Kentucky Law Journal

Volume 45 | Issue 4 Article 5

1957

The Running of Restrictive Covenants in Kentucky

Luther House
University of Kentucky

of acquittal is supported by the evidence there would clearly be double jeopardy.[33] The proposal for a state statute might read:

> An appeal may be taken by the state from any judgment adverse to the state:
>
> 1. upon questions of law arising upon the trial and
> 2. with the permission of the trial judge.
>
> A judgment acquitting the defendant of all or part of the charge shall be deemed adverse to the state. Such a right as appeal by the state from an acquittal is further conditioned upon prompt application for permission to appeal. Such application must come before discharge of the accused.

Such a proposal places three safeguards upon possible abuse by the state. First, there can clearly be no appeal upon the facts of the case as to their sufficiency to support the *jury's* verdict of *acquittal.* The right can only be invoked to test the rulings of the trial court on matters such as admissibility of evidence, an order setting aside a conviction, or an erroneous instruction. Secondly, with the consent of the trial judge as a prerequisite to the state's appeal, it could not be termed an *absolute* right but rather a *discretionary* right. Thirdly, the application for permission to appeal must be prompt and before discharge of the defendant. This provision would prevent the accused from being apprehended after discharge and termination of jeopardy in the cause.

Henry H. Dickinson

THE RUNNING OF RESTRICTIVE COVENANTS IN KENTUCKY

The purpose of this note is to determine under what conditions a vendee of property in Kentucky is bound by, or may enforce, covenants made by his vendor. This requires a study of Kentucky cases involving covenants running with the land. These cases will be analyzed to determine the extent to which orthodox doctrine is now applied in light of modern policy.

Restrictions on the free use of land are not new. Licenses, easements, retaining wall agreements, leases and subdivision restrictions have been known since early times.[1] The last seventy-five years, however, have seen the most rapid increase in the amount of land transferred within the restricted subdivision scheme. This increase, to a great extent, has been due to the demand by individuals for protection

[33] 28 Jour. of Crim. Law 919, 923 (1938).

[1] Horack and Nolan, Land Use Controls 202 (1955).

of their economic investment in residential property. The courts are willing to enforce these restrictions because of the benefit received by the community in obtaining assurance of an orderly expansion in residential developments. Naturally such agreements would not be effective to secure stable land values if they were construed as mere personal agreements and not binding on subsequent vendees. As the land would be transferred the original agreement would be unenforceable against subsequent buyers.

Two concepts, historically, have been used by the courts to hold a subsequent vendee of realty to the covenants of his vendor:

First. The oldest of these concepts is known by the phrase, "covenant running with the land at law." This is merely a phrase which describes the situation where a court at law will find subsequent vendees subject to the restrictions as established between the original covenantor and covenantee. The classical requirements of a covenant running with the land are:[2] (1) Privity, (2) Intention, (3) Form, (4) Touch and Concern, (5) Notice. These are strict requirements which seriously limited the usefulness of the concept of real covenants.

Second. The other concept, equitable in nature, used to bind subsequent purchasers to the covenants of their vendor is usually known as an "equitable servitude." The concept was first used in *Tulk* v. *Moxhay*[3] to relieve the rigors of the requirements at law. The classical requirements of an equitable servitude are: (1) Notice of the covenant and (2) Intention that subsequent purchasers be bound.[4] The *Tulk* decision, due to its liberal standards, was a great benefit to English landowners who desired more property regulation. It answered needs created by the growth of modern cities and the crowded conditions of modern life.[5]

Are the foregoing requirements of orthodox doctrine accepted in Kentucky today? This can only be answered by looking at the cases and taking up each requirement separately.

PRIVITY OF ESTATE

One requirement of a covenant at law, and perhaps the most stringent, is privity of estate.[6] The exact meaning of this term is in

[2] Clark, Covenants and Interests Running with Land 94 (2d ed. 1947); Patton on Titles 1036 (1938). Also see Wheeler v. Schad, 7 Nev. 204 (1871).

[3] 2 Phillips 774, 41 Eng. Rep. 1143 (1848).

