Kentucky Law Journal

Volume 27 | Issue 4 Article 16

1939

Equitable Servitudes--Termination--Change in Neighborhood

Marvin Tincher
University of Kentucky

court, so that they may exercise their rights and powers as voters in electing a governor who will act conscientiously in the exercise of his powers.[5]

The result in the case is desirable since it places responsibility for the failure to enact a law on the person who causes that failure. Such placing of responsibility for failure of an act gives the people an opportunity to take corrective steps.[6] Further, this requirement of reasons serves to inform the public as to why a particular bill was vetoed by their governor. In cases where non-legislative bodies have opportunity to exercise vital powers, the public should be allowed, in all fairness, to hear the reasons why this vital power was so exercised.

Of course, after the governor has once given his reasons for a veto the court should not attempt to pass upon the validity of such objections but should leave the merits to be considered by the legislature.[7] For a court to pass upon the substance of objections accompanying a veto would be an example of encroachment by the judiciary upon the functions of the executive. JOHN L. YOUNG

EQUITABLE SERVITUDES—TERMINATION—CHANGE IN NEIGHBORHOOD

Deeds to lots in a certain subdivision contained restrictive covenants as to character and minimum cost of residences which might be erected thereon. Since the establishment of the subdivision, a number of business houses had been erected there, and the city zoning commission had declared the subdivision to be a business district. The plaintiff lumber company acquired a lot adjoining defendant's garage and asserted its right to erect thereon a business house. Defendant denied that right because of the restrictive conditions mentioned.

---

[5] In the principal case the attempt to exercise the veto power was made *after* the adjournment of the legislature. Conceding that the statement by the court in the *Arnett* case, that the reasons must be given in case of a veto while the legislature is in session, is mere dictum (Arnett v. Meredith, 275 Ky. 223, at p. 231), yet there would seem to be no ground upon which a rational distinction could be made in cases where the legislature is in session. The same reasons for requiring an accompanying message exist, without regard to whether the legislature is in session or adjourned.

[6] Whether the exercise of the "power to disapprove any part or parts of appropriation bills embracing distinct items" (Ky. Const., Sec. 88) will require an accompanying message containing reasons therefor will depend upon the court's construction of Sec. 88 in its entirety. One case intimates that a part or parts of an appropriation bill embracing distinct items could be vetoed by a mere notation of the fact of veto without any reasons. (Dickinson v. Page, 120 Ark. 377, 179 S. W. 1004 (1915). However, if the reason for the rule is sound, then there is no valid ground for relaxing the rule when applying it to parts of an appropriation bill as contrasted with the veto of a bill *in toto*. (See the dissenting opinion in the *Dickinson* case, 179 S. W. 1004, at p. 1007.)

[7] Birdsall v. Carrick, 3-4 Nev. Rep. (Hawley's Republication) 138 (1867). See esp. p. 141 of the opinion.

Held, the restrictions not binding as having been abandoned and their purpose defeated by changing conditions. *Goodwin Bros.* v. *Combs Lumber Co.*, 275 Ky. 114, 120 S. W. (2d) 1024 (1938).

Following *Tulk* v. *Moxhay*,[1] restrictive covenants on the use of land, imposed for the benefit of adjoining land, have been generally enforced. Such covenants, whether called equitable easements,[2] or covenants running with the land,[3] are held to be enforceable, against successors to the covenantor, only in equity,[4] and then only when the successors are not bona fide purchasers for value without notice of the restriction.[5] As a general proposition, even though a restrictive covenant be regarded as a real property interest,[6] if for any reason equity refuses to enforce it, that interest ceases to exist.[7]

When there has been such a change in the character of the neighborhood as to defeat the purpose of the restriction, it will not be enforced.[8] Refusal to specifically enforce a restrictive covenant, however, does not always mean that it will be ignored, and some courts have held that damages may be recovered for breach of a restriction which, by reason of a change in the neighborhood, equity will not specifically enforce.[9] The remedy may take the form of retaining the injunction suit for assessment of damages, after denial of the injunction,[10] or awarding damages on condition of releasing the servitude,[11] or the court may suggest that damages, if any, are to be recovered in law.[12]

The proposition that damages of any kind may be awarded in these

---

[1] 2 Phillips 774 (Eng. 1848).

