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Real Property--Notice of Restrictive Covenants in Kentucky

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> out the permission of the donor, is clearly shown, the mere fact that the donor keeps the machine in her garage, or wishes to supplement her kindness by paying all the expenses incident to the operation of the machine cannot be regarded as the retention of such dominion over the machine as to render the gift ineffective.[32]

In analyzing this case it is apparent that the subject of the gift is the automobile. And it is equally clear that the absolute, most unequivocal delivery possible would be a single act of giving the keys and the car simultaneously. In view of this there was no actual delivery here. But was there a symbolic delivery;—a transfer of the means of control, the keys to the car? Undoubtedly there was, not once, but many times. But since in daily life such a transaction is a very common occurrence, it might well be inconsistent with a gift and indicative of only a bailment. Therefore, to find any concrete basis for enforcing the gift it is necessary to rely on the constructive delivery concept. Since the delivery of the keys was equivocal, yet clearly an act possible of construction as a gift, the validity of the gift rests finally on the donor's manifestation of intention. Did the donor manifest so strong an intent to give that the gift should be sustained despite an equivocal act of delivery? The court felt that she did. In view of the conflicting nature of the evidence and the apparent equal weight on each side, it seems more realistic to say that she did not, that no clear manifestation of intent was shown. But this, it would seem, is an inevitable difference of opinion in such cases. This case undoubtedly represents the extremity of the constructive delivery concept where final determination of validity must rest on opinion.

J. Leland Brewster

REAL PROPERTY—NOTICE OF RESTRICTIVE COVENANTS IN KENTUCKY

Restrictive covenants that run with the land are enforceable against a subsequent purchaser only if he has notice of them.[1] This note discusses the various ways of obtaining notice of restrictive covenants in Kentucky including actual, implied, inquiry, and constructive notice. For classification purposes the kinds of notice may be defined as follows: Actual notice is information concerning the existence of the

[32] Id. at 431, 200 S.W. at 652.

[1] A purchaser will be bound, either by his knowledge o fthe covenant or by constructive notice from the record thereof. Patton on Titles, 1036 (1938). Also note 14 Am. Jur. Covenants, Conditions, and Restrictions, 659-663.

covenant, directly and personally communicated to the purchaser.[2] Implied notice exists when the purchaser is shown to have had knowledge of such facts and circumstances as would give a reasonable, prudent man actual knowledge of the covenant.[3] Inquiry notice occurs when one has actual notice of circumstances sufficient to put a prudent man on inquiry as to the particular fact, and he omits to make such inquiry with reasonable diligence.[4] Constructive notice is based on the assumption that no information concerning the covenant has been directly and personally communicated to the purchaser but his knowledge of it is inferred by operation of legal presumption as a consequence of recordation.[5]

ACTUAL NOTICE

If a purchaser has actual notice of restrictions at the time of purchase, he is bound by them even though they are not in his deed.[6] *Hammonds* v. *Eads*[7] illustrates clearly the meaning and effect of actual notice in Kentucky even though it involved an easement rather than a covenant; the meaning of actual notice is clearly the same in both instances. In this case Mrs. Eads' deed provided that "when the Hanging fork is past fording and the grantee cannot get across same to the above land, she is to have the right to pass over the other lands of the grantor to same."[8] A Mrs. Hammonds was about to purchase the land in which the easement existed. Mrs. Eads sent her stepson to see Mrs. Hammonds' agent. The son showed the agent the deed and the easement provision in it. The court held that the act of showing the purchaser the deed and informing him of the easement prior to purchase constituted actual notice of the restriction. They also dismissed the possibility of constructive notice even though the recorded deed had been conveyed from a common grantor with Mrs. Eads. The phrase "other lands" was too general to determine the particular lands to which it applied.

[2] 2 Pom. Eq. Jur., 611, 612. The definitions in the footnotes numbered two through five have been changed somewhat to make them applicable specifically to the restrictive covenant situations. For a general discussion of Notice, see 39 Am. Jur. 233 (1942).

[3] Interstate Life and Accident Co. v. Wilson, 52 Ga. App. 171, 183 S.E. 672, 677 (1935).