[4] Equitable Servitudes—The Running of Covenants in Equity, 2 Md. L.R. 265, 270 (1937-38). Some courts may require additional elements, i.e., a writing or that the covenant must touch and concern. See Sprague v. Kimball, 213 Mass. 380, 100 N.E. 622 (1913); 2 American Law of Property, 415 (1952).

[5] Barkley, Equitable Servitudes, 1 Baylor L.R. 440 (1948-49); Clark, supra note 2 at 170.

[6] Clark, supra note 2 at 111.

doubt. Several divergent views[7] are taken as to the elements necessary to its fulfillment: (1) succession to the estate of one of the parties to the covenant;[8] (2) succession of estate between covenantor and covenantee;[9] (3) mutual and simultaneous interest of the covenanting parties in the land;[10] and (4) the landlord and tenant relationship.[11]

The only Kentucky case found that mentions the word "privity" is *Swiss Oil Company* v. *Dials*,[12] a 1929 decision. There it is stated:[13]

> It is the general rule that, in order to make a covenant run with the land of the covenantor and bind his heirs and assigns, the covenantee must have such an interest in the land as to amount to privity of estate between the parties to the covenant; and, strictly speaking, such privity must exist between the parties when the covenant is made.

This vague language might imply that the court has adopted the second or third view of privity but the facts of the case do not support such a conclusion. A covenant was put in an oil lease between the land owner (plaintiff) and his lessee. The oil lease was subsequently assigned to the defendant. The assignee claimed not to be bound by the original covenant. The court found the covenant to run with the land since *privity* existed and it was the *intention* of the parties that subsequent lessees be bound. Thus, the facts of the case support only the proposition that privity is necessary between landlord and tenant.[14] This holding has little significance for the general requirement of privity. Privity is always present in the landlord and tenant relationship. Such a case cannot be used as a stepping-stone to the proposition that Kentucky requires privity of estate where a landlord-tenant relationship does not exist. In fact the *Swiss Oil* case seems to place emphasis on intention, not privity, when it says, "The important consideration is whether the covenant is intended to be and is annexed to the estate."[15]

[7] Ibid.

[8] Ibid. This view of privity differs from the others for it only requires succession between the covenanting party and his assign. Such a relationship will always exist with the possible exception of an adverse possessor or where the land has been assigned for life with remainder over. This view, essentially, places no restriction on a covenant running with the land. See Holmes, The Common Law, 404 (1881).

[9] Ibid. Holmes and Clark find this to be an entirely unjustifiable meaning.

[10] This is the Massachusetts view. Clark, supra note 2 at 128.

[11] This is the English view. 2 American Law of Property 336 (1952).

[12] 232 Ky. 298, 22 S.W. 2d 912 (1929). This case is later mentioned in Commonwealth v. Elkhorn Piney Coal Mining Co., 241 Ky. 245 at 250; 43 S.W. 2d 684 at 686 (1931) and in Warfield National Gas Co. v. Small, 282 Ky. 347 at 350; 138 S.W. 2d 488 at 489 (1940). Neither cites the Swiss Oil Case as standing for the requirement of privity.

[13] Id. at 22 S.W. 2d 914.

[14] This is the English view. Supra note 11.

[15] Supra note 13.

The Kentucky reports are full of cases dealing with covenants but no decision subsequent, or prior, to the *Swiss Oil* case has been found which mentions privity. Another Kentucky case, on its facts, does aid in dispelling any illusions that privity is a necessity. *Ferguson* v. *Worrall*[16] involved adjacent lot owners who entered into an agreement for the erection of a party-wall. One person was to build the wall on the party-line and bear the total expense. The other party covenanted that if he should ever use the wall as part of a building he would bear one-half the expense of the original cost. The court, many years later, held that the agreement to reimburse ran with the land and was binding on the first subsequent vendee who, with notice, used the wall. No privity (within the common law view of number two) existed here —yet the court enforced the covenant, without mention of privity, while saying, "The criterion for determining whether a covenant runs with the land is the intention of the parties."[17] The court again placed its emphasis on intention and notice—not privity.

