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Equitable Servitudes Benefiting a Business

M. T. V.H.

West Virginia University College of Law

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power, can promote these interests only to the extent that upon a balancing of these interests against the conflicting individual interests, these interests so outweigh the individual interests as to justify the *pro tanto* sacrifice of the individual interests. Any statutory action in excess of that would be a deprivation of property without due process.

An application of these principles to our general problem clearly leads to the conclusion that it is within the police power of a state to conserve its natural resources, such as natural gas, to the extent of preventing an unreasonable, excessive or wasteful use thereof by surface owners or lessees; for, as to such resources, other interests than the interests of the user are so vitally affected that the individual interests of the user should be sacrificed to the extent that all the interests involved may be best subserved by such sacrifice.

EQUITABLE SERVITUDES BENEFITING A BUSINESS.—The power of a court of equity to enforce negative restrictions imposed by agreement upon the use of property has long been established. The principles controlling the exercise of this power were originally thought to be those underlying the specific performance of contracts. The current English authorities, however, and to a large extent, the more recent American decisions, regard these agreements as creating equitable property rights in another's property.¹ According to this view, they constitute "a sort of equitable appendix to the common law servitudes" of easements, profits, and covenants running with the land, and are properly called "equitable servitudes."² In the recent cases of *Withers v. Ward*³ and *Cole v. Seamonds*,⁴ the West Virginia Supreme Court of Appeals adopts the property theory, thus repudiating, in effect, the contract theory enunciated in earlier cases.⁵ This jurisdiction of the chancellor seems to have been developed largely because of the failure of the common law to create the rights in another's land made necessary by modern social and economic conditions, and

¹ See Pound, "Progress of the Law, 1918-1919: Equity," 33 HARV. L. REV. 420, 813, 929, 813-822; Clark, "Equitable Servitudes," 16 MICH. L. REV. 90.

² 31 HARV. L. REV. 876, 877.

³ 104 S. E. 96 (W. Va. 1920).

⁴ 104 S. E. 747 (W. Va. 1920).

⁵ *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 630-639, 46 Am. Rep. 527 (1883); *Robinson v. Edgell*, 57 W. Va. 157, 49 S. E. 1027 (1905). *Hennen v. Deveney*, 71 W. Va. 629, 77 S. E. 142 (1913), appears to proceed upon the property theory.

also because of the almost total lack of governmental supervision of building in Anglo-American countries.⁶

The shift from the contract theory to the property theory has produced important consequences. According to the first conception, relief was granted or denied after a discretionary consideration of the balance of hardships and conveniences between the parties. Under the property theory, the existence, nature, extent and duration of the rights resulting from the agreement depend primarily upon the intention of the original parties. If this intention was that the benefits of a restricted use of a piece of property should inure to the ownership of another piece of property, while a given relation between those properties exists, the rights to those benefits pass, without express assignment, with the property to which they are appurtenant. Moreover, persons subsequently taking the property whose use is so restricted, having either actual or constructive notice of the outstanding rights, hold subject thereto. Therefore, while the original purpose can still be carried out, the refusal of a chancellor to enforce those rights, because of a discretionary sense that compliance with the restrictions would be inequitable as between the present parties, amounts to a taking of property without the consent of the owner for the unentitled use of another.⁷

Perhaps the most familiar cases of equitable servitudes are those in which restrictions have been imposed upon the use of land for the benefit of the persons who are to use another piece of land. Thus residents of exclusive neighborhoods have been protected against the disruption of building lines,⁸ and against the invasion of commercial establishments,⁹ apartment or tenement buildings,¹⁰ and other obnoxious operations.¹¹ It is also true that the notion of equitable servitudes was largely developed in connection with the protection of interests in real property.

Nevertheless, there is nothing in the conception of an equitable servitude to prevent its applicability to the use of properties other

⁶ See Clark, "Equitable Servitudes," 16 MICH. L. REV. 90, 92; 28 HARV. L. REV. 201.

⁷ Riverbank Improvement Co. v. Chadwick, 228 Mass. 243, 117 N. E. 244 (1917). See 31 HARV. L. REV. 876.

⁸ Manners v. Johnson, L. R. 1 Ch. Div. 673 (1875); Brandenburg v. Lager, 272 Ill. 622, 112 N. E. 321 (1916); Withers v. Ward, 104 S. E. 96 (W. Va. 1920).

⁹ Parker v. Nightingale, 6 Allen 341, 83 Am. Dec. 632 (Mass 1863); Trustees of Columbia College v. Lynch, 70 N. Y. 440 (1877); Withers v. Ward, *supra*.

¹⁰ See the cases collected in 41 L. R. A. (N. S.) 625, 1 B. R. C. 993, and L. R. A. 1918C, 873.

