreement did not create a covenant running with the land. *Accord*, *Bryant v. Grosse*, 155 Cal. 132, 99 Pac. 449 (1909); *Bauby v. Krasnow*, 107 Conn. 109, 139 Atl. 508 (1927); *Meade v. Dennistone*, 173 Md. 295, 196 Atl. 330 (1938); *Evans v. Foss*, 194 Mass. 513, 80 N. E. 587 (1907); *Parker v. Nightingale*, 88 Mass. (6 Allen) 341 (1863); *Trustees of Columbia College v. Lynch*, 70 N. Y. 440 (1877); 3 TIFFANY, REAL PROPERTY § 858 (3d Ed. 1939).

⁵ A detailed discussion of the theories as to the technical nature of equitable servitudes is beyond the scope of this note. A minority of courts and writers support the theory that such rights are only contractual rights to be enforced by specific performance. *Bauby v. Krasnow*, 107 Conn. 109, 139 Atl. 508 (1927); *Weigman v. Kusel*, 270 Ill. 520, 110 N. E. 884 (1915); *Cotton v. Creese*, 80 N. J. Eq. 540, 85 Atl. 600 (Ch. 1912); *DeGray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329, 24 Atl. 388 (Ch. 1892); CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 171-174 (2d Ed. 1947); 3 TIFFANY, REAL PROPERTY § 861 (3d Ed. 1939); *Ames, Specific Performance For and Against Strangers to the Contract*, 17 HARV. L. REV. 174 (1904); *Giddings, Restrictions Upon the Uses of Land*, 5 HARV. L. REV. 274 (1892); *Stone, Equitable Rights and Liabilities of Strangers to a Contract*, 18 COL. L. REV. 291 (1918). The majority view is that restrictive covenants create a property right. *Osius v. Barton*, 109 Fla. 556, 147 So. 862 (1933); *Bristol v. Woodward*, 251 N. Y. 275, 167 N. E. 441 (1929); *Goldberg v. Nicola*, 319 Pa. 183, 178 Atl. 809 (1935); *Queen City Park Ass'n v. Gale*, 110 Vt. 110, 3 A. 2d 529 (1938); *Clark, op. cit. supra* 174-177; 3 TIFFANY, REAL PROPERTY § 861; *Jones, Equitable Restrictions on the Use of Real Property*, 13 CHI-KENT. REV. 33 (1934); *Pound, The Progress of Law*, 33 HARV. L. REV. 813 (1920); 31 HARV. L. REV. 876 (1918); 28 HARV. L. REV. 201 (1914).

⁶ *Town of Stanford v. Vuono*, 108 Conn. 359, 143 Atl. 245 (1928) (Adjacent owners within restricted residential area allowed compensation for building of school by city on ground that restriction created interest in land in nature

use is in violation of the restriction, payment is allowed as if the interests were legal easements.⁷

Other courts fail to recognize any property rights arising from restrictive covenants and insist that the rights are only contractual in nature.⁸ Under this view the condemnation clauses of the constitutions are avoided and no payment is allowed.⁹

The importance of the technical approach as a basis for decision is weakened by the fact that most of the courts which have denied compensation have done so on grounds that do not necessitate a definite stand

of easement); *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242, 117 N. E. 244 (1917) (Equitable restriction held to be property right in favor of whose estate it runs); *Ladd v. City of Boston*, 151 Mass. 585, 24 N. E. 858 (1890) (City required to pay compensation for building courthouse destroying an easement in favor of light and air created by restrictive covenant); *Sipes v. McGhee*, 316 Mich. 614, 25 N. W. 2d 638 (1947) (Restriction limiting use and occupation of property to the Caucasian race held to create valuable property right for which compensation must be paid); *Johnstone v. Detroit, G. H. & M. Ry.*, 245 Mich. 65, 222 N. W. 325 (1928) (Owners of property in restricted subdivision held qualified for compensation on the taking of part of the area for a railroad track); *Allen v. Detroit*, 169 Mich. 464, 133 N. W. 317 (1910) (Erection of firehouse in area restricted to private dwellings entitled adjoining owners to compensation for taking of private property); *Allen v. Murfin*, 159 Mich. 612, 124 N. W. 581 (1910); *Porter v. Johnson*, 232 Mo. App. 1150, 115 S. W. 2d 529 (1938) (Restriction against Negroes creates easement in favor of owner of one parcel of land and to all the parcels covered by the restrictions, can be taken by public agency only after payment of just compensation); *State v. Mulloy*, 332 Mo. 1107, 61 S. W. 2d 741 (1933); *Britton v. School District*, 328 Mo. 1185, 44 S. W. 2d 33 (1931) (School District not allowed to erect new school until compensation paid to adjoining landowners for violation of restrictions that certain property be used as a private street); *Peters v. Buckner*, 288 Mo. 618, 232 S. W. 1024 (1921) (Rights conferred by building restrictions were property rights which must be paid for when destroyed by public taking); *Hayes v. Waverly & P. Ry.*, 51 N. J. Eq. 345, 27 Atl. 648 (Ch. 1893) (Restrictions prohibiting certain uses of property of railroad company held to create a right of amenity in the land in the nature of an easement); *Flynn v. New York, W. & B. Ry.*, 218 N. Y. 140, 112 N. E. 913 (1916) (Restrictive covenants create compensable damages which otherwise would have been noncompensable).