However, the *Ferguson* case, as standing for no need of privity, may be weak in two aspects. First, it could be argued that privity does exist because the wall is on the property line and it is the basis of mutual or cross easements (view number three).[18] The objection to this argument is that the easement would not exist until sometime *after* the covenant and this could not satisfy the requirements of privity under views number two and three.[19] Second, a party-wall case is a poor case upon which to base any conclusion concerning privity. It seems that the courts, contrary to theory, have seldom required privity to be present in such cases in order that subsequent parties will be bound to the covenants of their vendors.[20]

No other Kentucky cases have been found which bear significantly on the requirement of privity. The facts of all reviewed cases present facts which place the parties within a privity relation—yet the court does not speak of privity. Since the court has not mentioned privity since 1929, it is doubtful if the requirement now exists.[21]

[16] 125 Ky. 618, 101 S.W. 966 (1907).

[17] Id. at 101 S.W. 968.

[18] Aigler, The Running With The Land of Agreements to Pay For a Portion of the Cost of Party Walls, 10 Mich. L.R. 187 (1912); Clark, supra note 2 at 150, n. 19.

[19] Clark, supra note 2 at 154, n. 30.

[20] Id. at 127, n. 108.

[21] Louisville H. & St. L. Ry. Co. v. Baskett, 134 Ky. 822, 121 S.W. 957 (1909) has had a history of being cited for the proposition that Kentucky requires privity. Clark, in his first edition, cited it as applying the Massachusetts view of privity. See Clark, Covenants and Interests Running With Land 108, n. 82 (1st ed. 1929). But it is noticeable that in Clark's second edition the case is cited as a "privity" case. See Clark, supra note 2 at 252. Tiffany, too, cites the case for the second

INTENTION

The second requirement for a covenant to bind subsequent purchasers of the land is intention. The covenanting parties must intend that all subsequent owners be bound by the covenant before it will become binding on them. This is one element universally accepted in law and in equity.[22] *Maynard* v. *Ratliff*,[23] a 1944 Kentucky case, states, "The criterion for determining whether a covenant runs with the land or is merely personal is the intention of the parties."[24] A more recent case, *Bagby* v. *Stewart's Ex'r.*,[25] reiterated this point when the court stated,[26]

> The right of a person not a party to a restrictive covenant to enforce it depends upon the intention of the parties in imposing it. In order to confer such a right upon one not a party to the agreement, it must appear that it was the intention of the covenantee to create a servitude or right which should run with the land. It is not necessary that such an intention appear from the express language of the instrument creating it, but it may be implied where it appears that it was imposed as part of a general building plan or scheme. . . .

Thus, it is clear that Kentucky will not bind subsequent purchasers of land to the covenants of their vendors unless the covenanting parties clearly intend the vendees to be bound.

FORM

Correct form is often listed as the third element necessary for a covenant to bind those not a party to it. Several factors are embodied in correct form, but only the most important, a writing, will be herein considered. The requirement of writing has been held to be necessary for full compliance with the statute of frauds,[27] although some courts may confuse it with notice. A frequently recurring situation arises when the grantee covenants in writing with the grantor that his (grantee's) land is to be bound but the grantor merely makes an oral

---

type of privity. See Tiffany, Real Property 1408, n. 18 (2d ed. 1920). The facts of the case actually contain privity in both senses, i.e., grant to a railroad, by deed, of a right of way. However, the court *did not* mention privity nor make it an essential requirement. Hence, the case does not stand for the proposition for which it is cited.

[22] Pound, The Progress of the Law 1918-1919, 33 Harvard L.R. 813 at 815 (1920); supra note 16.

[23] 297 Ky. 127, 179 S.W. 2d 200 (1944).

[24] Id. at 179 S.W. 202. For other cases in accord, see: Kentucky Central R.R. v. Kenney, 82 Ky. 154, 6 Ky. Law Rep. 17 (1884); Ferguson v. Worrall, 125 Ky. 618, 101 S.W. 966 (1907); Parrish v. Newbury, 279 S.W. 2d 229, 233 (Ky. 1955).

[25] 265 S.W. 2d 75 (Ky. 1954).

[26] Id. at 76.

[27] Sprague v. Kimball, 213 Mass. 280, 100 N.E. 622 (1913) (applied the statute of frauds to equitable servitudes); Sims, The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute, 30 Cornell L.Q. 1, 27 (1944-45).

promise, or indicates his intention by a general scheme, to bind the remainder of his (grantor's) land. Can the remainder thus be bound?

