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# Property - Restrictive Covenant Enforceable as Equitable Servitude

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## PROPERTY–RESTRICTIVE COVENANT ENFORCEABLE AS EQUITABLE SERVITUDE

Hercules Powder Company, assignee of covenantor, acquired a parcel of land by deed containing the following covenant: "That in further consideration of the conveyance of the within described property, the said grantee hereunder hereby covenants and agrees that it will not conduct, operate or maintain, either directly or indirectly on the aforesaid property any of the following: . . . any manufacturing plant, or industry, manufacturing chemical or mechanical wood pulp . . . and the above described covenants shall bind the said grantee herein, its successors, representatives and assigns and shall constitute a covenant running with the land." As the result of experimental work Hercules developed a method by which it can manufacture chemical cellulose from pulpwood instead of from cotton linters, and proposed to build a mill on its property for this purpose. The Continental Can Co., asignee of the original covenantee, refused to eliminate the restriction prohibiting the use of its land for the manufacture of chemical or mechanical pulp wood. The trial court rendered a declaratory judgment holding the covenant valid and enforceable. On appeal, *held,* affirmed. *Hercules Powder Co.* v. *Continental Can Co.*, 196 Va. 935, 86 S.E.2d 128 (1955).

Likening the restrictive covenant here with that type recognized in *Tulk* v. *Moxhay,*[1] an English case which was the first to apply the doctrine of restrictive covenants in equity, the Court quoted with approval the words of Lord Chancellor Cottenham: "It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land but whether a party shall be permitted to use land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased . . ."[2]

At law, a covenant running with the land must satisfy three requirements: There must be privity of contract between the

[1] 2 Phil.Ch. 774, 41 Eng.Rep. 1143 (1848).
[2] 41 Eng.Rep. 1143, 1144.

parties to the covenant, privity of estate, and the restriction must "touch and concern" the land.[3] Assuming that a covenant satisfies the requirement that it touch and concern the land, the theory under which the duties of a convenantor can attach to his estate and pass to a subsequent owner of the estate is predicated upon the dual nature of a covenant. As a contract, the covenant creates a privity of contract relationship; as a lease, the covenant creates a privity of estate relationship.[4] Because of its contractual nature, the development and extension of "covenants running with the land" have been restrained by the rules of contract law.

Covenants between owners in fee could not be upheld unless there was privity of contract between these owners. Mr. Justice Holmes in 1881 recognized this and in an attempt to extend the application of this doctrine contended that only privity of estate was necessary between covenantee and his assigns and between covenantor and his assigns.[5] Having eliminated the requirement of privity of contract, he asserted that a real covenant can be created by parties who are strangers to the title of each other, so long as the benefit and burden touch and concern the land. This restricted application and the consequent refusal of English courts to uphold the running at law of burdens between owners in fee led to the introduction of the doctrine of equitable easements or servitudes.

Easements[6] are not confined to agreements wherein there is privity of contract, because the burden attaches to the land rather than to the estate of the covenantor. The important difference lies in the distinction between enforceability of duties against all owners and possessors of servient land irrespective of privity of estate and duties enforceable only against owners of the estate of which the duties are a part.[7]

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[3] 2 Minor, *Real Property* §406, §1040, §1041 (2d ed. Ribble, 1928).
[4] Abbot, *Covenants Running with the Land*, 31 Yale L.J. 127 (1921).
[5] Reno, *The Enforcement of Equitable Servitudes in Land: Part I*, 28 Va.L.Rev. 951, 962 (1942).
[6] Washburn, *Easements and Servitudes* 3 (4th ed. 1885): "The essential qualities of an easement are these: 1st, they are incorporeal; 2d, they are imposed on corporeal property, and not upon the owner thereof; 3d, they confer no right to a participation in profits arising from such property; 4th, they are imposed for the benefit of corporeal property; and 5th, there must be two distinct tenements,—the dominant, to which the right belongs, and the servient, upon which the obligation rests."
[7] Reno, *op. cit. supra* note 5, at 964.

If the imposition of burdens and servitudes on lands were circumscribed by the application of these two theories used in conjunction with each other, the courts would have succeeded in limiting and controlling the possibility of whimsical restraints on the land within a well-defined framework. For, within the construction of rules governing covenants running with the land, any number of new types of affirmative or negative duties could have been created, but the running of these duties would have been thwarted by the rules relating to privity of estate. On the other hand, freedom from requirement of privity of estate would unleash the running of the burdens provided the burden fell within the following outlined categories of negative easements: for light, air, support of a building laterally or subjacently, and for flow of an artificial stream.

There remained outside the scope of this legal network, the situation where a purchaser would take land impressed with a restriction at a reduced price and because the restriction did not technically run with the land at law or could be classified as an easement, sold it at a higher price to a subsequent purchaser who was not bound by the restriction. Equity intervened to cover this loophole with the doctrine of equitable servitudes.

Three theories have been advanced as a possible basis upon which this doctrine can rest, but some cases have not recognized any clear-cut basis and no jurisdiction has consistently followed one theory.[8] It has been suggested that equity is merely extending the doctrine of covenants running with the land, but since it is applied even in the absence of the requirements for covenants running with the land, this theory has been generally discredited[9] Serious consideration has been given the two other theories. One proposes that this doctrine rests on the application by equity of the principle of specific performance of contracts concerning land. The other asserts that it is a recognition of the existence in equity of equitable easements not recognized or enforceable at law.[10]

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[8] *Id.* at 978.

[9] 3 Pomeroy, *Equity Jurisprudence* 2595 (3rd ed. 1905): "This equitable right would arise where no similar legal right, or perhaps no legal right at all, would exist between the same parties, in the following instances: 1. Where the covenant is not one which runs with the land, because in such case no legal liability whatever would rest upon the subsequent grantee or owner . . ."

