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Theories as to the Nature of Equitable Servitudes

Ira G. Stephenson

University of Kentucky

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time of delivery, but construed acceptance as being at the exact moment the grantee actually consented to the transfer. The court deemed it essential for the purposes of justice that the actual time of acceptance be considered as the beginning of ownership of the grantee. Probably this same result is reached in the majority-rule states.28

If the American rules were interpreted literally, injustice would result in certain instances. However, the courts have shown a tendency to integrate the two rulings in order to achieve justice in particular cases, e.g., the minority holds like the majority in infant cases, and the majority holds like the minority where the rights of third parties intervene. The two American views are sufficiently flexible to allow a broad interpretation when justice demands. It would therefore appear that there is little difference in many jurisdictions in the application of these rules.29

JAMES COLLIER

THEORIES AS TO THE NATURE OF EQUITABLE SERVITUDES

The entire subject of equitable servitudes is somewhat confused, most of the confusion probably arising because of a failure to understand their nature. It is generally agreed that an equitable servitude is a restriction on the use of land enforceable in equity between contracting parties or their successors with notice. Their development may be accredited to judicial legislation originating with the English case of Tulk v. Moxhay.1 The result in this case was obtained on the theory that the covenant should be enforced in order to prevent unjust enrichment on the part of the purchaser who presumably had paid less for the property because of the servitude. This rationalization has, however, been definitely repudiated.

Several other theories have been advanced by courts of equity in enforcing such agreements. The two theories most often relied upon by the courts are; first, such restrictions are enforceable as contracts concerning the land;2 and second, they are enforceable substantially as servitudes attached to the land.2

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1 Arnegaard v Arnegaard, 7 N.D. 475, 75 N. W 797, 41 L.R.A. 258 (1898)
2 If the different jurisdictions are to reach the same results, facts similar to those in the principal case would perhaps cause the greatest difficulty
3 See 2 TIFFANY, REAL PROPERTY (2d ed. 1920) 1434-1438; Stone, The Equitable Rights and Liabilities of a Stranger to a Contract (1918) 18 Col. L. Rev 291; Ames, Specific Performance for and Against Strangers to a Contract (1904) 17 Harv L. Rev 174; Giddings, Restrictions Upon the Use of Land (1892) 5 Harv L. Rev 274.
Proponents of the contract theory have been influenced by the language used and the results obtained in *Tulk v. Moxhay*. In this case the court, thinking purely in terms of specific performance said, "the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased."

Thus, together with the fact that equity usually gives specific performance to land contracts, has led many judges and writers to adopt the contract theory *in toto*. In *Wilson Co. v. Gordon*, involving the sale of land in a restricted area, the court said, "there is not here involved any grant of an actual interest, title, or direct easement in the land itself, of another, but strictly a restrictive covenant."

In many cases involving equitable servitudes it is possible and often convenient to use the contractual peg on which to hang the decision.

The more persuasive and substantially more logical theory, however, seems to be that these covenants run with and attach to the land in equity. This theory has been advanced by Dean Pound and other learned writers. In *Withers v. Ward*, Ritz, J., said, "the right to have them enforced, so far as the plaintiff is concerned, is one that is attached to his real estate. It is a part of his real estate, and when the owner of another lot in the subdivision attempts to violate one of these restrictions he is taking from all the other owners part of their estate. He is not merely committing a trespass upon it. He is destroying it, and equity will take jurisdiction by injunctive process to prevent one from inflicting permanent injury upon the real estate of another."

New York has held such interests are property rights, in condemnation proceedings. In *Peters v. Buckner*, the Supreme Court of Missouri held that the owner of a lot in a subdivision in which all of the lots were restricted to residential use has a property interest in each of the other lots which could not be taken for public use without compensation. The owner in that case was held to be entitled to a writ of mandamus compelling a school district to award him compensation before it could build a school building on the lot across the street from the plaintiff's land. Woodson, J., said, "The covenants and agreements in the deeds, create and vest in them, as owners, a legal right of property which is an appurtenance to their respective lots."

Where land subject to an equitable servitude, is acquired by adverse possession the servitude is not destroyed even though the

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52 Phillips, op. cit. supra note 1, at 1145.
5 See note 3, supra.
224 S. W 703 (Tex., 1920)
9 See note 4, supra.
86 W Va. 558, 104 S. E. 96 (1920)
224 N. Y. 140, 112 N. E. 913 (1916)
288 Mo. 616, 232 S. W 1024, 17 A. L. R. 543 (1921)
288 Id. at — 232 S. W at 1027.
acquirer had no notice of it. It would, therefore, appear that the doctrine of equitable servitudes operates as an equitable appendix to the law of real property.

It is believed, however, that it is not advisable to place equitable servitudes unequivocally in either of the aforementioned categories, since they possess certain characteristics inherent in both contract and property rights. It must be admitted that as between the covenantor and covenantee the restriction is contractual, and that all equitable servitudes have their origin in contracts. However, by no stretch of the imagination could it be said that the relation between the remote grantee of the covenantee and one who takes by adverse possession from the covenantor is contractual. Nevertheless, the equitable servitude can be enforced against one who takes by adverse possession since he is not a purchaser for value.

It may be concluded, then, that equitable servitudes are both contractual and real (pertaining to realty) in their nature. The result in a particular case may be influenced, or even determined, by whether the court is more persuaded by the contract phase of the servitude than by the property phase, or vice versa, at the time the decision is made.

IRA G STEPHENSON

TORTS—LIABILITY OF ELECTRIC COMPANY FOR CURRENT ESCAPING FROM POWER LINE

In Chase v. Washington Power Company, two chicken hawks became engaged in an aerial battle in the course of which their talons interlocked, and they fell, so attached, between the defendant's power line and guy wire. One touched the highly charged power line and the other touched the guy wire, thereby establishing a connection. From the connection thus made, the current ran down the guy wire and escaped into a wire fence which had been allowed to sag against the guy wire. The current was transmitted through the wire fence to the plaintiff's barn, to which the fence was attached. As a result, the plaintiff's barn was destroyed by fire and some other buildings were damaged. The Supreme Court of Idaho, in affirming a judgment for the plaintiff, found that there was sufficient evidence for the jury to find negligence on the part of the defendant and reasoned that since birds had, at other times, caused disturbances on the power line, it was foreseeable that they might make such a connection as the one made here.

This case raises some interesting problems, as it may be questioned whether there was really any negligence on the part of the power.

\[^15\] In re Nisbet and Potts Contract, 1 Ch. 386 (1906).
\[^16\] See note 12, supra.
\[^17\] 111 P (2d) 872 (Idaho, 1941)