Several Kentucky cases present fact situations which raise this difficult question, but none of them mentions the statute of frauds. *Bondurant* v. *Paducah and I. Ry. Co.*[28] is such a case. The common grantor divided a large tract of land into lots and streets. The grantor (covenantee) placed a restriction in the deed to the property which plaintiff (assignee of the covenantor) eventually purchased. The restriction prohibited the use of the lot for any business which may become a nuisance. Nothing was written in the plaintiff's deed about similarily restricting grantor's remaining property. The defendant railroad bought another of grantor's lots but no similar restrictions were inserted in his deed. Plaintiff sued in equity to recover damages for what plaintiff termed a breach of the covenants mutually imposed on the lots by the intent of the grantor as shown by an *alleged* general scheme.

The Kentucky tribunal rejected the argument, saying,[29]

> The mere fact that [plaintiff's deed] contains a restriction as to 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 a similar restriction. It will be noticed, too, that it is not alleged that the [grantor] made any agreement to or did embody in other conveyances it might make similar restrictions, but only that such was its custom.

The language of the court, in light of the facts, is vague. The case may be read as based on several points: (1) there is no writing; (2) the court indicated that there may be a lack of notice (restrictions were not in the defendant's chain of title); (3) the court, judging from the language of the last sentence in the foregoing quotation, may have found a lack of *intention* to create a general scheme. Of course, intention to create a general scheme can be found through means other than an agreement. It can be found, in the absence of an express agreement, by the general, orderly and consistent lay-out of a subdivision. Any one of these factors could well be the basis of the case but the court does not indicate that it considered one controlling. No further conclusion can be safely drawn.

A decision, a few years later, with strong dictum to the effect that a writing is required to bind subsequent vendees was issued by the court in *Holliday* v. *Sphar*.[30] Here, the original grantor of the tract of

[28] 186 Ky. 794, 218 S.W. 257 (1920).

[29] Id. at 218 S.W. 258. Contra Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925).

[30] 262 Ky. 45, 89 S.W. 2d 327 (1936).

land inserted certain restrictions in the deeds which he conveyed. These restrictions were recorded and written on the plat. One restriction provided that no dwelling house shall be built closer than twenty-five feet to the street. The grantor failed to insert in the deeds that the lots in the subdivision were to be used for "residence purposes only." The grantor did, however, by his advertisements[31] clearly imply that the lots were only for residential purposes. The defendant bought a lot and was about to build a service station when the circuit court granted an injunction enjoining such construction. The defendant contended that the "twenty-five feet frontage" clause could not be construed as limiting the property only to residences. The plaintiff maintained that the "twenty-five" provision plus the advertisements showed a clear intention to restrict mutually all the property to residences. The court, using a narrow construction and finding for the defendant, held that the words of the covenant could not be construed as restricting the property to residences. However, the court, in its language, went beyond the facts[32] of the case and said,[33]

> The vendor's oral representations, or his advertisements of the sale of the lots, that the land is to be wholly devoted to one purpose is not operative as an estoppel to use a portion of it for a nonrestricted purpose. Such is merely to be considered as a circumstance in ascertaining from the language used in the deed the intention of the parties to the deed containing the restrictions.

The court indicates, by this language, that oral evidence can only be used to aid in construing the written instrument, and that an oral promise can not be used as the sole basis for binding subsequent vendees under a restrictive covenant. The *Sphar* decision uses strong language indicating a need for a writing but the case actually turns on the issue of construction. No more than this can be said.

A third Kentucky case, *McCurdy* v. *Standard Realty Corporation*,[34] contains language which may indicate a need for a writing. There, the common grantor inserted racial restrictions in plaintiff's deed and made oral representations (public advertisements and announcements) that similar provisions would be inserted in the remaining lots. These the grantor failed to insert. The grantor sold to Negroes and the plaintiff sued, alleging breach of restrictions imposed by a general scheme and the representations of the grantor.

[31] Id. at 89 S.W. 2d 328 for the full advertisement.

[32] If it had been definitely alleged and established that the advertisements were oral representations that the property was to be used for "residences only"—then the quoted statement would be holding, not dictum. The point was not litigated.

[33] Supra note 30 at 89 S.W. 2d 329.