¹¹ Robinson v. Edgell, *supra*. See the cases collected in 9 L. R. A. (N. S.) 1039. Compare Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641 (1915), and Gandolfo v. Hartman, 49 Fed. 181 (1892).

than land. Two chattels may have such a relation to each other that compliance with negative restrictions upon the use of one will enlarge and preserve the enjoyment of the other.¹² Similarly, the ownership of a business may be benefited, not only by compliance with negative restrictions upon the use of a chattel but by restricted use of another business,¹³ or of a piece of land.¹⁴ If this was the intention of the parties, there seems to be no reason why equity should not lend its coercive powers to the enforcement of such servitudes, as between those claiming under the original parties, with notice. This assertion assumes, of course, the absence of conflict with a countervailing public policy such as that prohibitive of unreasonable restraint of trade. Certainly the economic happiness of the owner of a business, whose good will, trade relations, and labor problem constitute such vulnerable objectives for disturbing conditions and influences, is as deserving of equity's solicitude as the aesthetic contentment of the owner of a home.

In this connection, the recent West Virginia case of *Cole v. Seamonds*¹⁵ is of especial interest. The owner of a two-acre plot of land located in the midst of extensive coal mining operations agreed with the owners thereof, for himself, his executors, administrators and assigns, that the land would be used for residence and agricultural purposes only and, particularly, that no mercantile business would ever be maintained thereon. This agreement was to run with the land. The purpose back of these restrictions was to prevent the maintenance of establishments capable of convenient use as loafing places where undesirable persons, hostile to the coal operators, might congregate and spread "radical and dangerous doctrines" among those employed in the mines. As between the assignee of the entire holdings of the promises, and various persons holding under the promisor, with notice, the court refused to enjoin the operation of a general mercantile store and "hot dog" and soft drink emporium. The reason assigned was that equity should not permit an equitable servitude to be created so as to be available to and binding upon persons claiming under the original parties, with notice, unless the servitude

¹² *Murphy v. Christian Press Ass'n Pub. Co.*, 38 N. Y. App. Div. 426, 56 N. Y. Supp. 597 (1889); *New York Bank Note Co. v. Hamilton Bank Co.*, 28 N. Y. App. Div. 411, 50 N. Y. Supp. 1093 (1895). See 32 HARV. L. REV. 278.

¹³ *Wilkes v. Spooner*, 24 L. T. R. 157 (1910), [1911] 2 K. B. 473. See 24 HARV. L. REV. 574.

¹⁴ *Abergarw Brewery Co. v. Holmes*, L. R. (1900) 1 Ch. 188; *Rubel Bros. v. Dumont Coal & Ice Co.*, 110 N. Y. Misc. Rep. 32, 180 N. Y. Supp. 662 (1920).

¹⁵ 104 S. E. 747 (W. Va. 1920).

tends toward the "physical or moral advantage" of the promisee's land, that is, "unless it benefits the land itself". If the purpose was "to benefit the covenantee in his particular use of the land," the agreement should be considered a purely personal one, enforceable, perhaps, between the makers, but not as to others.

This doctrine seems to be unsound. The court felt that the conception of an equitable servitude should be limited to the protection of interests in land. Even so, it is difficult to conceive of a servitude benefiting land as such. It is always someone's "particular use of land", as for residence purposes, and not the inherent quality of land as land, that is protected. The case, however, is actually one of a servitude benefiting the ownership of a business. Presumably the coal miners, in the absence of the disturbing influences of agitators, would remain more contented, more loyal and more efficient in their work. The validity of this sort of an equitable servitude has already been suggested.

—M. T. V. H.

DISCRETION OF THE COURT IN RULING UPON A MOTION FOR A NEW TRIAL IN WEST VIRGINIA.—Throughout the entire course of the West Virginia decisions, it has frequently been asserted by the Supreme Court of Appeals that a motion for a new trial is addressed to the sound discretion of the trial court, although only recently, it seems, has the court found it necessary to define the principle, or reason, upon which this discretion rests. The rule has generally been stated as broadly and unqualifiedly by the courts of other states. Nevertheless, it must often have occurred to members of the profession that such a statement can not be literally true, or is true only with reference to certain particular phases of trial error. Perhaps there is no great difficulty in the way of conceding the general proposition that such a discretion, as broadly as stated, exists in all those instances where the motion is based upon matters of fact, or mixed law and fact, for example, the probative sufficiency or weight of the evidence, newly discovered evidence, *etc.* But it is difficult to conceive how a court can consistently have any discretion where it appears that the motion is based upon plain prejudicial error of law, such as the admission of proper evidence or the submis-