⁷In *Herr v. Board of Education*, 82 N. J. L. 610, 83 Atl. 173 (1912) the court, in theory, allowed compensation for the taking of restricted land but held that the total amount recoverable by all the parties, including the owner of the fee and the holders of the restrictions, would be the value of the land taken without regard to restrictions. It was the problem of the property owners to establish their respective rights among themselves. See Note, 36 W. VA. L. Q. 363, 365 (1930).

⁸*Sackett v. Los Angeles City School*, 118 Cal. App. 254, 5 P. 2d 23 (1931); *Anderson v. Lynch*, 188 Ga. 154, 3 S. E. 2d 85 (1939); *City of Houston v. Wynne*, 279 S. W. 916 (Tex. Civ. App. 1925), *aff'd*, 115 Tex. 255, 281 S. W. 544 (1926). See *Moses v. Hazen*, 69 F. 2d 842, 844 (D. C. Cir. 1934); *Wharton v. United States*, 153 Fed. 876, 878 (1st Cir. 1907); *Friesen v. City of Glendale*, 79 Cal. 498, 288 Pac. 1080, 1082 (1930).

⁹It has been suggested that under the more modern constitutions which provide compensation for land that is taken or *damaged* by the state that there will be damage to the benefited land by interference with a restrictive covenant even though there is no interest in the land taken. 14 WASH L. REV. 137, n. 1 (1939). However, compensation was denied in Georgia under such a provision without considering the "or damaged" clause. *Anderson v. Lynch*, 188 Ga. 154, 3 S. E. 2d 85 (1939); Comment, 38 MICH L. REV. 357, 358 n. 6 (1940).

on the issue of property rights.¹⁰ One theory advanced declares that the covenants must be construed as not intending to prohibit any acts of public agencies; that if such intention had been expressed the covenants would be void as against public policy.¹¹ In other cases the courts decide that the restrictive language does not bar the contemplated use, often resorting to rather violent construction to reach this conclusion.¹²

The possibility of a reconciliation of the two conflicting theories concerning the nature of the rights arising from the "doctrine of *Tulk v. Moxhay*"¹³ seems unlikely. It is doubtful whether this is essential

¹⁰ *United States v. Certain Lands*, 112 Fed. 622 (C. C. R. I. 1899) has been relied upon by practically every court denying compensation for the public taking of restricted land as the landmark decision supporting the contract doctrine of equitable easements in an eminent domain situation. It is submitted that since the court's decision was actually based on the fact that the restriction was never violated by the government's use of the land that the contract doctrine expressed was pure *dictum*. In a much more recent case involving the exercise of eminent domain by the Federal Government the court said: "Whether the Federal Government, as distinguished perhaps from the State of New York, can brush aside the restrictive covenants concerning the character of buildings to be erected upon the condemned property, without making compensation to the remaining lot owners, is too serious an issue to be disposed of upon a mere motion to intervene." *United States v. Certain Lands*, 49 F. Supp. 265, 267 (E. D. N. Y. 1943). No mention was made of the earlier decision denying compensation in a similar situation, but the court did cite *Peters v. Buckner*, 288 Mo. 618, 232 S. W. 1024 (1921) which allowed compensation on the ground that restrictive covenants created a property right.