[34] 295 Ky. 587, 175 S.W. 2d 28 (1943).

The court, holding for the defendant stated,[35]

> The appellant's case is deficient, it seems to us, in respect to the time and character [i.e., they were oral] of the representations claimed to have been made, and weak in respect to the notice or knowledge of the appellee. . . . The advertisements and public announcements relating to the ineffective auctioning of the lots . . . cannot be regarded in and of themselves as creating the burden of an encumbrance as against subsequent *bona fide* purchasers. (italics added).

This case, like the others, may turn on several points: (1) there is no writing; (2) there probably is no notice although the court expressly avoids this problem; (3) there is only vague evidence of intention to bind the section where the defendant bought. This case is probably the strongest of the three foregoing cases in its requirement of a writing. But, it does not state the basis of its decision, i.e., was violation of the statute of frauds an essential part of the finding?

A recent decision, *McLean* v. *Thurman*,[36] goes a long way in striking down the requirement of a writing to bind subsequent vendees to the covenants of their vendors. The court uses general language to the effect that it would not require a writing to bind the land retained by the covenantee when, in quoting from *American Jurisprudence*, it states,[37]

> The governing principle involved is: 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, which is enforceable against the grantor of a subsequent purchaser of the lot from his with notice, actual or constructive.

This statement is broad enough to stand for the proposition that no writing is necessary to bind a subsequent vendee to *oral* covenants of his vendor if he has notice and if the restrictions are in writing in a prior deed. However, the facts of the case may not support this generalization because the deed to the covenantor contained the written promise by the grantor that the remaining lots would be similarly restricted.

In light of the foregoing cases, a rule as to the requirement of a writing is difficult to state. Few cases, factually, have squarely presented the question. Nearly all the cases present facts that embody vague evidence of intention and notice. However, it seems, in light of

[35] Id. at 175 S.W. 2d 32.
[36] 273 S.W. 2d 825 (Ky. 1954).
[37] Id. at 829.

the dicta of the *McLean* and *Bagby* decisions, that the modern Kentucky Court would enforce any oral promises of the covenantor to bind his land when the covenantee's restriction is written in the original agreement. But the dicta and language of the foregoing cases make it doubtful the court would enforce an oral promise if no *written* restriction at all were placed in the deed between the covenantor and covenantee.

TOUCH AND CONCERN

The fourth element required by orthodox doctrine to bind a vendee to the covenants of his vendor is that the covenant touch and concern the land. The meaning of this phrase is somewhat elusive and has at times been confused with privity. It is impossible to state exact tests to determine those covenants which touch and concern and those covenants which do not.[38] However, one method, though somewhat circular, has been suggested which approaches the problem from the effect of the covenant upon the legal relations of the parties.[39] If the promisor's legal relations in respect to land are lessened (interest *as owner* less valuable), then the burden touches and concerns the land. If the promisee's legal relations are increased (interest *as owner* more valuable), the benefit touches and concerns the land.

No Kentucky cases have been found which present facts where the covenant does not touch and concern the land and only a few mention the requirement by name. The *Swiss Oil*[40] case makes the clearest statement on this matter when it says,[41]

> If the thing to be done is merely collateral to the land, and does not touch and concern the thing demised, then the assignee is not charged, though named in the covenant. . . . The important consideration is whether the covenant is intended to be and is annexed to the estate.

Such language clearly indicates that a covenant must touch and concern the land before it will be enforced although the intention language may somewhat weaken this conclusion.

A second case which refers to touch and concern is *Ferguson* v. *Worrall*[42] for it states,

> [W]hether a covenant will or will not run with the land does not, however, 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.

[38] Clark, supra note 2 at 97.
[39] Bigelow, The Content of Covenants in Leases, 12 Mich. L.R. 639 (1914). See Neponsit Property Owner's Ass'n., Inc. v. Emigrant Ind. Sav. Bank, 278 N.Y. 248, 15 N.E. 2d 793 (1938).
[40] Supra note 12 at 22 S.W. 2d 914.
[41] Ibid.
[42] Supra note 16 at 101 S.W. 968.

The foregoing cases are the only ones in which the Kentucky court has specifically referred to the requirement of touch and concern. The last case is 1929. In all cases examined the covenants in fact have touched and concerned the land.

