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Property Subject to Restrictive Covenants--Eminent Domain

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statute.[15] In lieu thereof the injured husband is required to join the adulterer as a co-respondent in a suit for divorce, unless such joinder is dispensed with by the court upon sufficient grounds, and if the adultery is proved, damages therefor are recovered against the co-respondent.[16] Some states deny the husband a right of action against one who has merely deprived him of his wife's affections.[17] Louisiana has refused to allow a husband any right of action for damages either for alienation of his wife's affections or for criminal conversation.[18] In view of these recent decisions it seems that a court would not be doing violence to stare decisis to discourage the action of criminal conversation or at least to place a decided check upon large and oppressive verdicts rendered therein. Whatever the outcome we feel that the resources of the common law are capable of a nearer approximation to perfect justice than was attained in the Brewer Case.

—FLETCHER W. MANN.

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[15] 20 and 21 Victoria, ch. 85, § 59.
[16] Quicke *v.* Quicke, 2 Sw. & Tr. 419.
[17] Sherry *v.* Moore, 155 N. E. 441 (Mass. 1927).
[18] Moulin *v.* Monteleone. 165 La. 169, 115 So. 447 (1927).

PROPERTY SUBJECT TO RESTRICTIVE COVENANTS—EMINENT DOMAIN.[1]—Restrictive covenants have been employed very extensively in modern times for the purpose of safe-guarding property against undesirable uses of adjacent property. They have been looked upon with favor by the courts and there is now no question of their enforcibility against the covenator and purchasers of the property with notice of the restriction.[2]

With the increasing use of this device a number of problems have arisen. Among them is to what extent the owners of land

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[1] This note was prepared as part of the work in an Honor's Course.

[2] Catt *v.* Tourle, L. R. 4 Ch. App. 652 (1868-9); Tulk *v.* Moxhay, 2 Phil. 774, 11 Beav. 571 (1848); Webb *v.* Robbins, 77 Ala. 176 (1879); Bryan *v.* Grosse, 155 Cal. 132, 99 Pac. 499 (1909); Baker *et al. v.* Lunde *et al.*, 96 Conn. 530, 114 Atl. 673 (1921); Tinker *v.* Forbes, 136 Ill. 221, 26 N. E. 503 (1891); Peck *v.* Conway, 119 Mass. 546 (1876); Kettle River Ry. Co. *v.* Eastern Ry. Co., 41 Minn. 461, 43 N. W. 469 (1889); Talmage *v.* East River Bank, 26 N. Y. 105 (1862); Korn *v.* Campbell, 192 N. Y. 490, 85 N. E. 687 (1908); Boyden *et al., v.* Roberts *et al.*, 131 Wis. 659, 111 N. W. 701 (1907); Eason *v.* Buffaloe, 152 S. E. 496 (Ga. 1930); Dixon *v.* Van Swearingen, 31 Oh. St. 56, 166 N. E. 887 (1929); 2 TIFFANY, REAL PROP., 2nd ed., 1446; 33 HARV. L. REV. 813; 24 L. QUAR. REV. 366.

benefited by restrictive covenants are entitled to compensation when the servient land is condemned for purposes which, when effectuated, would amount to a violation of the covenant. In England and in the majority of jurisdictions in the United States where the question has been raised, the restrictive covenant has been considered a property right and if taken must be compensated for.[3] The contrary view has been accepted by Ohio and the lower federal courts.[4]

The basis of the decisions allowing compensation is that the owner of each lot in a restricted district has an interest in each other lot, and the taking of such a lot for public use is a taking of his interest therein, for which he is entitled to compensation under the Constitution.

The analogy to common law easements may be considered. It is doubtless true that building restrictions did not constitute easements known to the common law. The House of Lords, however, has stated that the category of easements must expand with the circumstances of mankind.[5] That there is much in common between these restrictive covenants and easements cannot be denied. It has been held that where property subject to an easement is taken by eminent domain the owner of the dominant tenement is entitled to compensation for the destruction of his interest.[6] The so-called easement of light, air and accessibility in property abutting on a public street is not a common law easement but its impairment by public use of a street is a taking of property.[7]

