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Eminent Domain--Covenant by Grantee to Sell Only Products of Grantor Is Covenant Running with Land for Which Grantor's Successor Due Compensation

John T. Bondurant

University of Kentucky

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Recent Cases

**Eminent Domain—Covenant by Grantee to Sell Only Products of Grantor Is Covenant Running with Land for Which Grantor’s Successor Due Compensation.**—In March, 1948, the owners of a wholesale oil products distributing business sold and conveyed a filling station through which they were retailing their products. As part of the consideration, the grantee agreed that he, his heirs and assigns would for fifteen years thereafter handle only the oil products distributed by the grantors, their heirs and assigns. The terms of this agreement were recited in the deed. In November, 1948, the plaintiffs acquired the distributing business, together with the grantors’ rights under the agreement. The filling station passed through several owners, all of whom bought only the plaintiff’s products. In 1957, the Commonwealth of Kentucky condemned the property for highway purposes, and in March, 1958, the station was destroyed in the course of construction. When the state refused to recognize that the plaintiffs had any interest in the property for which compensation was due, they brought this action. The trial court concluded that the plaintiffs merely had a contractual right to furnish the filling station owners supplies for sale and dismissed the complaint. **Held:** Reversed, with two judges dissenting. The agreement constituted a restrictive covenant running with the land in favor of the grantors and their successors in the distributing business. The plaintiffs were entitled to compensation for the destruction of their contractual right to have the property used as a retail outlet for their products. *Folger v. Commonwealth*, 380 S.W.2d 106 (1959).

This case presents two novel issues equally worthy of examination: (1) Where the grantee of land agrees in the deed of conveyance to use in connection with a business which he plans to operate on the premises only the products sold by the grantors (a) does the burden of this agreement run with the land against subsequent grantees, and (b) may the benefit thereof be assigned by the grantors to their successors in business? (2) If the property is subsequently condemned for public use, must the grantors’ successors be compensated for the loss of their rights under the agreement? To recover, the plaintiffs in the principal case needed favorable answers to both of these questions. For unless they had an enforceable right under the agreement when the property was condemned, there was nothing on which to base a claim for compensation.

Insofar as it holds that the burden of this covenant will run with
the land, the principal case is a matter of first impression in Kentucky. In the two previous cases which have dealt with this type of agreement, Trosper v. Shoemaker\(^1\) and Knight v. Hamilton,\(^2\) the party against whom enforcement was sought was the original grantee. Hence the question whether the covenant ran with the land so as to bind subsequent grantees was not presented.

It is generally accepted that in order for the burden of a restrictive covenant to run with the land, either at law or in equity, so as to bind successive owners of the property, the covenant must touch and concern the land.\(^3\) Two jurisdictions which have considered whether the kind of covenant involved in the principal case touches and concerns the land have reached opposite conclusions. In Smith v. Gulf Refining Co.,\(^4\) the grantor was held entitled to an injunction against violation of the agreement by the grantee's successor. In reaching this result, the Georgia court concluded that the covenant related directly to the mode of enjoyment of the estate conveyed.\(^5\)

It is submitted, however, that the real basis for its decision is set forth in the following language:

> Evidently the *intention* of the parties to the deed was that for the term specified the products of a certain company should be sold there—the products of a company in which the grantor had an interest—and it is inferrable that he would not have conveyed the property to the grantee without the protection which rests upon the stipulation against the sale of the products of any other company than that named.\(^6\) [Emphasis added.]

This line of reasoning, of which traces can be found in the Kentucky cases,\(^7\) is contrary to the accepted principle that unless the covenant

\(^1\) 312 Ky. 344, 227 S.W.2d 176 (1949).
\(^2\) 313 Ky. 658, 293 S.W.2d 969 (1950).
\(^3\) 2 American Law of Property §§ 9.13, 9.25 n. 16 (Casner ed. 1952) (hereinafter referred to as Am. Law Prop.). See also Note, 45 Ky. L. J. 637 (1957). Clark, Covenants and Interests Running with Land 96-7 (2d ed. 1947), points out: "It has been found impossible to state any absolute tests to determine what covenants touch and concern land and what do not. The question is one for the courts to determine in the exercise of its best judgment upon the facts of each case." [Footnote omitted.] In Ferguson v. Worrall, 125 Ky. 618, 627, 101 S.W. 966, 968 (1907), the Kentucky court adopted this view:

> Whether a covenant will or will not run with the land does not . . . so much depend on whether it is to be performed on the land itself, as on whether it tends directly or necessarily to enhance its value or render it more beneficial or convenient to those by whom it is used or occupied.

