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REAL PROPERTY -
CONSTRUCTION OF COVENANTS RESTRICTING USE OF PREMISES
TWO RECENT CASES

A large house in Richmond was built on a lot subject to a covenant limiting the property to a "dwelling or two dwellings". Rooms were let by the owner to persons, such as school teachers, whose stay was of a permanent nature. HELD: (1) the restriction did not prohibit the owner, either in express terms or by necessary implication, from renting rooms to "persons expected to stay as long as their business would permit". *Schwarzschild v. Welborn*, 186 Va. 1052, 45 S.E. 2d 152.

A covenant restricted the use of a lot in Norfolk to "one residential building", and for "residential purposes". HELD: (2) not to preclude the owner from erecting a four-family apartment building. *Jernigan v. Capps*, 187 Va. 73, 45 S.E. 2d 886.

In the first case the house was the roomer's dwelling, (3) and not an ordinary tourist home. The court did not consider this use of the defendant's property such a use as would constitute a place of business - thus violating the restriction. Certainly the mere fact that more than one family lives in a large house does not constitute that house a "business" in the usual commercial sense. Nor was language used in the covenant appropriate to effect the object suggested by plaintiff, such as "a private family dwelling".

As to the second case - an apartment building is clearly a residential building within the accepted definition of that term. (4) However, a dissenting opinion (5) in the *Jernigan* case takes the position that an apartment house, even though it is for residential purposes, is also a business, and thus is not restricted to residential purposes. The argument is that if a four family apartment building can be sustained under the restriction, then, on principle, "larger ones requiring the constant employment of a manager, desk clerks, inspectors, elevator operators, mechanics, plumbers, and janitors" must also be sustained. The opinion points out that an orphanage, a college dormitory, a nurses' home, and even a jail are used for residential purposes. Bearing in mind that "each case ... must be decided on its merits, considering the facts of the case", *Boston-Edison Protective Association v. Paulist Fathers*, (6) quoted with approval in the *Schwarzschild* case, it would seem that the fears of the dissenting judges would not be likely to materialize if such instances should come before the courts. Large apartment buildings, with the attendant commercial characteristics described in the dissenting opinion, would seem to fall into the category of "business", and thus would not likely be permitted under a "residential purposes" restriction. (7)

The major principles followed in interpreting building restriction covenants are:

- (1) Equity will enforce them where the intention of the parties is clear and the restrictions are reasonable.
- (2) They are not favored by the law and are to be construed most strictly against the grantor and persons seeking to enforce them, and

substantial doubt or ambiguity is to be resolved in favor of the free use of property and against restrictions.

(3) A restriction will not be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time the restriction was written. (8)

The stated principles indicate that negative restrictions, if reasonable, will always be given effect, but that positive limitations on use must be very carefully phrased in order that the result desired by the parties may clearly appear upon a later reading. (9)

The Supreme Court of Appeals, in following the great weight of authority (10) and closely adhering to these principles, are achieving greater uniformity and affording to the practicing attorney more definite standards by which he may be guided in drafting such restrictive covenants.

- (1) By Mr. Justice Buchanan, per curiam.
- (2) By Mr. Justice Eggleston, speaking for the majority in a four-to-three decision.
- (3) "A house, or sometimes part of a house, occupied as a residence, in distinction from a store, office, or other building." Websters New International Dictionary 2d Ed.
- (4) "Designed as a residence or for occupation by residents". Websters New International Dictionary 2d Ed. "A fixed and permanent abode or dwelling place for the time being, as contra distinguished from a mere temporary locality of existence." 4 Min. Inst. (Pt.I) 367.
- (5) By Mr. Justice Staples for the minority.
- (6) 306 Mich. 253, 10 N.W. 2d 847.
- (7) Deittrick v. Leadbetter, 170, 8 S.E. 2d 276, 127 A.L.R. 849, holding an overnight tourist home to be a "business" and as violative of a "residential purposes" covenant.
 "A sanitarium***is not a residence***, such as institution is a commercial enterprise." Heisler v. Marceau, 95 Fla. 135, 116 So. 447, 448.
 But cf. Courtney v. Hunter, 159 Ga. 352, 125 S.E. 714, holding a twenty-two unit apartment house as not violative of this restriction: "the said land shall not be used except for residence purposes.
- (8) Stevenson v. Spively, 132 Va. 115, 110 S.E. 367, 21 A.L.R. 1276; 26 C.J.S., Deeds 163; 14 Am.Jr., Covenants, 212; Note to Sayles v. Hall, Ann. Cas. 1912 D 495.
- (9) See, e.g. Elterich v. Leicht Real Estate Co., 130 Va. 224, 107 S.E. 735, 18 A.L.R. 441.
- (10) Sayles v. Hall, loc. cit., supra.