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Real Property - Restrictive Covenants - Termination by Declaratory Judgment

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REAL PROPERTY—RESTRICTIVE COVENANTS—TERMINATION BY DECLARATORY JUDGMENT—Appellant originally owned all of a certain tract of land upon which his home was built. In 1942 he conveyed one lot to the predecessor in title of the appellees, including in the deed a covenant restricting the lot to residential uses. Subsequently he conveyed three other lots carved from the original tract without inserting restrictive covenants in the deeds. The appellees brought suit for a declaratory judgment invalidating the restrictive covenant on their lot, and such judgment was granted. While an appeal from this decree was pending, appellant sold his home to a rural electric co-operative for admittedly commercial uses, but he retained a portion of the original tract. *Held,* affirmed. The right to enforce the covenant is lost by abandonment, waiver, and by a change in the character of the neighborhood which renders its enforcement no longer practicable. *Bagby v. Stewart's Executors,* (Ky. 1954) 265 S.W. (2d) 75.

The principal case presents three important problems for consideration: the running of the benefits of restrictive covenants, the effect of an equitable defense upon the continued validity of a covenant at law, and the nature of certain equitable defenses themselves. The extent of a restrictive covenant is dependent upon the intent of the parties to that covenant.[1] This intent is generally inferred from either the express words of the covenant or from the circumstances under which the conveyance was made.[2] In the principal case there was no express language to indicate for whose benefit the promise was extracted. The absence of a general neighborhood plan evinced by the failure to put covenants in later deeds supports the conclusion that the covenant was not intended to run to lots subsequently conveyed by the grantor.[3] There was no

[1] Hays v. St. Paul Methodist Episcopal Church, 196 Ill. 633, 63 N.E. 1040 (1902); Whitmarsh v. Richmond, 179 Md. 523, 20 A. (2d) 161 (1941); 14 AM. JUR., Covenants, Conditions and Restrictions §211 (1938).

[2] Schlicht v. Wengert, 178 Md. 629, 15 A. (2d) 911 (1940); 5 PROPERTY RESTATEMENT §527, comment *b* (1944).

[3] Price v. Anderson, 358 Pa. 209, 56 A. (2d) 215 (1948), 2 A.L.R. (2d) 593 (1948). In holding that a later grantee was not a necessary party to the action for declara-

express promise on the part of the grantor to restrict the land retained to non-commercial uses, nor was there extrinsic evidence (such as a finding that the covenant ran to subsequent grantees or that it was in the furtherance of a general restrictive scheme) from which to infer a reciprocal covenant.[4] Therefore to say that the covenant was reciprocal and burdened the land retained would be inconsistent with the holding of the court.

The refusal of a court of equity to enjoin the breach of a restrictive covenant does not extinguish such covenant nor necessarily prevent an action at law for damages resulting from the breach.[5] But when a declaratory judgment invalidating a restrictive covenant is sought, the power of a court of equity to grant such relief and completely extinguish the covenant is clearly established.[6] To invalidate a covenant, however, the case presented must be far stronger than would be necessary as a defense to enforcement.[7]

Abandonment is a matter of intent, such intent being inferred from the acts of the parties.[8] The failure to include similar restrictive covenants in the later deeds in the principal case cannot be considered an abandonment of a "restrictive scheme" since there is no reason why a restriction as to one lot must be a part of a general scheme.[9] A restriction can be considered waived only if it is assumed that the acts of the grantor evinced the intentional relinquishment of the right of enforcement.[10] Any abandonment or waiver in the principal case must be founded upon the sale by the grantor of his home to the rural electric co-operative upon the theory that a court of equity will not enforce a covenant which the grantor has himself breached. But, if, as in the principal case, no such burden was placed upon the land retained by the grantor, equitable relief should not be refused him, nor should the covenant be invalidated, because he

tory judgment which invalidated the covenant, the court, in effect, denied that it extended to such parties. There is dicta in the principal case to the effect that the property which was to benefit from the covenant was that upon which the residence was built. From this it could have been held that the covenant did not run to the unimproved portion of the original tract retained by the covenantee. Bauby v. Krasow, 107 Conn. 109, 139 A. 508 (1927), 57 A.L.R. 331 (1928). This would be a rather extreme result considering that the portion retained and that upon which the home was built were contiguous and originally one tract. If it were so held, however, then the covenant could be enforced only if the doctrine of a benefit in gross were adopted. VanSant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913); 49 L.R.A. (n.s.) 186 (1914).