The present case involves the converse of this proposition; i.e., the covenant directly reduces the value of the land and renders its enjoyment less beneficial to the owner or occupier.

\(^4\) 162 Ga. 191, 134 S.E. 466 (1926).
\(^5\) 134 S.E. at 448.
\(^6\) Ibid.

\(^7\) In Trosper v. Shoemaker, 312 Ky. 344, 227 S.W.2d 176 (1949), the deed recited: "This is a covenant running with the land hereinabove described,
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 touches and concerns the land, it cannot run, no matter how clearly the parties indicate their desire that it do so.8

In Montgomery v. Creager,9 a Texas court refused to enforce a similar restriction in a contract for dissolution of a partnership against one partner's subsequent grantee with notice. It stated:

We do not believe the view is correct that the contract provides for a restricted use of the filling station. The contract was one for the purchase and sale of gasoline. The filling station is only important as identifying the subject-matter of the contract; namely, such gasoline as is sold at the filling station. The agreement, if it could properly be called a covenant [sic], is certainly not such as attaches to the property, but it is purely personal between [the partners]. . . .10

The court went on to say that even a covenant which is enforceable in equity against a subsequent purchaser of the property with notice thereof must directly relate to or concern the land, its use or enjoyment; it is not sufficient that it affect the use or enjoyment of the property in an indirect fashion.11

Assuming, however, that a covenant of this nature does touch and concern the burdened land, it may be precluded from running with the land on still another ground. Namely, the benefit is in gross; i.e., there is no particular property which is benefited by the terms of the agreement. Doubtless when the covenant involved in the present case was made, the grantors owned some real estate in connection with their distributing business. However, the benefit did not attach thereto, but to the business itself. Had the grantors moved their establishment to a new location, they would still have been able to enforce the covenant against the grantee. The plaintiffs are entitled to enforce the covenant (if at all) as the grantors' successors in the distributing business, and not as the grantees of their real property.12

and this covenant also binds the second party and his heirs, successors and assigns herein.” Id. at 345, 277 S.W.2d at 177. The court there indicated its willingness to give effect to this expression of the parties' intention, saying:

The deed must be construed . . . in the light of the situation of the parties at the time the deed was executed, their purpose in inserting the restriction, . . . and the end to be obtained by the restriction. . . . Appellee [the grantor] . . . was no doubt interested in having as many outlets as possible for the distribution of his products. He did not have to sell his interest in the property. . . .

Id. at 347, 277 S.W.2d at 178. Evidently it was this dictum which the court in the principal case relied upon for its authority. See 330 S.W.2d at 107.

8 2 Am. Law Prop. § 9.10, at 366; Restatement, Property § 531, comment a (1944).
10 Id. at 466.
11 Ibid.
12 "We must next determine whether grantors’ successor in the distributing business is entitled to enforce the covenant. . . ." 330 S.W.2d at 108. This raises
Although there is no real policy in this country against allowing the burden of a covenant to run solely because the benefit is in gross, several courts have refused to do so in particular cases on the ground that it is undesirable to encumber a fee simple estate where there is no corresponding benefit to other land. Other jurisdictions, however, have enforced a covenant against the grantee of the burdened land both at law and in equity despite the fact that the benefit was personal to the covenantee.

So far this comment has considered the covenant in the principal case as a negative restriction on the use of the property conveyed; i.e., an agreement not to use any oil products other than those sold by the grantors or their successors. However, a plausible argument can be made that this agreement imposes on the grantee an affirmative duty to purchase all oil products sold in the premises from the grantors or their successors in the distributing business. Such an interpretation raises the additional problem whether the burden of an affirmative covenant will run with the land.

Following the lead of the English courts, which have refused to enforce affirmative agreements against subsequent purchasers with notice, a few American cases limited enforcement of affirmative

the question of the assignability of a benefit in gross. In Trosper v. Shoemaker, 312 Ky. 344, 227 S.W.2d 176 (1949), the Kentucky court held that a similar covenant could be enforced by the grantor's successor in the distributing business. The court in the instant case relied on this authority to find that the plaintiffs were entitled to the benefit of the covenant. 330 S.W.2d at 108.