[10] Reno, *op. cit. supra* note 5, at 973-976.

Since the doctrine of equitable servitudes was espoused to apply precisely where the elements of privity of estate and contract were lacking, it is in the nature of an easement and as such should retain as a condition for its application the restriction that it "touch and concern" the land. Some courts, however, in reliance on the contract theory of servitudes have gradually extinguished the requirement that it must touch and concern the land. As will be seen from an examination of cases in this jurisdiction and others, this choice of theoretical basis has given parties a freer reign to impress land with restrictions which had not before been countenanced at law in the interest of preserving the free use of land.

Confining this examination to cases involving a restriction on the use of land either to, or in exclusion of, a business purpose, it will be seen that there is a conflict of authority as to whether or not such covenants touch and concern the land irrespective of the matter of intention of the parties to the covenant. "The intention of the parties to the covenant that it shall run with the land is occasionally referred to in determining whether it does run, but in the majority of cases no reference is made to the matter, the question whether the covenant runs being regarded as one to be determined by consideration whether it touches and concerns the land."[11]

The Virginia Court was originally aligned with the majority, questioning whether a covenant touches and concerns the land, but has in recent cases either mentioned its irrelevancy or has disregarded the question. It is submitted that this indicates a shift from the more conservative "easement" theory to the more liberal "contract" theory.

The Court's reasoning in the two early cases of *Board of Supervisors of Bedford County* v. *Bedford High School,*[12] and *Cheatham* v. *Taylor*[13] indicates a mixture of the contract and easement theories in the first case and a tendency in favor of the contract theory in the second. Twenty years later in *Allison* v.

[11] 3 Tiffany, *Real Property* §854 (3rd ed. 1939); Cole v. Seamonds, 87 W.Va. 19, 104 S.E. 747 (1920); 14 Am.Jur. 503 (1938).
[12] 92 Va. 292, 23 S.E. 299 (1895).
[13] 148 Va. 26, 138 S.E. 545 (1927).
[14] 188 Va. 64, 49 S.E.2d 279 (1948).

*Greer*[14] the Court invoked the principles of the easement theory, and in *Meagher* v. *Appalachian Electric Power Co.*[15] the Court clearly shifted into alliance with the easement theory by noting the burden carved out of one lot of land for the benefit of another lot. But in *Oliver* v. *Hewitt*[16] the Court reveals a definite change of position from adherence to the easement theory to that of the contract theory. It found "no difficulty in concluding that the restriction imposed upon the use of the land is a personal covenant for appelant's sole benefit as distinguished from a covenant that runs with the land." It was said, "It is not for the natural use and enjoyment of the land retained by the grantor but is merely a restriction imposed upon the use of land conveyed which is simply for the purpose of protecting from injurious competition the business operated by the grantor. It is a mere personal covenant that does not run with the land in equity . . . but, in equity, one is bound by such a personal covenant even though it does not run with the land if he takes title with knowledge of its existence." The Court further quoted with approval, "It is not binding on him merely because he has taken the estate with notice of a valid agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he can not equitably refuse to perform."[17]

In the *Hercules* case, the Court did not discuss whether the covenant touched and concerned the land thereby creating an easement in the land, but directed its attention to the fact that the party having notice was bound by conscience in equity to comply with the covenant. It cannot be easily supported that the Court assumed that it was a covenant touching and concerning the land because in another case decided earlier this year[18] the Court held, although enforcing the covenant on other grounds, that a covenant restricting the use of property against using a theatre as a moving picture theatre was a personal covenant. And in *Tardy* v. *Creasy*[19] it was held that a covenant to abstain from the sale of wares, goods, merchandise, the keeping of

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[15] 195 Va. 138, 77 S.E.2d 461 (1953); see also Norcross v. James, 140 Mass. 188, 2 N.E. 946 (1885); Brown v. Huber, 80 Ohio St. 183, 88 N.E. 322 (1909); Tallmadge v. E. River Bank, 26 N.Y. 105 (1862).
[16] 191 Va. 163, 60 S.E.2d 1 (1950).
[17] See Brewer v. Marshall, 4 C.E.Gr. 542, 19 N.J.Eq. 546 (1868); Wootten v. Seltzer, 83 N.J.Eq. 163, 90 A. 701 (1914).
[18] Carneal v. Kendig, 196 Va. 605, 85 S.E.2d 235 (1955).
[19] 81 Va. 553, 59 Am.Rep. 676 (1886).

houses of public entertainment or refreshments and the establishment and erection of warehouses, factories, foundries and shops, was collateral—purely personal—not touching the land.

Substantiating the suggestion that the Court now adheres to the contract theory, it is pointed out that the Court quoted in the instant case with approval from *Springer* v. *Geddy*:[20] "The doctrine is, in brief, that when, on a transfer of land there is a covenant or even an informal contract or understanding that certain restrictions in the use of the land conveyed shall be observed, the restrictions will be enforced by equity, at the suit of the party or parties intended to be benefited thereby, against any subsequent owner of the land except a purchaser for value without notice of the agreement."[21]

It has been suggested that this freedom to shift from one theory to the other as a basis upon which the application of the doctrine of equitable servitudes rests should be preserved because it enables a court to adjust to the specific social interests at that time. [22] It is submitted that application of the equitable doctrine predicated upon the "easement" theory requiring that restrictions touch and concern the land would remedy the injustice resulting from the limitations of the doctrines at law and at the same time would preserve the interest of society in the free use and alienation of lands.

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[20] 172 Va. 533, 2 S.E.2d 355 (1939).
[21] *Id.* at 540, 2 S.E.2d 355, 358.
[22] Reno, *op. cit. supra* note 5, at 978.