[4] Bristol v. Woodward, 251 N.Y. 275, 167 N.E. 441 (1929).

[5] Jackson v. Stevenson, 156 Mass. 496, 31 N.E. 691 (1892); 5 PROPERTY RESTATEMENT §560, comment *c*, §561, comment *d*, §562, comment *c*, §563, comment *b* (1944); 44 HARV. L. REV. 989 (1931).

[6] Rector v. Rector, 130 App. Div. 166, 114 N.Y.S. 623 (1909); 4 A.L.R. (2d) 1112 (1949); Simpson, "Fifty Years of American Equity," 50 HARV. L. REV. 171 at 216 (1936).

[7] Bickell v. Moraio, 117 Conn. 176, 167 A. 722 (1933).

[8] 2 AMERICAN LAW OF PROPERTY §9.37 (1952).

[9] The case in which the doctrine of equitable servitudes was first set forth was one involving a single lot. Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143 (1848). See Marra v. Aetna Construction Co., 15 Cal. (2d) 375, 101 P. (2d) 490 (1940).

[10] Ocean City Assn. v. Chalfant, 65 N.J. Eq. 156, 55 A. 801 (1903); Sheridan v. Kurz, 314 Mich. 10, 22 N.W. (2d) 52 (1946).

has supposedly breached a covenant that does not exist. Though a change in the character of a neighborhood may be a defense to the enforcement of a restrictive covenant,[11] and may even be the basis for an affirmative decree invalidating such restriction,[12] in general, such change must be of a radical[13] and permanent[14] nature, which is doubtful in the principal case. Because of the discretionary power assumed by the equity courts in the area of restrictive covenants it is impossible to prescribe any definitive rules which can be used as a guide in predicting the outcome of a case, the particular fact situation being always of predominant importance.[15] The Kentucky courts have generally stated a policy of construing restrictive covenants strictly against those attempting enforcement and those defending against declaratory judgment actions for invalidation.[16] In the principal case, however, the court seems to have exercised a maximum of "discretion." If the covenant was to be invalidated it should have been on the finding that it had become of no benefit to the covenantee, its purpose being obsolete, and upon the theory that the law will eradicate a restrictive covenant when it no longer serves its purpose.[17] Though a covenant may be terminated by abandonment, waiver, change of neighborhood, or any combination thereof, none of these reasons seem particularly relevant as justification for the decision in the principal case.

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[11] Jackson v. Stevenson, note 5 supra.

[12] Rector v. Rector, note 6 supra.

[13] Welshire v. Harbison, (Del. 1952) 88 A. (2d) 121; 18 VA. L. REV. 439 (1932); 4 THOMPSON, REAL PROPERTY 557 (1940).

[14] Maganini v. Hodgson, 138 Conn. 188, 82 A. (2d) 801 (1951); Riverton Country Club v. Thomas, 141 N.J. Eq. 435, 58 A. (2d) 89 (1948).

[15] Hamburger v. Kramp, 268 Mich. 611, 256 N.W. 566 (1934). See also 62 HARV. L. REV. 1394 (1949).

[16] Meyer v. Stein, 284 Ky. 497, 145 S.W. (2d) 105 (1940); Goodwin Bros. v. Combs Lumber Co., 275 Ky. 114, 120 S.W. (2d) 1024 (1938); Anderson v. Henslee, 226 Ky. 465, 11 S.W. (2d) 154 (1928); Hobson v. Cartright, 93 Ky. 368, 20 S.W. 281 (1892).

[17] CLARK, COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND," 2d ed., 171-177 (1947); Pound, "The Progress of the Law 1918-1919," 33 HARV. L. REV. 813 at 821 (1920).