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Real Property - Grantor's Covenant to Insert Restrictions in Future Deeds as Personal Covenant

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REAL PROPERTY—GRANTOR'S COVENANT TO INSERT RESTRICTIONS IN FUTURE DEEDS AS PERSONAL COVENANT—Certain farm owners, intending to subdivide the land, conveyed a lot to plaintiff by a deed restricting its use to residence purposes and providing that only single dwellings could be erected. The grantors covenanted to insert the same restrictions in future deeds to the rest of the land. Plaintiff recorded his deed. The grantors subsequently sold another lot to defendant church without inserting a similar restrictive covenant. Plaintiff brought suit to enjoin the erection of the church. On appeal from a decree for defendant, *held*, affirmed, three judges dissenting. The parties to the first deed, in providing for similar covenants in future deeds from the same grantor, did not impose upon the land retained by the grantors, while owned by them, the same restrictions as were imposed on the land granted; therefore, under the theory of reciprocal negative easements, the restrictions could not subsequently be imposed on the land when sold to the defendants. The language indicated that the grantors' covenant to insert similar restrictions in future deeds was intended to be merely a personal covenant. *Buckley v. Mooney*, 339 Mich. 398, 63 N.W. (2d) 655 (1954).

A conveys part of his land to B, the deed contains mutual restrictive covenants, and the deed is properly recorded. A later conveys all or a part of his remaining land to C. In Michigan, as in some other states, C is charged with notice of the restrictions imposed upon the land by the prior deed.¹ This rule foreclosed any claim by the defendant in the principal case that it was a purchaser without notice of the encumbrance. The defendant did, however, persuade the court that the covenant was a personal one as against the grantors, and that he, the defendant, consequently was not bound to observe the restriction even though having notice of it. Although not clearly stated in the opinion of the court, there are two possible bases for the court's conclusion that the grantors' covenant was personal: (1) it would be personal if it did not "touch and concern"

¹ *McQuade v. Wilcox*, 215 Mich. 302, 183 N.W. 771 (1921). *Accord*, *Finley v. Glenn*, 303 Pa. 131, 154 A. 299 (1931). See also 16 A.L.R. 1013 (1922); 2 TIFFANY, *REAL PROPERTY*, 2d ed., pp. 2188-2190 (1920). *Contra*, *Glorieux v. Lighthipe*, 88 N.J.L. 199, 96 A. 94 (1915). The *McQuade* case, as authority for imposing reciprocal negative easements, was distinguished on the basis that the restrictions there were expressly stated as being for the benefit of all present and future owners. A subsequent grantee in Michigan is also charged with notice of any restrictions disclosed by an examination of the character of the neighborhood. *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925).

the land; (2) it would also be personal, even if it did touch and concern the land, if the parties did not intend that the burden and benefit attach to their respective lots.² There is little question but that the covenant in the principal case touches and concerns the land. Furthermore, it is difficult to believe that the court, in construing the covenant as personal, gave effect to the reasonable intentions and expectations of the parties to the earlier deed. Such a personal covenant would be fully executed if A, the grantor in the earlier deed, inserted the required restriction in his deed of conveyance to C, the grantee of A's remaining land. C would not be bound to impose the same restrictions upon a grantee to whom he, in turn, might convey the land; nor would B have a cause of action against C's grantee even though the latter might be said to take with notice of the restrictions imposed by the earlier deeds. It would seem rather that the parties intended that the burdens and benefits attach to their respective lands in order that the retained land be restricted at the time of the sale to defendant whether or not the restrictions were put in his deed.³ Thus construed, the plaintiff could enjoin any future grantee with notice from violating the restrictions, even though the plaintiff suffered no damage from the violation.⁴ The fact that the parties did not impose the restrictions on the retained land while owned by the grantors is not inconsistent with an intention to subject this land to the restrictions when conveyed to subsequent grantees.⁵ The court, having summarily concluded that the covenant of the grantor was personal, limited its decision to the difficult issue of implied reciprocal negative easements.⁶ Had the covenant been construed as real, the case could have been solved under the broader principles of equitable servitudes in general. Thus the defendant in the principal case would be charged with notice of the express covenant and restrictions, and the case would have been decided for the plaintiff under the equitable principle that the burden of an owner's covenant will be binding in equity on a purchaser who takes the estate with notice.⁷ In most cases applying this rule, a landowner enforced a covenant made by his grantee B against a sub-grantee of B who took with notice.⁸ In the few cases having facts parallel to those of the principal case, however, no distinction has been

² See 2 AMERICAN LAW OF PROPERTY §9.10 (1952).

³ Cf. *University Club of Chicago v. Deakin*, 265 Ill. 257, 106 N.E. 790 (1914).

⁴ *Peck v. Conway*, 119 Mass. 546 (1876). See Clark, "Equitable Servitudes," 16 MICH. L. REV. 90 at 96 (1917).

⁵ The dissenting opinion construed the covenant as indicating that the intention of the parties was that the restrictions were to be immediately applicable to the land while still retained by the grantors.

⁶ Counsel for plaintiff prejudiced their case by limiting the brief to this issue.

⁷ *Tulk v. Moxhay*, 2 Phil. 774, 41 Eng. Rep. 1143 (1848). See note 1 *supra*.

⁸ *Whitney v. Union Ry. Co.*, 77 Mass. 359 (1858); *Trustees of Columbia College v. Lynch*, 70 N.Y. 440 (1877). See 2 POMEROY, EQUITY JURISPRUDENCE, 2d ed., §688 (1892). See also *Lewis v. Gollner*, 129 N.Y. 227, 29 N.E. 81 (1891), where the equity of the covenantee attached to after-acquired property of the covenantor.

drawn on this ground.⁹ Where the question has been raised the court has stated that the rule applies equally in the two situations.¹⁰

The doctrine of implied reciprocal negative easements performs the function of imposing on one lot, the chain of title to which does not disclose any restrictions, the same restrictions as have been imposed on neighboring lots pursuant to a general scheme. In the principal case the grantor's covenant was an express one and was within the defendant's chain of title. Thus, it should have been easier to find an enforceable restriction in this case than in the type of case involving an implied reciprocal easement.

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⁹ *Finley v. Glenn*, note 1 *supra*; *Ward v. Parks*, 166 Ga. 149, 142 S.E. 690 (1928); *Kirkpatrick v. Peshine*, 24 N.J. Eq. 206 (1873). In the last case cited, the principle of the *Tulk* case was strongly endorsed, but could not be applied because, under *Glorieux v. Lighthipe*, note 1 *supra*, the subsequent grantee could not be charged with constructive notice. See also *Rosen v. Wolff*, 152 Ga. 578, 110 S.E. 877 (1922); and *Langenback v. Mays*, 207 Ga. 156, 60 S.E. (2d) 240 (1950), where prior tenants enjoined subsequent tenants from carrying on a business in breach of the landlord's covenant in prior tenant's deed not to rent remaining land to competing concerns.

¹⁰ *Trustees of Columbia College v. Lynch*, note 8 *supra*; *McKenrick v. Savings Bank of Baltimore*, 174 Md. 118, 197 A. 580 (1938).