[4] Coleman v. Armstrong, 128 Okla. 87, 261 P. 228, 230 (1927).

[5] 2 Pom. Eq. Jur., 641-643.

[6] Hegna v. Peters, 199 Iowa 259, 201 N.W. 803-804 (1925). Where the court says, "[T]he evidence satisfactorily shows that he (purchaser) knew of and was advised that building restrictions existed on all this property before he bought it. This being so, whatever restrictions there were will be binding on him, although omitted from his deed."

[7] Hammond v. Eads, 146 Ky. 162, 142 S.W. 379 (1912).

[8] Id. at 163, 142 S.W. at 379.

Other jurisdictions, in accord with the general principle, have held that actual notice of an unrecorded covenant[9] or a valid parol agreement[10] binds the purchaser. There is also the possibility that a purchaser would be bound if he had actual notice of restrictions in an instrument of record outside the chain of title[11] or one which is defectively acknowledged.[12]

IMPLIED NOTICE

Under certain circumstances notice of restrictions will be implied even though the purchaser actually does not know about them and they are not of record. A common example is where the restrictions are imposed as part of a general building plan or scheme for the development of contiguous lots. Restrictive covenants imposed in this manner are for the benefit of all the lots included in the tract and may be enforced by the owner of any lot against the owner of any other lot.[13] In many of these cases implied notice is not involved because the covenants are recited in the recorded deed or placed of record as part of the plat. In one Kentucky case,[14] however, the recorded plat did not mention the restrictions. Although the purchaser conceded he had notice of the restrictions recited in his deed, he contended he had no notice, actual or constructive, of a general building scheme that would permit the restrictions to be enforced by any vendee of a lot within the area. The court found sufficient proof of a "general scheme and purpose" to cause the covenants to run with the land. But this only partly solved the problem because the purchaser must have notice of them in order for the restrictions to be enforceable by any vendee against him. Concerning this aspect of the case the court reasoned that if actual notice of the building scheme were necessary, (in the absence of constructive notice) the facts were sufficient to "impute knowledge" to the purchaser. The court said:

> Those facts consisted in the advertisements referred to, (these stated that the subdivision would be used for "residence pur-

[9] Newbold v. Peabody Heights Co., 70 Md. 493, 17 A. 372 (1889). Annotation 15 L.R.A. (N.S.) 1129. Also, Cotton v. Creese, 80 N.J. Eq. 540, 85 A. 600 (1912). A written agreement between adjoining lot owners that each should not build nearer than three feet to the common line in certain places is enforceable against a purchaser with notice.

[10] 49 L.R.A. (N.S.) 358 (1914).

[11] Stetson v. Cook, 39 Mich. 750 (1878).

[12] Horseshoe Coal Co. v. Fields, 207 Ky. 172, 268 S.W. 1078 (1925); Graves v. Graves, 6 Gray (Mass.) 391 (1856). These cases held that a defectively acknowledged deed was not recordable, and therefore would not give constructive notice. But suppose it was recorded and the purchaser had actual knowledge of the restrictions in it. Then it seems he would be bound by them.

[13] For discussion see note at 89 A.L.R. 815 (1934).

[14] Greer v. Bornstein, 246 Ky. 286, 54 S.W. 2d 927 (1932).

> poses only") and the ever present one of universal observance of the covenants by every other owner of the lots in the subdivision, even by the plaintiff herself up to the date when she attempted to commit the violation complained of.[15]

The court's terminology concerning the "imputed knowledge" of the purchaser is not helpful in classifying the type of notice. Assuming no constructive notice, the facts show the purchaser had implied notice of the restrictions. He had knowledge of the advertisements and observance by others pointing to the existence of a general building scheme. These facts and circumstances should lead him to knowledge that the restrictions ran with the land. Thus, in a typical building scheme situation, the Kentucky court in effect found implied notice to the purchaser or in their words, he had "imputed knowledge" of the restrictions.