¹¹ In *Doan v. Cleveland Short Line Ry.*, 92 Ohio St. 461, 112 N. E. 505, 506 (1915) the court, in denying compensation for the violation of restrictive covenants by a railroad company, argued, "If, on the other hand, it (restrictive covenant) be construed as prohibiting the use of the property for any purpose other than that of residences, it would prevent a public use of the lots and thereby defeat the right of eminent domain. The right of eminent domain rests upon public necessity, and a contract or covenant or plan of allotment which attempts to prevent the exercise of that right is clearly against public policy, and is therefore illegal and void." The same view is advanced in *Norfolk and W. Ry. v. Gale*, 12 Ohio St. 110, 162 N. E. 385 (1928); *Ward v. Cleveland Short Line Ry.*, 92 Ohio St. 571, 112 N. E. 507 (1915); and as an additional or alternative ground in *Sackett v. Los Angeles City School*, 118 Cal. App. 254, 5 P. 2d 23 (1931); *Anderson v. Lynch*, 188 Ga. 154, 3 S. E. 2d 85 (1939); *City of Houston v. Wynne*, 278 S. W. 916 (Tex. Civ. App. 1925). See *United States v. Certain Lands*, 112 Fed. 622, 628 (C. C. R. I. 1899).

¹² A restriction which provided that "all buildings erected or to be erected . . . shall be built and used for residential purposes only" and not be used for "any trade, business, manufacturing or mercantile purpose" was held not to intend the exclusion of a public school. *Moses v. Hazen*, 69 F. 2d 842 (D. C. Cir. 1934). Restriction that land be used for residential purposes only construed not to forbid the building of a public street through the area. *Friesen v. City of Glendale*, 79 Cal. 498, 288 Pac. 1080 (1930); criticized in 19 CAL. L. REV. 58 (1931). Provision that "no slaughter house, smith shop, steam engine, furnace, forge, boneboiling establishment . . . drinking saloon . . . shall ever be located upon any part of said granted land, and that no other noxious, dangerous, or offensive trade or business whatever shall ever be done" held not to prevent the erection of coastal defense fortifications by the government upon the property. *United States v. Certain Lands*, 112 Fed. 622 (C. C. R. I. 1899), *aff'd sub nom. Wharton v. United States*, 153 Fed. 876 (1st Cir. 1907).

¹³ See note 4 *supra*.

when many of the courts have not relied on either theory for their decisions,¹⁴ and others have tended to advance one or the other concepts as a means to secure desired social results.¹⁵ The presence of a conflicting theory has seemingly justified the refusal of the latter courts to apply the logical extension of the theory applied in earlier cases to new fact situations where the result might be undesirable. With this attitude prevailing the problem appears to be one of policy rather than legal technicalities.

When viewed in the light of the well-established compensable interests under the laws of eminent domain there is no logical reason why public policy should discriminate against rights arising out of restrictive covenants. It is evident that landowners, through the use of such covenants, cannot prohibit the public exercise of eminent domain.¹⁶ The only effect would be to increase the financial and procedural burden of the condemnor.¹⁷ Yet, if landowners may increase that burden by the creation of legal easements or by adding physical improvements to their land, it would seem absurd to argue that it is against public policy to reach the same result by restrictive covenants.¹⁸

¹⁴ *Moses v. Hazen*, 69 F. 2d 842 (D. C. Cir. 1934); *United States v. Certain Lands*, 112 Fed. 622 (C. C. R. I. 1899), *aff'd sub nom.* *Wharton v. United States*, 153 Fed. 876 (1st Cir. 1907); *Friesen v. City of Glendale*, 79 Cal. 498, 288 Pac. 1080 (1930); *Norfolk and W. Ry. v. Gale*, 19 Ohio St. 110, 162 N. E. 385 (1928); *Doan v. Cleveland Short Line Ry.*, 92 Ohio St. 461, 112 N. E. 505 (1915); *Ward v. Cleveland Short Line Ry.*, 92 Ohio St. 571, 112 N. E. 507 (1915).

¹⁵ In practically no jurisdiction have the courts relied consistently on one established theory. Many of them have treated building restrictions as creating a property right when the question involves the Statute of Frauds, but seem to find only a contract right in eminent domain situations. Compare *Martin v. Holme*, 197 Cal. 733, 242 Pac. 718 (1925), with *Friesen v. City of Glendale*, 79 Cal. 498, 288 Pac. 1080 (1930); *Miller v. Babb*, 263 S. W. 253 (Tex. Comm. App. 1924), with *City of Houston v. Wynne*, 279 S. W. 916 (Tex. Civ. App. 1925); *Swan v. Mithikun*, 207 Mich. 70, 173 N. W. 529 (1919), with *Windemere-Grand Improvement Ass'n v. American Bank*, 205 Mich. 539, 172 N. W. 29 (1919).