Elsewhere there is little authority for or against assignment of a benefit in gross, either at law or in equity. 2 Am. Law Prop. § 9.32, at 430 suggests that equitable servitudes in gross may be treated as personal to the promises on the same grounds that easements in gross have been held non-assignable by a majority of American courts. On this latter point see 2 id. §§ 8.75-83. The Restatement of Property distinguishes between commercial and non-commercial easements in gross, allowing alienation of the former as a matter of law and leaving assignability of the latter to be decided on the facts of the particular case. Restatement, Property §§ 389, 491 (1944). The covenant in the principal case is analogous to a commercial easement in gross.

13 2 Am. Law Prop. § 9.13, at 375. Compare Restatement, Property § 537, comment a (1944), which takes the position that there is a strong policy against the running of a burden unless there is a corresponding benefit to land rather than to a person or business. Moreover, the Restatement does not permit the burden to run in any case where the benefit is in gross and the covenant deals with the use of the covenantor's land. Id. § 543, comment c. For a criticism of this position see Clark, "The American Law Institute's Law of Real Covenants," 32 Yale L. J. 699, 708-12, 723-5 (1943).


15 2 id. §§ 9.13 n. 11, 9.32, at 430 n. 7. See Pratte v. Balatsos, 99 N.H. 430, 113 A. 2d 492 (1955), where an agreement which gave the plaintiff the exclusive right to install and maintain a juke-box in a luncheonette was enforced against a subsequent purchaser of the business with knowledge thereof. The implications of this case are discussed in Chafee, "The Music Goes Round and Round: Equitable Servitudes and Chattels," 69 Harv. L. Rev. 1250 (1956).

16 Haywood v. Brunswick Bldg. Soc'y, 8 Q.B.D. 403 (1881). However, in several cases the English courts have enjoined commission of a particular act which would constitute a breach of the affirmative duty. See Clegg v. Hands, 44
covenants to certain types, such as those concerning fences or party walls.17 Several more recent decisions have expressly declared that a covenant with respect to the use of land which is essentially affirmative in nature may be enforced against any subsequent grantee with knowledge thereof.18 Most courts, however, have not distinguished between the running of affirmative as compared with negative burdens in covenants, whether enforcement is sought at law or in equity.19 In Ferguson v. Worrall 20 the Kentucky court construed an agreement which imposed on anyone using a party wall the obligation to reimburse the builder for part of the cost thereof as a covenant running with the land, without describing the burden as an affirmative one. Thus, in Kentucky, as in most jurisdictions, whether the burden of a covenant is affirmative or negative apparently has little bearing on whether it will run with the land.

Accepting for the moment the court's decision that the plaintiffs had an enforceable contract right in the property, let us now consider whether they must be compensated for the loss of that right by condemnation of the property.

Under section 13 of the Kentucky Constitution, no man's property may be taken or applied to public use without just compensation being paid to him. The purpose of such provisions as this is to redistribute among the general population certain economic losses which are inflicted on those who happen to lie in the path of a public or quasi-public improvement.21 However, as the Supreme Court has pointed out, such provisions do "not undertake . . . to socialize all losses, but those only which result from a taking of property."22 [Emphasis added.] Therefore, before one whose economic position is adversely affected by the exercise of the power of eminent domain is entitled to compensation, he must show that some property of his was taken.

Ch. D. 503 (1890), Luker v. Dennis, 7 Ch. D. 227 (1877), Catt v. Tourel, L. R. 4 Ch. App. 653 (1869). This suggests that refusal to enforce affirmative agreements may rest upon the difficulty of supervising performance thereof rather than any policy against the running of affirmative burdens per se. See 2 Am. Law Prop. § 9.36, at 438.


18 See, e.g., Nordin v. May, 188 F.2d 411 (8th Cir. 1951); Murphy v. Kerr, 5 F.2d 905 (8th Cir. 1925); Whittenton Mfg. Co. v. Staples, 164 Mass. 319, 41 N.E. 441 (1895).

The plaintiffs in the instant case should have had little difficulty with the first requirement, for it is well settled that an enforceable contract right constitutes property for which compensation must be made if it is taken for public use. The more difficult question, but one to which the court gave little consideration, is whether this contract right was in fact taken.