[2] Pomeroy, 4 Eq. Juris. (4th ed. 1919) 3958n-3959n.

[3] Highland Realty Co. v. Groves, 130 Ky. 374, 113 S. W. 420 (1908); Leader v. La Flamme, 111 Me. 242, 88 A. 859 (1913); Zoller v. Goldberg, 183 Mich. 197, 149 N. W. 989 (1914); Withers v. Ward, 86 W. Va. 558, 104 S. E. 96 (1920).

[4] Pomeroy, op. cit. supra, note 1.

[5] Clark, Principles of Equity (1919) 120.

[6] "According to the preferable analysis, an equitable servitude gives rights of property rather than of contract." 38 Harv. L. R. 115 (1924) citing 31 Harv. L. R. 876. See also Riverbank Improvement Co. v. Chadwick, 228 Mass. 243, 117 N. E. 244 (1917).

[7] This must necessarily follow from the fact that equitable servitudes are enforceable only in equity.

[8] Letteau v. Ellis, 122 Cal. App. 584, 10 P. (2d) 496 (1932); Clark v. Vaughn, 131 Kans. 438, 292 Pac. 783 (1930); Ocean City Land Co. v. Weber, 83 N. J. Eq. 476, 91 A. 600 (1914); Columbia College v. Thacher, 87 N. Y. 311 (1882); Knight v. Simmonds, 2 Ch. 294 (Eng. 1896).

[9] Columbia College v. Thacher, 87 N. Y. 311 (1882); Bull v. Burton, 227 N. Y. 101, 124 N. E. 111 (1919).

[10] Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691 (1892).

[11] Amerman v. Deane, 132 N. Y. 355, 30 N. E. 741 (1892).
Whether the equity court assess damages after denial of the injunction or award damages on condition of releasing the servitude, it is in effect condemning private property for private use, *i. e.*, compelling the dominant owner to sell his interest to the servient owner. See 31 Harv. L. R. 876 (1918) at 878.

[12] McClure v. Leaycraft, 183 N. Y. 36, 75 N. E. 961 (1905).

cases is criticised by Dean Pound.[13] He says: "It is submitted that the sound course is to hold that when the purpose of the restriction can no longer be carried out the servitude comes to and end; that the duration of the servitude is determined by its purpose. . . . When the original purpose can no longer be carried out, the same reasons that established its existence are valid to establish its termination. There is then nothing left to protect by injunction and nothing for which to award damages."[14]

Meager case authority in Kentucky must submit to this criticism. In *Doll* v. *Moise*,[15] the court awarded damages after enforcement of the restriction had been refused, apparently treating the covenant as running with the land at law.[16] The decision is open to the objection that the burden of a restrictive covenant does not run with the land at law in a fee simple conveyance where the only interest retained in the land conveyed is that created by the covenant itself.[17]

In the instant case, a declaratory judgment is rendered declaring a restrictive covenant terminated by change in neighborhood, and the court is not concerned with an award of damages. Since the restrictions were not binding, there could be no breach, and, without a breach, no occasion for an award of damages. To put it tersely, if the purpose of the restriction is attainable, it will be enforced by injunction; if

[13] "Progress of the Law—Equity", 33 Harv. L. R. 813 (1919).

[14] Id. at 821.

[15] 214 Ky. 123, 282 S. W. 763 (1926).

[16] An injunction against building in violation of a restriction had been denied because the construction was so far advanced that the court was of the opinion that its removal would damage the defendant out of proportion to the damage sustained by the plaintiff by its erection. In this action at law, the plaintiff recovered damages for breach of the restriction. Though the lot had been resold several times, the court quoted from Highland Realty Co. v. Groves, 130 Ky. 374, 113 S. W. 420 (1908) that "The covenants run with the land, and are mutual, inuring to the benefit of all appellant's vendees." In the Highland case, however, the suit was *by the covenantee* against the original covenantor for an injunction, and the court, as is evident in the excerpt quoted, had reference to the *benefit*, not to the *burden*.