NOTICE

Notice has always been a requirement in equity and at law in order to bind a subsequent vendee to the covenants of his vendor. This is still true in Kentucky today.[43]

RECENT CASE TRENDS

The language used by the Kentucky court in several recent cases may give insight into the present trend of decisions in their requirements for a covenant to bind subsequent owners of land. The court, from its statements, seems to place very little emphasis on the classical requirements of the common law. It now speaks in terms of equitable servitudes,[44] where formerly it spoke of restrictive covenants running with the land. The equitable and legal concepts of covenants, in terms of language, now seem to be used interchangeably. Cases, which on their facts would support covenants running at law if damages were asked for, use the language of equitable servitudes. The case of *McFarland* v. *Hanley*,[45] talking exclusively in servitude language, attempts to summarize the present status of restrictions in Kentucky when it states,

> Probably in no single subject of the law is there found a greater divergence of opinion among the courts of the several states than on the nature, extent, and construction of covenants restricting building and the use of land. Such covenants have been variously referred to as creating rights in the nature of servitudes, easements, equitable easements, amenities, reciprocal negative easements, or as equities in favor of adjoining land. *Such rights are denominated in this State as mutual, reciprocal, equitable easements of the nature of servitudes in favor of other lots of a plot of which all were once a part.* There is also a contrariety of opinion as to whether such restrictions run with the land. Kentucky, with a majority of jurisdictions, is firmly committed to the view[46] that such covenants constitute property rights which run with the land. (italics added)

[43] See Carroll, Real Property—Notice of Restrictive Covenants in Kentucky, 45 Ky. L.J. 172, 179 (1956) for an extensive discussion of the requirement of notice.

[44] See, McCurdy v. Standard Realty Co., 295 Ky. 587, 175 S.W. 2d 28 (1943); Bagby v. Stewart's Ex'r., 265 S.W. 2d 75 (Ky. 1954); McLean v. Thurman, 273 S.W. 2d 825 (Ky. 1954); Robertson v. Western Baptist Hospital, 267 S.W. 2d 395 (Ky. 1954).

[45] 258 S.W. 2d 3, 4 (Ky. 1953). The restrictions were inserted in all the deeds.

[46] This is important dictum on a long debated point. See, American Law of Property secs. 9.30 and 9.34 (1952).

Another recent Kentucky case employs the language of equity when it states,[47]

> [W]e are among the jurisdictions which adhere to the concept that such [residential] restrictions constitute mutual, reciprocal, equitable easements in the nature of a servitude in favor of owners of other lots of a plot of which all were once a part; . . . and if it be inequitable to have injunctive relief, to recover *damages*. (italics added).

Again all the attributes of a covenant at law are present but the court still speaks with the tongue of equity. The case implies that no distinction remains between covenants at law and covenants in equity when it speaks of *damages* for breach of a servitude.

The least that can be said about the foregoing court language is that it represents a trend in Kentucky of generally applying the concepts of equitable servitudes to restrictions placed on land. Such a trend, if it continues, will probably lead the court to adopt the liberal requirements of equity (notice and intent)[47a] as being necessary to bind subsequent purchasers to the covenants of the original owner.

POLICY EXAMINATION

Historically, a general policy has existed against anything which tends to limit the free use of land. However, during the last century, the courts found that many covenants were actually beneficial to the land, i.e., the covenants were the first assurance to the community that the neighborhood character would remain stable. This in turn insured real estate values and preserved a pleasant and enjoyable community in which to live. In order to give effect to these beneficial covenants, the equity court enforced covenants, which were unenforceable at law, as equitable servitudes.[48] Certainly, in recent years, restrictive covenants have been looked upon as beneficial—even as a necessity. Such a philosophy was stated only recently in a Kentucky decision,[49]

> As a general proposition it may be said that, when building restrictions first came into use, they were looked upon as restrictions against the individual owner of property and were scrutinized carefully to avoid the untrammeled use of real property. In recent years, however, they have come into rather general use in metro-

[47] Ashland-Boyd City County Health Dept. v. Riggs, 252 S.W. 2d 922, 925 (Ky. 1952) (restrictions in all deeds).

[47a] Jones v. Lambert, 298 S.W. 2d 297 (Ky. 1957) (notice and intention emphasized.)