Exercise of the power of eminent domain has been said to affect contractual rights in two ways: (1) the rights themselves may be directly appropriated for public use; or (2) they may be frustrated by the taking of other property to which they pertain. As has just been pointed out, where there is a direct appropriation just compensation must be made. On the other hand, frustration incidental to the condemnation of other property has been held to require compensation only where the contract is considered part of the res taken.

In applying the last proposition to the condemnation of real property, some courts have concluded that the contract is not part of the res, and therefore is not "taken", unless the person benefited is thereby given some "interest" or "estate" in the land. In many instances, whether or not a person has such an "interest or estate" presents little difficulty. For example, most courts recognize that a tenant under a lease for a term of years has an interest in property sufficient to enable him to share in the compensation awarded when all or part of the leasehold is taken or damaged by the exercise of eminent do-


24 See note 26 infra.


26 See Omnia Commercial Co. v. United States, 261 U.S. 502 (1923); Annot., 152 A.L.R. 307, 308 (1944). Clearly in the principal case the plaintiffs' rights under the covenant were not directly taken by condemnation of the filling station but rather were frustrated thereby. However, the majority of the court apparently disregarded the distinction between these two situations, and simply found that the plaintiffs' rights had been "destroyed by the taking." 330 S.W.2d at 108. This attitude may be explained in part by the wording of Ky. Const. § 242, which provides that just compensation must be made for property "taken, injured or destroyed" by the exercise of the right of eminent domain. By a forced interpretation of this provision, frustration of contract rights such as occurred in this case could be construed as an injury to or destruction of property.

27 18 Am. Jur. Eminent Domain § 160 (Supp. 1959, at 105); Annot., 152 A.L.R. 307, 310 (1944). It should be noted, however, that there are interests (such as a tenancy at will) which constitute recognized estates in land, but whose owners are not entitled to compensation when the land condemned. See, e.g., Petry v. City & County of Denver, 123 Colo. 509, 233 P.2d 867 (1951) (lease terminable on 30 days' notice); Millhouse v. Drainage District No. 48 of Dunklin County, 304 S.W.2d 43 (Mo. Ct. App. 1957) (lease terminable at will). The apparent grounds for denial of recovery are that the right is incapable of evaluation or is not significant enough to be considered in arriving at the compensation for the land taken. Annot., 152 A.L.R. 307, 312 (1944).
main during the term of the lease. However, where, as in the present case, a contract creates rights concerning land which are not capable of classification as one of the customary interests or estates in real property, compensation has been required or withheld on a case-to-case basis in such a manner that no criteria for doing so has been established.

On the other hand, some courts, notably those of New York, have declined "to grope about in the mysterious world of 'estates' and 'interests not estates.'" Instead, they have taken the practical position that regardless of its source a right with respect to property taken by eminent domain should be disregarded in awarding compensation only where it is too remote or incapable of evaluation. Notice that this is a two-pronged test of compensation. When it is applied, a right may be disregarded for the purpose of compensation even though it is capable of evaluation if the relation which it bears to the land condemned is too remote.

The rule which the Kentucky court laid down in the principal case may be summarized in this manner: When contract rights are destroyed by the condemnation of real property for public use, the owner of such rights is entitled to compensation unless the interest or estate created thereby is so remote as to be incapable of evaluation. This represents a cross between the "estate or interest" requirement and the "remoteness and capability of evaluation" standards of the New York rule. In the process, however, the Kentucky court made one alteration in the latter principle, which may have affected the outcome of the principle case. Where the New York courts disregard those rights which are too remote or incapable of evaluation, the Kentucky court chose to ignore only interests and estates which are "so remote as to be incapable of evaluation." Due to the emphasis thus placed on remoteness, when the majority applied this rule to the facts of the instant case, they concluded that

28 See, e.g., City of Ashland v. Price, 318 S.W.2d 861 (Ky. 1958); see also cases cited in 18 Am. Jur. Eminent Domain § 232 n. 8 (1938).
30 United States v. 53 1/4 Acres of Land, 139 F. 2d 244, 247 (2d Cir. 1944).
32 The significance of the remoteness aspect of this rule may be illustrated by this example. Suppose the owner of a drive-in restaurant contracts to buy certain quantities of food supplies from a certain wholesaler for five years at a reduced price. After two years, the drive-in is condemned. May the wholesaler recover from the condemnor for any loss he sustained due to frustration of the contract? The value of the contract to him can be quickly and accurately ascertained. However, any court when asked to decide this question could, and probably would, say, "The wholesaler's rights under the contract were so remotely connected with the real estate on which the restaurant was located that he is not entitled to compensation."
the plaintiffs were entitled to compensation solely because their interest in the property was "immediate" and not at all remote, without considering the problem of evaluation.