[17] This proposition appears to be generally accepted as the law. Maitland says: "We shall assume in every case that the person against whom the covenant is to be enforced is a purchaser of the land of the covenantor bound by the covenant who bought with notice of the covenant. Against such a person the covenant will not be enforceable at law. . . ." Equity, (2nd ed. 1936) 169-70. In I Smith's Leading Cases, (8th Am. ed. 1884) 185, it is stated that "It results from what has been said that the burden of a covenant made with the owner of land with an entire stranger in estate, will not pass with the land at law to an assignee. . . ." Walsh explains that "The reason why a covenant placing a burden on the land does not run with it in like cases where no tenure, easement, or other privity exists, is that such burdens tend to make the land inalienable and are therefore contrary to public policy." Hist. Eng. and Am. Law (1923) 307. See also Brewer v. Marshall, 19 N. J. Eq. 337 (1867), at 343; Austerberry v. Corp. of Oldham, 29 Ch. 750 (1885), at 773; Salmond, The Law of Torts, (5th ed. 1919) 281.

not, it will be declared non-existent.[19] A declaratory judgment was refused in *Riverbank Improvement Co.* v. *Chadwick*,[19] as taking "private property for private use" contrary to the Bill of Rights,[20] and in *Strong* v. *Shatto*,[21] on the ground that a change in neighborhood did not relieve from the contractual obligation imposed by the restriction. When, however, the restriction is no longer of practical benefit, the better view seems to be that equity will remove it as a cloud on the plaintiff's title.[22] As it clearly appeared in the instant case that the purpose for which the restriction was imposed had been defeated, the court reaches the proper result.

MARVIN TINCHER

CONFLICT OF LAWS—TORTS—SUIT IN A FOREIGN COURT ON AN OBLIGATION CREATED BY THE LAW OF THE PLACE OF TORT

Defendant and his wife were citizens of New York. While the wife was vacationing in Florida without her husband she assaulted the plaintiff. Suit was brought by the plaintiff in New York where she seeks to enforce liability against the defendant husband on the ground that in Florida, where the tort occurred, a husband is liable for his wife's torts.[1] Defendant moved that the complaint be dismissed because under the New York law a husband is not liable for the separate torts of his wife.[2] *Held*: Complaint dismissed. The law of New York was applied and the husband was not liable for the tort of his wife. *Siegman* v. *Meyer*, 100 F. (2d) 367 (1938).

In deciding the case Judge Hand announced his theory of the conflict of laws to be: "Strictly speaking, it is impossible for a court to enforce a liability except one created by the law of the state in which it sits. That state may take for its model a liability created by another

[18] Equity really can have little discretion in the *type* of remedy. See note 11, supra. If there is a binding restriction, it constitutes a property right which a court has no authority to take for private use. If there is no binding restriction, there is nothing. The only discretion left to the court lies in determining whether there exists a valid restriction.

[19] 228 Mass. 243, 117 N. E. 244 (1917).

[20] The Massachusetts statute allowing the removal of a covenant by the court where there had been a change in the neighborhood, and providing that the defendant be paid for any loss caused by the removal was held invalid.

[21] 45 Cal. App. 29, 187 Pac. 159 (1920).

[22] McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N. E. 162 (1915); Burton v. Moline Properties, Inc., 121 Fla. 683, 164 So. 551 (1935). This view is in accord with that expressed by Pound that when the purpose of the restriction has failed of accomplishment there is "nothing left to protect by injunction." Supra, note 13 at 821.

[1] Meek v. Johnson, 85 Fla. 248, 95 So. 670 (1923); Greene v. Miller, 102 Fla. 767, 136 So. 532 (1931).

[2] N. Y. Domestic Relations Law sec. 57, Strubing v. Mahar, 46 App. Div. 409, 61 N. Y. Supp. 799 (1899); Tanzer v. Read, 160 App. Div. 584, 145 N. Y. Supp. 708 (1914).