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[3] Long Eaton Recreation Co. *v.* Midland Ry. Co., 2 K. B. 574 (1902); Herr *v.* Board of Education, 82 N. J. L. 610, 83 Atl. 173 (1912); Rowland *v.* Mercer Co. Traction Co., 90 N. J. L. 82, 102 Atl. 814 (1917); Peters *v.* Buckner, 288 Mo. 618, 232 S. W. 1024, 17 A. L. R. 543 (1921); Allen *v.* City of Detroit, 169 Mich. 464, 133 N. W. 317, 36 L. R. A. N. S. 890 (1911); Ladd *v.* City of Boston, 151 Mass. 585, 24 N. E. 858, 21 Am. St. Rep. 481 (1890); Flynn *v.* New York W. & B. Ry. Co., 218 N. Y. 140, 112 N. E. 913 (1916); Fuller *v.* Town Board of Town of Madison, 193 Wis. 549, 214 N. W. 324 (1927); 2 LEWIS, EMINENT DOMAIN, 530, n. 11; 2 TIFFANY, REAL PROP., 2nd ed., 2162.

[4] Doan *v.* Cleveland Short Line Ry. Co., 92 Oh. St. 461, 112 N. E. 505 (1915); Norfolk & W. Ry. Co. *v.* Gale, 119 Oh. St. 110, 162 N. E. 385 (1928) (application for certiorari was denied by Supreme Court of the United States for want of a substantial Federal question, 278 U. S. 571, 49 Sup. Ct. Rep. 93 (1928); *In re* Newlin, 112 Fed. 622 (1899); Wharton *v.* U. S.; 153 Fed. 876 (1907).

[5] GALE ON EASEMENTS, 20.

[6] Newman *v.* Metropolitan Elevated Ry. Co., 118 N. Y. 618, 23 N. E. 901 (1890); U. S. *v.* Welch, 217 U. S. 333, 30 S. Ct. 527 (1910); Miller *v.* Horton, 152 Mass. 540, 547, 26 N. E. 100 (1891); 1 LEWIS, EMINENT DOMAIN, § 223; 2 TIFFANY, REAL PROP., 2162, n. 5.

[7] *In re* Forty-Second Street, 216 N. Y. S. 2, 126 Misc. Rep. 879 (1926); Randon *v.* City of Sault Ste. Marie, 143 Mich. 661, 107 N. W. 439 (1906).

Furthermore, in other types of cases where the question has arisen as to whether a restriction is a property interest the courts have usually indicated that it should be so regarded.[8]

Reasoning by analogy, however, is not very satisfactory in solving problems of this nature. There may be considerations of social policy that make it undesirable to give compensation in cases of this kind. If that is true the conception of "property interest" is sufficiently flexible to permit the inclusion or exclusion of these equitable interests, depending upon the court's view of the desirability of giving compensation. Under the modern practice one frequently encounters reciprocal restrictive covenants over large areas of land included in a development scheme. It is not unusual to have a very large number of lots restricted to certain uses in order to enhance the value of these lots and to attract purchasers. Let us suppose that these lots have been sold, and subsequently A, by eminent domain proceedings, takes a parcel of this land which is restricted in favor of all the other lots. A's intended use of the land so taken will violate the covenant. If the owners whose lands are not physically taken are allowed compensation for the destruction of their interests, the condemnor would have to pay a sum perhaps many times the value of the land actually taken. This would place a great burden on the condemnor, which might amount to a discouragement of the taking of land and this might be detrimental to the public generally. It may be noted that where land is taken for a public use in the ordinary case there is frequently considerable depreciation in the value of surrounding property which must be borne by the individual owners in the public interest.[9] The loss, however, is distributed over a large number of owners and the burden on each individual owner has not been so great as to call for any judicial remedy. It may be that the increased burden on the condemnor requiring him to give damages in so large an amount may have influenced the Ohio Court in reaching the decision that no compensation could be allowed. A suggestion of this is to be found in the statement, "The right of eminent domain rests upon public necessity, and a contract or covenant or plan of allotment which attempts to prevent the exercise of that right is clearly against public policy, and is therefore illegal and void."[10]

Other courts have not felt the force of this consideration. The

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[8] Sprague *v.* Kimball, 213 Mass. 380, 100 N. E. 622 (1913); Ham *v.* Massasoit Real Estate Co., 42 R. I. 293, 107 Atl. 205 (1919); Rice *v.* Roberts, 24 Wis. 461 (1869); *Contra*, Lenning *v.* Ocean City Assn., 41 N. J. Eq. 606, 7 Atl. 491 (1886); 38 HARV. L. REV. 967-71; Green *v.* Creighton, 7 R. I. 1 (1861); 6 N. CAR. L. REV. 308.