Had the court undertaken to evaluate the plaintiffs' rights under the covenant, they would have had to consider these variable factors: (1) the likelihood that the plaintiffs or their successors would have continued in the distributing business for the rest of the term; (2) the possibility that the owner of the premises might have ceased to operate a filling station thereon; and (3) the volume of business which might have been done in the several oil products distributed by the plaintiffs and their margin of profit on each. In the present case evaluation would not be entirely impossible. Factor (3) could be estimated by projecting established business patterns through the remainder of the period. The resulting figure could then be discounted by factors (1) & (2). However, had the filling station been condemned shortly after the original conveyance, before any patterns of business had been established, not only would the plaintiffs' potential loss have been much greater, but also much harder to evaluate. Yet no court could with consistency require compensation in the first case and deny it in the latter.

After extensive consideration, this writer has concluded that there is no set of criteria that will indicate in every instance with absolute certainty which rights connected with the property condemned must be compensated for. Keeping this in mind, the rule enunciated by the New York courts, the gist of which was adopted by the Kentucky court in the principal case, appears to offer a guide for attorneys and courts alike which will be adequate in most cases. Moreover, it comes closer to achieving the purpose behind the constitutional provisions on which compensation is based.

Although the particular situation presented by the facts of the principal case is unlikely to reoccur frequently, this decision will no doubt have widespread ramifications in Kentucky eminent domain law. Just how far the court will extend the rule of the principal case remains to be seen. Certainly counsel for a condemnor would be well advised to join in the condemnation proceedings all persons having any rights with respect to the property condemned which may possibly fall within the scope of this decision, including those created by covenants and contracts. Only in this way can the condemnor be

33 Some of the difficulties encountered in evaluating the plaintiff's rights under the agreement were pointed up by Chief Justice Montgomery in his dissenting opinion. 330 S.W. 2d at 108.
34 In the event the property is purchased rather than condemned, the purchaser should obtain a release from these persons of any interest they might have in the property.
certain that the verdict will represent the value of all interests in the property. In borderline situations, such as the principal case, another proceeding among the condemnees may be necessary to determine the extent, if any, to which each is entitled to share in the proceeds.

John T. Bondurant

Municipal Corporations — Constitutional Law — Liability of Employees.— Defendant Erwin operated a fire truck as an employee of the City of Mayfield. In response to a call to help fight a fire in Murray, he was driving outside the corporate limits of Mayfield when his truck and the vehicle of the plaintiff were involved in an accident. This action was brought against Erwin¹ for his alleged negligence. The trial court dismissed the complaint, relying on Kentucky Revised Statutes² section 95.830(2), which provides in part: “Neither the city nor its officers or employees shall be liable in any manner on account of the use of the [fire] apparatus at any point outside of the corporate limits of the city. . . .” An appeal was taken. Held: Reversed, two judges dissenting. The statute freeing members of city fire departments from personal liability for their negligent acts is violative of two sections of the Kentucky Constitution: section 14, which provides, “all courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay” and section 54, which provides, “the General Assembly shall have no power to limit the amount to be recovered for . . . injuries to person or to property.” Both of these sections were intended to preserve those jural rights which had become well established prior to the adoption of the Constitution. Happy v. Erwin, 330 S.W.2d 412 (Ky. 1959) ³.

The statutory provision invalidated in the Happy case was evidently part of the legislature’s answer to Jefferson County Fiscal Court v. Jefferson County, ⁴ which declared that a city’s contract to furnish fire protection to the surrounding county was ultra vires and void. KRS section 95.830, enacted the following year, furnished cities with the power which had been shown to be lacking in the Jefferson County case. It also contained the provision in question freeing fire-

¹ The City of Mayfield, the City of Murray, and the liability insurance carriers of the two cities were also defendants, but their positions are not relevant here.

² Hereinafter referred to as KRS.

³ 278 Ky. 785, 129 S.W.2d 554, 122 A.L.R. 1151 (1939).