Another possibility, and probably a preferable solution, would have been to find that the purchaser had constructive notice of both the restrictions and the general building scheme because every deed from the original grantor had contained the covenants. This should have given the purchaser notice from the record that a general building scheme existed.

INQUIRY NOTICE

No Kentucky cases have been found which expressly place a purchaser on inquiry notice of restrictive covenants, but the common law principle of inquiry notice has been adopted in other cases. These cases state that notice of facts which would put a man of ordinary prudence and intelligence on inquiry is equivalent to knowledge of all of the facts which a reasonably diligent inquiry might disclose.[16] When stated this broadly, the principle would clearly seem to encompass the covenant situation.

Other jurisdictions have specifically held that the purchaser of land is on inquiry notice of restrictive covenants under certain circumstances. In these cases two problems have arisen: (1) what facts put a purchaser on inquiry, (2) to what extent is the purchaser held to inquire. A purchaser may be put to inquiry from facts in the record which are insufficient to constitute constructive notice or from facts outside the record pointing toward the existence of uniform restrictions.

Concerning inquiry notice from facts of record, one case involved an effort by one purchaser in a platted subdivision to enforce a building

[15] Id. at 290, 54 S.W. 2d at 929.

[16] Sentry Safety Control Corp. v. Broadway and 4th Ave. Realty Co., 276 Ky. 648, 124 S.W. 2d 1051 (1939); Charles v. Whitt, 187 Ky. 77, 218 S.W. 994 (1920).

restriction against another purchaser.[17] There appeared on the recorded plat for the area a dotted line and the words, "Fifteen ft. building restriction." But on the minute books of the developing company was a stipulation that the restriction was to expire in ten years. Since the time limit had elapsed, the court refused to enforce the covenant and held that the facts of record should have placed the purchaser on "special inquiry" as to the time limitation on the covenant. The extent of the inquiry should have included the minute books of the grantor where the restriction was stated.

A well-known Michigan case, *Sanborn* v. *McLean*,[18] illustrates the view that certain facts outside the record, such as the existence of a building scheme, are sufficient to put a purchaser on inquiry of restrictions. The purchaser there was held to inquiry primarily because he had seen the strictly uniform residential character of the lots, all of which contained expensive dwellings. The purchaser should have inquired beyond his grantor or neighbors, and examined the record which showed the reason for the uniformly residential use. The court also suggested that the purchaser had constructive notice of the restrictions because they were inserted by the common grantor in the deeds to the other lots even though not in his chain of title. However, the restrictions recited in the deeds expressly applied only to the lots conveyed. To hold that the purchaser has constructive notice that restrictions on the land conveyed apply to the lot retained may result in an injustice to one who has no actual knowledge of the building scheme. In most of the cases in which a purchaser has actual knowledge of a building scheme or other facts pointing to the existence of restrictions a preferable solution would be to place on him a duty to make reasonable inquiries.

In comparing the Kentucky view with the analysis in the *Sanborn* case, it is interesting to note that practically all of the Kentucky cases involving a uniform residential scheme have held the purchaser to *constructive* notice because of recordation.[19] But these cases on their

[17] McCloskey v. Kirk, 243 Pa. 319, 90 A. 73 (1914). For a deed containing a covenant putting the purchaser on inquiry see Pearson v. Stafford, 88 N.J. Eq. 385, 102 A. 836 (1918).

[18] Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496, 498, 60 A.L.R. 1212 (1925). Also see 144 A.L.R. 916 (1943).

[19] Holliday v. Sphar, 262 Ky. 45, 89 S.W. 2d 237 (1935) (recorded deed contained the restrictions). Greer v. Bornstein, 246 Ky. 286, 54 S.W. 2d 927 (1932) (restrictions were in every recorded deed even though not in the recorded plat). Biltmore Development Co. v. Kohn, 239 Ky. 460, 39 S.W. 2d 687 (1931). All deeds in purchaser's chain of title contained the restrictive covenant. Anderson v. Henslee, 226 Ky. 465, 11 S.W. 2d 154 (1928), restrictions were contained in the deed. Crutcher v. Moffett, 204 Ky. 444, 266 S.W. 6 (1924), restrictions were contained in the original deed even though not in subsequent

facts did not raise the problem of recordation out of the chain of title. *Harp* v. *Parker*,[20] discussed *infra*, affords an opportunity to compare the Kentucky view on this latter point with the *Sanborn* case.

