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COVENANTS-RESTRICTIONS UPON THE USE OF LAND-NEGROES

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COVENANTS—RESTRICTIONS UPON THE USE OF LAND—NEGROES—Many years ago a subdivision in Detroit was platted, with recorded building restrictions.[1] When ready for the sale of lots, the intended high character of the subdivision and its desirability for expensive residences was much advertised. An association, an informal organization of some of the owners of houses in the subdivision, assumed the right to pass upon the desirability of prospective lot purchasers, and there was some indication that the person who advertised and marketed most of the lots verbally agreed to submit to the association the names of prospective purchasers and assured some intending purchasers that colored persons would be excluded. One *K* became the owner of one of the lots which, later on, he sold and conveyed to *D*, a negro.[2] Plaintiffs, resident property owners in the subdivision, sought an injunction against occupancy by *D*. *Held*, lower court was right in refusing the relief. *Kathan v. Stevenson*, (Mich. 1943) 12 N.W. (2d) 332.

The court rejected any contention that a restriction against occupancy by negroes could be added by parol to those set forth in the plat. In this the court, it would seem, was clearly on sound ground. Not only would the rules of evidence stand in the way, but also the Statute of Frauds.[3] Mr. Justice Wiest

[1] The report of the case does not disclose the restrictions other than that there was nothing in terms excluding colored persons.

[2] Apparently no question was raised as to *D* having taken with notice.

[3] Restrictions upon the use of land create interests in land within that statute. Such restrictions create what may fairly be called "equitable easements." The requirement of

pointed out that "verbal assurances by the subdivider to some lot buyers to exclude colored people from use and occupancy did not create a reciprocal negative easement." [4] But if the parol evidence was not relied on as *creating* restrictions but only as shedding light upon the meaning of general and ambiguous terms, it would seem to have been pertinent and admissible. While it is no doubt true, under the authorities, that one asserting that land is subject to restrictions has the burden of establishing that in fact restrictions have actually been effectively imposed thereon, it seems equally clear that, when such proof has been made, courts are inclined to interpret and enforce them in such a way as to effectuate the intent. A comparatively recent case decided by the same court displays such inclination.[5] The restrictions of record in that case were said by the court to be "indefinite and ambiguous." [6] The defendants in that case, admittedly of colored blood, had bought a lot in "a high-class residential district," and had erected a house thereon at a cost of $14,000. The plaintiffs, members of an association made up of many of the residents of the district, sued to enjoin occupancy by

a writing, of course, may be subject to the usual exceptions for cases of part performance and estoppel.

[4] Principal case at p. 334.

The doctrine of reciprocal negative easements was expressed by the same judge in Sanborn v. McLean, 233 Mich. 227 at 229-230, 206 N.W. 496, 60 A.L.R. 1212 at 1216 (1925) as follows:

"If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold. For want of a better descriptive term this is styled a reciprocal negative easement. It runs with the land sold by virtue of express fastening and abides with the land retained until loosened by expiration of its period of service or by events working its destruction."

Though this doctrine adds a lot to the problems of the title searcher, it has much to commend it. Just how much the doctrine has been restricted by Denhardt v. De Roo, 295 Mich. 223, 294 N.W. 163 (1940) is not clear. The Sanborn case arose out of a situation involving a general plan, but the language used by Mr. Justice Wiest, just quoted, obviously goes beyond such facts; he speaks of the owner of "two or more lots, so situated as to bear the relation." Thus it would seem that if *A*, owner of two adjacent lots, were to convey one to *B*, subject to restrictions as to building line and use, it might well be that *A*'s retained lot would be thereby subjected to like restrictions, even though nothing were said about it. That would seem to be the essence of an implied "reciprocal negative easement." If the doctrine applies only when the lots are within an area already subject to a "general plan," as might be concluded from the language used in the De Roo case, though the decision there might have gone on another ground, then the doctrine of the Sanborn case has but little room for application.

[5] Schulte v. Starks, 238 Mich. 102, 213 N.W. 102 (1927).

