UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 29 | Number 4 Article 9

6-1-1951

Easements -- Creation by Covenant in Deed

William C. Morris Jr.

Easements—Creation by Covenant in Deed

Plaintiff sought to have a municipal garbage dump abated as a private and public nuisance and to recover special damages for its maintenance.[1] The municipality defended the action on the basis of a recorded deed in which the predecessors in title to the plaintiff granted the defendant the right to use the land as a garbage dump and released all rights of action arising out of the use of the land for that purpose. This release was expressly made binding upon the grantors' successors in title. The North Carolina Supreme Court held on appeal that even if it be conceded that the normal operation of the garbage dump constituted a nuisance, the plaintiff was estopped to assert any claim by reason of the covenants in the deed to defendant. The release created a "right in the nature of an easement" in the remaining lands of the grantor, binding on his successors in interest.[2]

While easements[3] are generally created by grant or prescription, a covenant may be given the effect of granting an easement when necessary to carry out the manifest intention of the parties.[4] Such covenants are valid and enforceable without regard to whether they may interfere with alienation.[5] A covenant will be construed as creating an easement only under certain conditions. There must be both a dominant and a servient tenement.[6] The easement created must be appurtenant to the dominant tenement to which it belongs and must relate to the servient tenement upon which its burden is imposed.[7] The dominant tenement must be described with particularity[8] and must receive substantial benefit from the easement created.[9] It is not necessary that the dominant and

[1] Waldrop v. Town of Brevard, 233 N. C. 26, 62 S. E. 2d 512 (1950).

[2] Although the court speaks of this as being a right in the nature of an easement, it is giving the covenant the effect of a duly recorded easement.

[3] The word "easement," as here used includes both negative and affirmative easements. "A negative easement is one the effect of which is not to authorize the doing of an act by the person entitled to the easement, but merely to preclude the owner of the land subject to the easement from doing that which, if no easement existed, he would be entitled to do. An affirmative easement is one which authorizes the doing of acts which, if no easement existed, would give rise to a right of action." Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P. 2d 792 (1937).

[4] Orenberg v. Horan, 269 Mass. 312, 168 N. E. 794 (1930); Hogan v. Berry, 143 Mass. 538, 10 N. E. 253 (1887); Bronson v. Coffin, 108 Mass. 175 (1871); Norfleet v. Cromwell, 64 N. C. 1 (1870); 1 THOMPSON, REAL PROPERTY §372 (Perm. ed. 1939); 3 TIFFANY, REAL PROPERTY §776 (3d ed. 1939).

[5] 2 WALSH, REAL PROPERTY §259 (1947).

[6] Orenberg v. Horan, 269 Mass. 312, 168 N. E. 794 (1930). "A dominant estate is the one enjoying the easement, and to which it is attached; the servient estate is the one upon which the easement is imposed." Walker v. Clifford, 128 Ala. 67, 29 So. 588 (1901).

[7] Murphey v. Kerr, 5 F. 2d 908 (8th Cir. 1925).

[8] Martin v. Ray, 76 Cal. App. 2d 465, 173 P. 2d 573 (1946).

[9] Murphey v. Kerr, 5 F. 2d 908 (8th Cir. 1925).

servient tenements be contiguous,[10] and whether an easement is appurtenant or in gross[11] is determined by the intent of the parties.[12] Since such a covenant concerns an interest in realty, and hence comes within the Statute of Frauds, the courts have generally required that it be in writing, and a mere oral license is revocable.[13]

A great variety of covenants have been held to create valid and enforceable easements. When the grantor covenanted for himself and his heirs, assigns and personal representatives that he would forever maintain a fence between the property conveyed and his remaining lands, the court held that this covenant imposed an easement in the adjacent land of the grantor in favor of the grantee which could only be conveyed with a grant of the dominant tenement to which it was attached.[14] Such a covenant runs with the land, and is not merely personal between the parties. Covenants for light and air between adjoining property owners and between parties to a deed may create easements[15] which pass to subsequent grantees of the property to which the easement appertains.[16] A covenant in restraint of trade does not create an easement since it is invalid as being against public policy.[17] A covenant that the land would revert to the grantor if the premises should ever be used for the sale of liquors has been held to create an easement appurtenant to the remaining lands of the grantor,[18] and agreements between persons who each own a separate half of a building that no

[10] D. M. Goodwillie Co. v. Commonwealth Electric Co., 241 Ill. 42, 89 N. E. 272 (1909).

[11] "Easements appendant and appurtenant are always owned in connection with other real estate and as incidents to such ownership, while easements in gross are purely personal and usually end with the death of the grantee." Davis v. Robinson, 189 N. C. 589, 598, 127 S. E. 697 (1925).

A right of way across another's property to gain egress and ingress to the realty owned would be an appurtenant easement. An easement in gross, however, is purely personal, and is owned independently of any other ownership of realty. For example, a grant to A of the right to fish on the land of X, confers an easement in gross on A. 1 MORDECAI'S LAW LECTURES 469 (2d ed. 1916). This is connected with the requirement that there be a servient and a dominant tenement, for if the covenantee has no estate to which the covenant may appertain or attach, it is purely personal, and usually ends with the death of the covenantee.