CONSTRUCTIVE NOTICE

Constructive notice of restrictions is given to a purchaser by recordation and legal presumption.[21] Thus a deed or even a recorded plat with restrictions,[22] if in the chain of title, is sufficient to give constructive notice of restrictive covenants running with the land.

Although it is clear that a purchaser has constructive notice of restrictions appearing in his direct chain of title the problem remains as to the scope of notice given by a recordation not in the direct chain of title. Two types of off-conveyances containing restrictive covenants present the notice problem. In the first type the common grantor who owns two or more lots conveys one of them with restrictions in the deed expressly applicable to the lot retained. In the second type the grantor conveys one of the lots with restrictions in the deed expressly applicable only to the one conveyed, not mentioning the retained lot. In both cases the grantor later conveys the retained lot but does not mention any restrictive covenants as being applicable to it.

In the first type of off-conveyance Kentucky has held the purchaser of the second lot to have constructive notice of the restrictive covenant. In *Harp* v. *Parker*[23] the grantor who owned two lots conveyed one with a restriction in the deed that nothing would be built on the retained lot nearer the road than the front line of the grantor's residence. Subsequently, the retained lot was conveyed with no mention of such restrictions. However, even though the purchaser of the retained lot had no actual notice of the restrictions or record notice in his direct chain of title, the Kentucky Court, citing Tiffany, stated:

> A purchaser is, it appears, ordinarily charged with notice of an incumbrance upon the property created by an instrument which is of record, although the primary purpose of such instrument is, not the creation of such incumbrance, but the conveyance of neighboring

deeds and the purchaser was held to constructive notice. Highland Realty Co. v. Groves, 130 Ky. 374, 113 S.W. 420 (1908), restrictions were contained in the deed to the lot.

[20] Harp v. Parker, 278 Ky. 78, 128 S.W. 2d 211 (1939).

[21] See Clark, Covenants and Interests Running With Land, 162 (1929).

[22] Parrish v. Newbury, 279 S.W. 2d 229 (Ky. 1955). Building restrictions or anything else properly written upon a recordable plat become a part of it and constitute constructive notice.

[23] Harp v. Parker, supra note 20. Other jurisdictions in accord with the Kentucky rule are: Lowes v. Carter, 124 Md. 678, 93 A. 216 (1915); Finley v. Glenn, 303 Pa. 131, 154 A. 299 (1931).

> property. . . . And if, in conveying lot A, the grantor enters into a restrictive agreement as to the improvement of lot B, retained by him, a subsequent purchaser of lot B would ordinarily be charged with notice of the agreement, by reason of its record as a part of the conveyance of lot A. Were he not so charged, the restrictive agreement might be to a considerable extent nugatory.[24]

Thus in every instance where two or more lots have been conveyed by a common grantor, the Kentucky abstractor must examine all the grantor's deeds of off-conveyance for restrictive covenants expressly applicable to the land retained.[25] Because of the magnitude of the title examiner's task under this view, many states have attempted to impose some limitations on the extent of the constructive notice given by the records. One New York case[26] has suggested that the search should extend only to deeds of land which is intimately related to the land retained even though the deeds are not within the chain of title. However, this is actually of no value because it is impossible to tell which land is "intimately related" until there has been an examination.[27]

The second type of off-conveyance has presented more difficult problems. Some courts have held that where the restrictive covenants are expressly stated to apply only to the land conveyed the result is an implied restriction on the land retained, or what has been called a reciprocal negative easement. Perhaps the best example of this is *Sanborn* v. *McLean*,[28] discussed earlier, where the common grantor conveyed a number of lots with building restrictions. The grantor's deed to one of the purchasers contained no restrictions, however, and none of the off-conveyances contained restrictions expressly applicable to the land retained. Despite this the Michigan court states:

> 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 owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold. . . . [T]his is styled a reciprocal negative easement. . . . It is not personal to owners, but operative upon use of the land by any owner having actual or constructive notice thereof. They arise, if at all, out of benefit accorded land retained, by restrictions upon neighboring land sold by a common owner.[29]

The practical problem in this kind of case is whether a potential purchaser will actually obtain notice of the restriction even if he

[24] Tiffany, Real Property 2188-2190 (2d ed. 1920); Harp v. Parker, supra note 20 at 81-82, 128 S.W. 2d at 213.