[6] They are reported, id. at p. 104, as follows:

"The restrictions herein contained shall run and continue with the land; and it is agreed between the parties hereto that the said restrictions shall be contained in all other future conveyances of said land situated on said Lakewood boulevard in said subdivision. Further, that the granted premises shall not be sold, rented or leased to any person or class of persons whose ownership or occupancy would be injurious to the locality."

defendants.[7] The court said that "If we had before us only the restrictions of record [8] there would be much force in the contention of defendants' counsel that they are too indefinite to be enforced, at least too indefinite to be enforced against these defendants. But the proof is overwhelming that from the inception of the subdivision to the present time there has been followed a consistent plan of exclusions of colored people from the occupancy of lots in the subdivision." It was pointed out that sales agents, etc. and lot purchasers had consistently construed the restrictions to exclude colored people, and that purchases of lots had been so advised. Among the cases relied on in the *Schulte* case is *Oliver* v. *Williams*,[9] in which the opinion was written by the same justice who wrote the opinion in the principal case.[10] In the principal case, as reported, the terms of the restrictions are not stated, but the court appears to regard them as intended to make and keep the area a "high-grade residence district." In the *Schulte* case it appears specifically that lots should not be sold or leased to persons "whose ownership or occupancy would be injurious to the locality." This language seems a bit more specific than the terms of the restrictions in the principal case, so the cases may be distinguished on that ground.[11] One may still wonder, however, why

[7] The court pointed out that it was settled law in the state that while restraints upon alienation to colored people were void [Porter v. Barrett, 233 Mich. 373, 206 N. W. 532 (1925)] restraints upon occupancy by such persons are valid and enforceable [Parmalee v. Morris, 218 Mich. 625, 188 N. W. 330 (1922)]. See also Los Angeles Inv. Co. v. Gary, 181 Cal. 680, 186 P. 596, 9 A.L.R. 115 at 120 (1919); White v. White, 108 W. Va. 128, 150 S. E. 531, 66 A.L.R. 518 at 531 (1929); Meade v. Dennistone, 173 Md. 295, 196 A. 330, 114 A.L.R. 1227 (1937); Martin, "Segregation of Residences of Negroes," 32 MICH. L. REV. 721 (1934).

[8] See note 6.

[9] 221 Mich. 471, 191 N. W. 34 (1922).

[10] In that case it appeared that the subdivider and purchaser had consistently construed the building line in the restriction to apply to the main bearing wall and not to preclude the erection of porches and steps within the restricted area, and defendant insisted that such erections were a violation of such restrictions and amounted to an abandonment of them. The court at p. 475 said:

"Defendants knew, when they purchased their lots, of the buildings restriction thereon and, while they accepted the same, they evidently did so with the mental reservation that they would not abide thereby if they could avoid the obligation. It constitutes no hardship to defendants to hold them to the restriction, as construed by practical endeavor, but it would be an inequitable hardship to the owners of residences to permit defendants to wipe out all their efforts to make a fine street by permitting them to erect a store building to the street line at the corner. No one, apparently, before defendants appeared upon the scene, questioned the practical construction given the restriction, and it is too late now for defendants to successfully contend that such efforts to comply with the plan of restriction shall be swept aside because of a wrong idea of the strict letter thereof."

[11] It seems a reasonable point of view that "high-grade residence district," as used in the current case, means what is stated in the language of the restriction in the Schulte case. To keep a district "high-grade" would seem to involve not only preservation of creature comforts, such as freedom from undue noise, smoke, etc. but also preservation of values and psychological contentment. In this connection interest may be found in such cases as Barth v. Hospital Assn., 196 Mich. 642, 163 N.W. 62 (1917) and Saier v. Joy, 198 Mich. 295, 164 N.W. 507 (1917) where relief was granted on the facts

the *Schulte* case was not even mentioned. In advising clients lawyers are indulging in prophecy—what would the court of last resort decide on these facts? The task is often difficult even when the factors are susceptible of cold, analytical appraisal; it is much more of a gamble when subtle economic, social and racial elements are involved. The following at least seem pretty clear in Michigan: (1) restrictive agreements excluding use by persons on basis of race are upheld, though restraints upon alienation thus based are frowned upon; (2) agreements forbidding occupancy by persons whose ownership or occupancy would be "injurious to the locality" may be effective, when supported by evidence of conduct supporting such construction, to bar colored people; (3) restrictions to "high-grade residence district" do not warrant exclusion of negroes, even though the supporting proof shows such intent and practice.

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largely because of mental discomfort caused by uses of neighboring land. The fact remains, however, that a restriction in the Schulte case was in terms directed against persons, however vaguely they were described.