[9] Flynn *v.* New York W. & B. Ry. Co., *supra*, n. 3.

[10] Doan *v.* Cleveland Short Line Ry. Co., *supra*, n. 4.

New York court states that "these restrictive covenants * * * make direct and compensational the damages which otherwise would be consequential and non-compensational."[11] In determining the damages to be allowed the court measures the depreciation in value of each piece of property which allows the difference in value between the land with and without the benefit of the restriction.[12] This would seem to be the logical method of determining such damages. It has been the method followed formerly in the case of the valuation of the common law easements.[13] In *United States* v. *Welch*,[14] the government permanently flooded a three acre strip contiguous to other land of the plaintiff. The latter had a right of way over other lands of different ownership to a county road. The flooding of the strip destroyed access to the right of way. The court held them entitled to compensation not only for the three acres flooded, but also for the diminished value of their other land caused by the destruction of their use of the right of way.

> "A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits that it must pay. But if it were only destroyed and ended, a destruction for public purposes may as well be a taking as would be an appropriation for the same end. * * * * * The same reasoning that allows a recovery for the taking of land by permanent occupation allows it for a right of way taken in the same manner, and the value of the easement cannot be ascertained without reference to the dominant estate to which it was attached."

It is also worthy of note that the burden on the condemnor may frequently be reduced by taking into account in the valuation the benefits to their property arising from the improvement that involves the violation of the restrictive covenant. This has been done with respect to common law easements.[15] The theory seems to be not that these benefits are deductible from the damages but that they may be considered in ascertaining how much, if any, the property has been actually reduced in value by the appropriation of the rights of the dominant owner.

There is another entirely different method of measuring the

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[11] Flynn *v.* New York W. & B. Ry. Co., *supra*, n. 3.
[12] *Supra.*
[13] *Supra*, n. 6.
[14] *Supra*, n. 6.
[15] Newman *v.* Metropolitan Elevated Ry. Co., *supra*, n. 6; Page *v.* Chicago, Milwaukee & St. Paul Ry. Co., 70 Ill. 324 (1873).

damages which has been adopted by the New Jersey court.[16] Although in theory compensation is allowed to dominant owners where the servient land is taken by eminent domain, this rule for the measurement of damages seems to recognize a public policy against imposing such a heavy burden upon condemnors. In *Herr* v. *Board of Education*[17] the Board sought to condemn lands subject to restrictive covenants. An award was made to the owners of the fee but not to the covenantee. He brought an action to recover damages and testimony was admitted that the use of the tract taken would affect the value of the property of the covenantee. The court held that this not proper since the proper issue was the value of the land as a whole without regard to the covenants. The covenantees were merely entitled to a share of this total sum represented by their interest. Obviously this is a very radical departure from the method used by the New York Court. The decrease in value of the servient land caused by the existence of the servitude bears very little, if any, relation to the increase in the value of the dominant land, resulting from the restriction. It may thus be seen that the New Jersey view represents a midway position between that of New York and Ohio. Although theoretically a claim for compensation is admitted, the total amount recoverable by all claimants, including the owner of the fee and the holders of the restrictions, is limited to one gross value which is the value of the property without regard to the restrictions. Although this view seems illogical considerable may be said in its support. It provides for some compensation to the owners of land benefited by restriction, but at the same time it distributes over a large number of owners the loss which under the New York rule would be borne by the condemnor alone.

The view taken by the New Jersey court, however, raises problems with respect to joinder of parties in the proceedings. If the condemnor fails to join the holders of restrictive covenants as parties in the condemnation proceedings the company, after having paid the total value of the land without regard to the restriction may be compelled to pay over again in proceedings subsequently brought by covenantees. Furthermore, since these parties are not bound by the adjudication of the valuation they may insist upon another appraisement of the entire property for the purpose of determining the value of their restrictions.[18]

—RICHARD SOLOF.

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[16] Herr *v.* Board of Education, *supra*, n. 3.
[17] *Supra*, n. 3.
[18] State *v.* Easton, & Amboy Ry. Co., 36 N. J. L. 181, 185 (1873); Bright *v.* Platt, 32 N. J. Eq. 362, 371 (1880).