[25] Harp v. Parker, supra note 20.

[26] Holt v. Fleischman, 75 App. Div. 593, 600, 78 N.Y. Supp. 647, 652 (1902).

[27] For an excellent discussion of the problem see note, 21 Cornell L.Q. 479 (1936). Also, Philbrick, Limits of Record Search and Therefore of Notice, 93 U. of Pa. L.R. 125, 174, 175 (1944).

[28] Sanborn v. McLean, supra note 18.

[29] Id. at 206 N.W. 497.

searches the off-conveyance carefully. The *Sanborn* case suggests two possibilities as to the kind of notice. He may have constructive notice because the record shows the restrictions applicable to the conveyed lots, and if the restrictions are for the benefit of the retained lots, the covenant becomes equally applicable to the purchaser's lot by the doctrine of reciprocal negative easements. This is particularly true in the cases involving a general building scheme or plan. Or the purchaser may have inquiry notice based on the existence of a building scheme of which he had actual knowledge outside the record. This aspect of the *Sanborn* case is discussed more fully in the inquiry notice section of this note.

In several cases the Kentucky court has refused to imply a covenant on the retained property merely because of a restriction expressly applicable only to the property conveyed. *Bondurant* v. *Paducah & I. Ry. Co.*[30] is an example of the Kentucky court's refusal. In this case the grantor divided a large tract of land and adopted a common system of regulation and improvement for residence purposes. One regulation provided that a purchaser would not use or permit the lots to become a nuisance to adjacent residents or damaging to adjacent property. This restriction was clearly for the benefit of other property holders in the development and under the *Sanborn* rule probably would have imposed a mutual servitude. The defendant railroad company purchased property in the subdivision to which no express restrictions applied and built a track through the subdivision near the plaintiff's lot. Plaintiff contended that this damaged his property and that the system of restrictions adopted by the common grantor formed a basis for mutual restrictions on all property owners in the subdivision. The court rejected this argument and stated:

> The mere fact that the deed . . . under which appellant holds title, contains a restriction as to the use of the lots thereby conveyed, could in no wise be binding upon others acquiring lots within such addition, unless there was embodied in the deeds under which they hold title a similar restriction.[31]

Here the Kentucky court did not imply a restriction on the land retained by the grantor, and has maintained this position in the recent case of *McCurdy* v. *Standard Realty Co.*,[32] in which the court specifically considered the *Sanborn* case and refused to be governed by it. They held that a reciprocal negative easement would not be imposed on the grantor's retained lots because an implied restriction by reason

[30] Bondurant v. Paducah & I. Ry. Co., 186 Ky. 79, 218 S.W. 257 (1920).
[31] Id. at 218 S.W. at 258.
[32] McCurdy v. Standard Realty Corp., 295 Ky. 587, 175 S.W. 2d 28 (1943).

of a general plan or scheme can only be created by a "contemporaneous enforceable agreement".[33]

But in a subsequent case, *McLean* v. *Thurman*,[34] there is general language to the effect that the Kentucky court might adopt the Sanborn rule and imply a mutual servitude from a restriction expressly applicable only to the conveyed lot. The court stated:

> Where the owner of two or more lots situated near one another conveys one of the lots with express building restrictions applying thereto in favor of the land retained by the grantor, the servitude becomes mutual, and during the period of restraint, the owner of the lots retained may do nothing that is forbidden to the owner of the lot sold. Such a restriction is said to create a reciprocal negative easement. . . .[35]

This statement is broad enough to include the *Sanborn* rule and could be used by the court in adopting it and holding a purchaser to have constructive notice of the servitude. However, this language is weakened considerably when the cases are compared on their facts. In the *Sanborn* case the restrictions were stated so as to expressly apply only to the conveyed lots with no mention of their application to the retained lots. But in *McLean* v. *Thurman* the grantor covenanted that the restrictions would also apply to "any lot in said subdivision", making it much clearer that the purchaser should have constructive notice of their application to his lot.

