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Property - Enforcement of Personal Covenants Against Subsequent Grantees

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PROPERTY — ENFORCEMENT OF PERSONAL COVENANTS AGAINST SUBSEQUENT GRANTEES

Plaintiff sold two lots of land, and to protect his grocery business which he operated on a lot near-by, he included in the deed the following covenant:

> "The above conveyance is made upon the condition that said parties of the second part, nor their assigns, shall sell in any building to be erected upon said lots, any groceries or bottled drinks except that bottled High Rock may be sold on said premises, on any day after six o'clock P. M."

The deed was properly recorded. The purchaser from plaintiff later sold the lots to defendant, and although the second deed did not mention the covenant, defendant had actual knowledge thereof. Defendant leased one lot to lessee who opened a grocery store thereon. It was not shown that lessee knew of the covenant. The trial court refused to enjoin the operation of lessee's store, construing the covenant to be a personal one not running with the land which bound only the original parties to it. On appeal, *held,* reversed. Even though the covenant is personal and does not run with the land, it will be enforced in equity against a subsequent grantee of the land who takes with notice, either actual or constructive, of its existence. *Oliver v. Hewitt et al.,* 191 Va. 163, 60 S. E. 2d[1] (1950).

A personal covenant has been defined as one "which binds only the covenantor and his personal representatives in respect to assets, and can be taken advantage of only by the covenantee."[1] While this definition is basically correct, it is apparent that it falls far short of being complete. To round out the definition of a personal covenant it is helpful to show how it differs generally from a covenant that runs with the land. In the case of the latter it is necessary that the agreement touch and concern the land, and that there be privity of estate between the owners of the land to which the covenant is appurtenant.[2] Grantees,[3] heirs, and devisees[4] of either covenantor or covenantee may suffer the burdens or enjoy the benefits of this type of covenant regardless of whether or not such parties had actual notice of the restriction.[5] Personal covenants relate to some collateral matter not necessarily concerning the land itself, and are enforceable between the original parties[6] both at law and in equity. Grantees, heirs and devisees of the covenantee may enjoy none of the benefits of a personal covenant for the reason that the personal obligation is extinguished when said covenantee's interest in the land is terminated.[7] While it is well settled that personal covenants

can be enforced only by the covenantee, the question as to against whom this enforcement can be had is still the source of considerable disagreement. It is somewhat surprising to learn, however, that the principal disagreement among the leading authorities[8] is not as to whether there can be enforcement of personal covenants against subsequent grantees with notice, but rather as to upon what theory such enforcement is to be allowed.

An examination of the various theories of enforcement which have been advanced suggests that the strength of each theory is dependent upon the particular facts of each individual case. In the renowned English case of *Tulk v. Moxhay*[9] it was reasoned that the covenant must be enforced upon principles of unjust enrichment. If the parties to this subsequent transaction considered the restriction binding upon them and fixed the price accordingly, then the transferee would be unjustly enriched if the covenant were not enforced against him. On the other hand if the parties thought the covenant not to be binding upon transferees and determined the price accordingly, the covenantee would be unjustly enriched if the restriction were enforced. It has been asserted that this was more logically a case of ordinary estoppel predicated upon notice of the existence of the covenant.[10] At any rate the courts have now practically discarded the theory of unjust enrichment in equitable servitude cases.[11]

The application of the doctrine of constructive trusts is a more technical approach to the problem.[12] If there is a contract concerning the use of land which can be specifically enforced in equity, and the parties intend that it shall run with the land, then a constructive trust is created. Since the equitable obligation refers to the acts of the owner of the land, enforcement, if any, must be against the present owner of the land. Therefore the equitable obligation of the promisor is not personal but rather attached to the land in the manner of a constructive trust, and continues to be so attached until the land finds its way into the hands of a bona fide purchaser. Under this theory it would follow that where the covenant has been included in a deed properly recorded there could be no bona fide purchaser as to that covenant, and the constructive trust would continue until the interest of the covenantee was terminated. The theory, while adequate to explain the legal effect of such covenants, ignores in its terminology the fact that there is not really a trust situation because there is no fidiciary element.