¹⁶ *United States v. Land in Pendleton County*, 11 F. Supp. 311 (N. D. W. Va. 1935). Some courts speak of such restrictions as defeating the right of eminent domain if construed as intending to effect public agencies. *United States v. Certain Lands*, 112 Fed. 622 (C. C. R. I. 1899); *Doan v. Cleveland Short Line Ry.*, 92 Ohio St. 461, 112 N. E. 505 (1915); *Ward v. Cleveland Short Line Ry.*, 92 Ohio St. 471, 112 N. E. 507 (1915). The fallacy of this argument lies in the assumption of its minor premise that the requirement that the state compensate the owner of the neighboring property for the taking of his interest in the condemned property actually prevents the exercise of any governmental function. *Town of Stanford v. Vuono*, 108 Conn. 359, 143 Atl. 245 (1928); *Peters v. Buckner*, 288 Mo. 618, 232 S. W. 1024 (1921).

¹⁷ Two courts denying compensation appeared to have been greatly influenced by the possibilities of multitudinous claims against the condemning body. *Anderson v. Lynch*, 188 Ga. 154, 3 S. E. 2d 85 (1939); *City of Houston v. Wynne*, 279 S. W. 916 (Tex. Civ. App. 1925). As a practical matter only a relatively few owners nearby the condemned land would receive more than nominal damages for most governmental interferences. See the discussion of this point in *Aigler, Measure of Compensation for Extinguishment of Easements by Condemnation* (1945) WIS. L. REV. 5, 32.

¹⁸ Nor is there anything in our laws, system of government, or spirit of our institutions which curtails the genius of a citizen in creating or enhancing values

By giving these restrictions the dignity of an interest in land North Carolina has not only adhered to its established attitude toward equitable easements,¹⁹ but has emerged with what would seem to be the most reasonable and logical view in regard to policy.

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Libel—Liability for Negligent Republication

In the recent case of *Hellar v. Bianco*,¹ a writing on the restroom wall of a tavern resulted in a suit against the owners for republication of a libel. The writing, which challenged the chastity of the plaintiff,² was shown to be false, and its defamatory nature was conceded. Though it was not shown that the defendants had knowledge of the writing on their wall, there was evidence that the defendants' servant had been advised of it by the plaintiff's husband. On plaintiff's appeal from a nonsuit in the lower court, it was held to be a question for the jury as to whether the defendants had a reasonable time in which to remove the libel after their servant was informed of it.

Generally, where there has been an original publication of libelous matter,³ one who negligently or intentionally republishes the libel is as

in his property in any lawful way, by physical improvement, psychological inducement or otherwise. His obligation to recognize the power of eminent domain and the possibility of its exercise in no way restricts his right to a legitimate profit . . . He may order his affairs in the assurance that, if the state takes his property it will pay him the value of what it takes." *Johnstone v. Detroit G. H. & M. Ry.*, 245 Mich. 65, 74, 222 N. W. 325, 328 (1928). Yet it was stressed in *United States v. Certain Lands*, 112 Fed. 622, 629 (C. C. R. 1. 1899) that a landowner should not be able to increase the value of his land or impose a new burden on the exercise of eminent domain by contracting with a private individual.

¹⁹ See note 2 *supra*.

¹ 244 P. 2d 757 (Cal. 1952).

² *Ibid.* The evidence was that the writing on the restroom wall indicated that plaintiff was an unchaste woman who was not adverse to engaging in illicit amatory ventures. It suggested, also, that anyone interested should call a stated number and "ask for Isabelle," which was the given name of the plaintiff. An interested "gentleman" called the plaintiff, only to find that plaintiff was a respectable married woman. He then advised the plaintiff to investigate the writing on the tavern's restroom wall. The plaintiff immediately told her husband of the matter, and he called the tavern and told the employee on duty there to get the writing off the wall, and that he would be down shortly to see that it was off. The employee informed plaintiff's husband that he was alone at the tavern and busy and would get it off when he got around to it. After some delay, the husband arrived with a constable to find that the writing was still on the wall.

³ Generally, libel may be defined as the intentional or negligent unlawful publication of defamatory matter in a physical form to a third person resulting in injury to another's character in the minds of right thinking people. See NEWELL, SLANDER AND LIBEL § 2 (4th ed. 1924); ODGERS, LIBEL AND SLANDER § 16 (6th ed. 1929); PROSSER, TORTS § 92 at p. 797 (1941); RESTATEMENT, TORTS § 568 (1) (1938); 53 C. J. S. Libel and Slander § 1 (a, 2) (1948).

In RESTATEMENT, TORTS § 577 (1938), it is stated that "publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed"; and ODGERS, LIBEL AND SLANDER § 132 (6th ed. 1929) states that in order to hold one liable for publication, three things must