There is now a good possibility that the Kentucky court, if confronted with the proper fact situation, would adopt the *Sanborn* rule and hold a purchaser to have constructive notice, in a building scheme situation, that an express restriction applicable to a conveyed lot may raise an implied restriction on retained lots.

A minority of jurisdictions have eliminated the problem of constructive notice in both types of off-conveyances by holding such notice

[33] The court did not elaborate on what the phrase meant, but cited three cases. They require a written agreement between the grantor and grantee that the particular lot be subject to certain restrictions, ruling out the possibility of implied covenants. The cases are: McBride v. Freeman, 191 Cal. 152, 215 P. 678 (1923); Mutual rights in real property concerning building construction must be stated in the written instruments exchanged between them which constitute the final expression of their understanding. Werner v. Graham, 181 Cal. 174, 183 P. 945 (1919). There was no reference in the deed to a common plan of restrictions nor any expression of an agreement between the grantor and grantee that the lot conveyed was taken subject to any such plan. Sprague v. Kimball, 213 Mass. 380, 100 N.E. 622 (1913), required an agreement in writing that the remaining land should be conveyed under similar restrictions before the court would impose restrictions on the land.

[34] McLean v. Thurman, 273 S.W. 2d 825 (Ky. 1954).

[35] Id. at 829.

to be given only by deeds in the purchaser's direct chain of title and have made no exceptions.[36] One New York case states,[37]

> Recording constitutes notice only of instruments in the chain of title of the parcel granted. To have to search each chain of title from a common grantor lest notice be imputed would seem to negative the beneficial purposes of the recording acts.

This approach minimizes the title searcher's problem, but, as the case suggests, seriously impairs the scope of constructive notice and thus prevents a full utilization of the land records.

CONCLUSION

The necessity of giving notice of restrictions to purchasers has presented many problems resulting in the judicial extension of common law principles and the creation of new doctrines based on court interpretation of the purposes behind the recording acts. Underlying all of the decisions have been two prevalent factors—the need for an efficient, inexpensive method of land title transfer and the desire for the protection of land values within the developed areas. These two interests are often conflicting. For example, a modern subdivision development may contain a hundred or more recorded instruments representing title to the lots, utility easements, and building restrictions. To hold a purchaser to constructive notice of all restrictions in these instruments forces him to make a thorough search of all of them, resulting in slow, expensive transfers of land titles, a very undesirable thing for the modern business community. On the other hand, failure to hold the purchaser to notice of such restrictions would free him from them and would result in a serious decline in land values within the developed area. A strong argument can be made that other purchasers in the area should not have the value of their property jeopardized by a later buyer who fails to make reasonable inquiries or claims not to be bound by building restrictions outside his chain of title.

The adoption of a new system of title recordation may be the solution to the problem. The substitution of the tract index or the Torrens System of title registration for the present system has been suggested by many writers. But as long as the present system is retained, a court must continue to balance the need for an efficient, inexpensive means of title transfer against the often conflicting but generally paramount need for stability in land value. *Wayne J. Carroll*

[36] Judd v. Robinson, 41 Colo. 222, 92 P. 724 (1907); Hancock v. Gumm, 151 Ga. 667, 107 S.E. 872 (1921); Glorieux v. Lighthipe, 88 N.J.L. 199, 96 A. 94 (1915); Yates v. Chandler, 162 Tenn. 388, 38 S.W. 2d 70 (1931); Also note 16 A.L.R. 1013 (1922); Wichita Valley Ry. Co. v. Marshall, 37 S.W. 2d 756 (Tex., 1931).

[37] Buffalo Academy of the Sacred Heart v. Boehm Bros., Inc., 267 N.Y. 242, 196 N.E. 42, 45 (1935).