The state of California seems to stand alone in requiring that the covenantee have privity of contract[13] with the person against whom enforcement is sought. Constructive notice only of a restrictive covenant would be inadequate to fulfill the requirements of a meet-

ing of the minds between the two parties to the controversy. Strangely enough the California court relies on *Tulk v. Moxhay, supra,* as the authority for this reasoning, thus affording a wide variation to what is generally considered to be the doctrine of that famous case.

In personal covenant cases one is also confronted with two opposing legal principles; first, the law favors freedom of contract, and second, the law disfavors any restraint upon the use of land. The test applied by the courts of this state in reconciling this conflict is to consider whether the covenant merely affords fair protection to the interests of the covenantee, or whether the agreement is detrimental to public interest.[14]

In the *Oliver* case the court does not specifically say upon what theory the injunction will be allowed, but rather cites numerous authorities, none of which are in complete accord on this point. The most definite commitment made by the court as to theory of enforcement is the following quotation from the leading case of *Whitney v. Union Railway Company*:[15] ". . . It (the personal covenant) is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform".[16] Can one interpret this to mean equitable estoppel, unjust enrichment, or is it a combination of both? The court seems perfectly content to let the matter rest without further comment. While the lessee whose grocery business has been enjoined may be chagrined to note that he is victim of our system of recording land titles which was designed to enable him to avoid just such situations as the one in which he now finds himself, it is submitted that the decision of the court in the *Oliver* case is sound, and further that its policy in not committing itself upon any one or several of the various theories of enforcement of personal covenants against subsequent grantees with notice is likewise sound. The particular facts of each case must be weighed in determining whether relief should be granted, and the courts of equity should be unhampered within reasonable bounds in safeguarding against wrongs for which the law provides no remedy.

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FOOTNOTES

1. 3 BOUVIER'S LAW DICTIONARY 2576 (3rd ed. 1944).
2. McIntosh v. Vail, 126 W. Va. 395, 28 S. E. 2d 607, 151 A. L. R. 804 (1943).

3. 1 MINOR, REAL PROPERTY, § 1040 (2nd ed., Ribble, 1928).

4. 21 CORPUS JURIS SECUNDUM, COVENANTS § 85 (1940).

5. Bauby v. Krasow, 107 Conn. 109, 139 A. 508, 57 A. L. R. 331 (1927).

6. Whitney v. Union Railway Co., 11 Gray (Mass.) 359, 71 Am. Dec. 715 (1858).

7. E.g., 14 AM. JUR., COVENANTS, CONDITIONS, AND RESTRICTIONS § 205 (1938); 5 MICHIE'S JURISPRUDENCE, COVENANTS § 12 (1949).

8. E.g., 1 MINOR, REAL PROPERTY § 1040 (2nd ed., Ribble, 1928); 4 POMEROY, EQUITY JURISPRUDENCE § 1295 (3rd ed., Symons, 1905); Reno, *The Enforcement of Equitable Servitudes in Land,* 28 VA. LAW REV. 951, 1067 (1942); Giddings, *Restrictions Upon the Use of Land,* 5 HARV. L. REV. 274 (1892).

9. 2 Phillips 774, 41 English Reports 1143 (1848).

10. See Clark, *Equitable Servitudes,* 16 Mich. L. Rev. 90 (1917).

11. Ibid.

12. See Giddings, *Restrictions Upon the Use of Land,* 5 HARV. L. REV. 274 (1892).

13. McBride et al. v. Freeman et ux., 191 Cal. 152, 215 P. 678 (1923).

14. E.g., Klaff v. Pratt, 117 Va. 739, 86 S. E. 74 (1915). *Accord,* Tardy v. Creasy, 81 Va. 553, 59 Am. Rep. 676 (1886) (showing instance of illegal restraint).

15. 11 Gray (Mass.) 359, 71 Am. Dec. 715 (1858).

16. Id. at 718.