[48] Reno, The Enforcement of Equitable Servitudes in Land, 28 Va. L.R. 951, 970 (1942).

[49] Dorsey v. Fisherman's Wharf Realty Co., 306 Ky. 445, 449, 207 S.W. 2d 565, 567 (1947). McFarland v. Hanley, 258 S.W. 2d 3, 4 (Ky. 1953) stated that the strict rule of construction had often been given only lip service.

> politan areas and are looked upon more in the nature of a protection to the property owner and the public rather than a restriction as to the use of property.

The court clearly implies in this and other cases[50] that the past strict rules of construction[51] of covenants are no longer to be followed. The Kentucky court has apparently shifted to a policy of liberal construction.

In light of this shift in basic policy, to what extent should the rules relating to covenants be retained?

(1) Privity. Privity has only been mentioned in one Kentucky case (1929) as dictum. The cases, factually, contain the elements of privity but no mention is made of it. Apparently Kentucky has never placed any emphasis on the necessity of this element for it has not been mentioned in twenty-eight years. Certainly no rational argument, either in history or policy,[52] can be made in favor of the common law privity of estate which requires something more than succession of estate between the covenanting party and his transferee. Even if privity does state a rational requirement, most vendees can be held under equitable servitude theory anyway. Thus, no mere technical rule, originally used to keep property unburdened by restrictions, should now be applied when such restrictions are now considered beneficial.

(2) Intention. Kentucky has always required this to be present, both in law and equity, in order that subsequent assigns of the covenanting parties be bound by the terms of the covenant. The new policy of liberal construction enables the court more frequently to give effect to the parties' intention. The requirement of intention is sound. A basic social principle of our society is that individual volition should, within the confines of social policy, be given effect by the courts. If the parties do not intend for the covenants to run, there is no policy that should move the court to act as a land planner. If the parties choose not to restrict their land, why should the state restrict it for them?

(3) Writing. The older Kentucky cases indicate that a writing may be necessary in order to bind subsequent assigns to the covenant. However, the language of recent decisions seems to imply that this may no longer be true if the assignee has notice of an oral agreement. The basis given for a need for a writing is the statute of frauds. However, in the situation herein discussed (i.e. where the covenantee and

[50] Ibid.
[51] See Holliday v. Sphar, 306 Ky. 495, 207 S.W. 2d 565 (1947).
[52] Clark, supra note 2 at 116.

covenantor execute a written agreement and the covenantee *orally* promises to similarly restrict the remainder of his land) there is no good reason for not enforcing the oral agreement. Technically the statute of frauds could be said to be satisfied by the writing between the covenantor and covenantee.[53] Some courts enforce the oral agreement by saying that parties with notice are estopped in equity to assert the statute of frauds.[54] It seems that there is no need to do by indirection what the courts could do directly. Why do not the courts just state that the statute of frauds is not applicable to this situation? After all, most of the cases do not even discuss the statute.[55] It seems that the main purpose the statute serves in these cases is to give *notice* to subsequent purchasers. If they already have notice, then there is no overriding reason for requiring a writing. Certainly, it would be inequitable to destroy a general building scheme because of a lack of a *second* writing.

(4) Touch and Concern. In every case examined the covenant touched and concerned the land in every sense of the phrase that has been suggested. Very few decisions, however, mention the requirement. Therefore, it is impossible to know whether the requirement still exists. Nevertheless, in light of the new policy of liberal construction this element should be retained. The new liberal construction is based on the fact that the covenants benefit land. If the covenant does not touch and concern it can not benefit the property. There is no reason why, even today, land should be encumbered indefinitely without conferring a benefit.

CONCLUSION

There is a definite trend in the modern Kentucky court to allow restrictive covenants to be applied freely to realty. No longer are strict rules of the common law required. In fact, a sanguine person might even conclude that today there is no difference of any consequence as between "equitable servitudes" and "covenants at law"; the terms may be used interchangeably and the requirements for a covenant to run are the traditional requirements of equity.

Luther House

[53] 2 American Law of Property 432 (1952).
[54] Johnson v. Mt. Baker Park Presbyterian Church, 113 Wash. 458, 194 P. 536 (1920).
[55] Supra note 53 at 433.