[12] Post v. Bailey, 110 W. Va. 504, 159 S. E. 524 (1931).

[13] Village of Dwight v. Hayes, 150 Ill. 273, 37 N. E. 218 (1894).

[14] Hazlett v. Sinclair, 76 Ind. 488 (1881); Kellogg v. Robinson, 6 Vt. 276 (1834) (covenant by grantee).

[15] Bryan v. Grossee, 155 Cal. 132, 99 Pac. 499 (1909); Davis v. McCarthy, 131 App. Div. 755, 116 N. Y. Supp. 149 (1910), *aff'd without opinion*, 198 N. Y. 581, 92 N. E. 1083 (1910).

[16] North Carolina, however, has said, ". . . the easement of light and air, sometimes called the 'Ancient Window Doctrine,' does not apply in this State." Davis v. Robinson, 189 N. C. 589, 599, 127 S. E. 697 (1925).

[17] Kettle River R. R. v. Eastern R. R., 41 Minn. 461, 43 N. W. 469 (1889); 1 THOMPSON, *op. cit. supra* note 4, §375.

[18] Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P. 2d 792 (1937).

change will be made in the front of the building[19] constitute reciprocal easements. Agreements between parties to a deed that they will dedicate a strip for a road;[20] that the grantor will have water pumped into a reservoir on the land of the grantee;[21] that space will be kept open "for the passage of teams;"[22] that the grantor will erect no building within a certain distance of the property conveyed;[23] or that the grantee will "build and maintain a suitable wagon road crossing at the grade,"[24] have been held to create easements because the covenant concerned land or its use, and the creation of an easement was necessary in order to give effect to the manifest intention of the parties. When adjoining property owners mutually covenanted that none of the properties would be used or occupied by persons of Negro descent,[25] or that each would observe a certain building line,[26] an easement was created in favor of each property owner in all property covered by the agreement, which inured to the benefit of his successors in interest. Restrictions placed upon lots conveyed by a common grantor as part of a general scheme for the benefit of the land, requiring grantees to set back the front walls of structures[27] or restrictions on the use of the property,[28] have all been held to give each grantee, as appurtenant to his land, an easement in every other lot covered by the deeds, binding on and enforceable by and against each owner's successor in interest.

A release of a claim for damages[29] caused by a particular undertaking or occurrence on the land of the released party is given the effect of a covenant creating an easement in favor of and appurtenant to the property of the released party. In an action for damages arising out of the flooding of the plaintiff's land, the defendant showed a release executed by the plaintiff's predecessor in title in favor of defendant.[30]

[19] First Nat'l Bank of Portsmouth v. Portsmouth Savings Bank, 71 N. H. 547, 53 Atl. 1017 (1902).

[20] United New Jersey R. R. & Canal Co. v. Crucible Steel Co., 86 N. J. Eq. 258, 98 Atl. 1087 (1916), *affirming decree* 85 N. J. Eq. 7, 95 Atl. 243 (Ch. 1915).

[21] Murphey v. Kerr, 5 F. 2d 908 (8th Cir. 1925).

[22] Morton v. Thompson, 69 Vt. 432, 38 Atl. 88 (1897).

[23] Hogan v. Barry, 143 Mass. 538, 10 N. E. 253 (1887); Hennen v. Deveny, 71 W. Va. 629, 77 S. E. 142 (1913).

[24] Beck v. County of Lane, 141 Ore. 580, 18 P. 2d 594 (1933).

[25] Meade v. Dennistone, 173 Md. 295, 196 Atl. 330 (1938); Porter v. Johnson, 232 Mo. App. 1150, 115 S. W. 2d 529 (1938).

[26] Wetmore v. Bruce, 118 N. Y. 319, 23 N. E. 303 (1890).

[27] Brandenburg v. Lager, 272 Ill. 622, 112 N. E. 321 (1916); Gilbert v. Repertory Co., 302 Mass. 105, 18 N. E. 2d 965 (1939).

[28] Scheuer v. Britt, 217 Ala. 196, 115 So. 237 (1928) (lots sold for residential purposes only); State *ex rel.* Britton v. Mulloy, 332 Mo. 1107, 61 S. W. 2d 741 (1933) (property to be used only for residential purposes); Schwab v. Whitmore Rauber & Vicinus Co., 245 App. Div. 174, 281 N. Y. Supp. 30 (1935); Kokenge v. Whetstone, 60 Ohio App. 302, 20 N. E. 2d 965 (1935).

[29] The release of both presently existing and future claims were here contemplated.

[30] Brush v. Lehigh Valley Coal Co., 290 Pa. 322, 138 Atl. 860 (1927).

The court held that this was not merely a revocable license, but was the grant of an easement or estate in lands binding on the grantees of the predecessor in title. In an action to restrain the defendant from polluting a stream with mine tailings, the defendant produced a release from the grantor of the plaintiff, and the court held that the release was binding on the plaintiff as it created an easement in the watercourse.[31] Owners of land in executing a release of a railroad from all claims incident to the construction, maintenance, and operation of the road, thereby created an easement appurtenant to the property of the railroad, binding on their heirs and assigns.[32] Similarly, where plaintiff's predecessor in title executed a release for himself and all those claiming under him of all causes of action arising out of the erection of a building in the street in front of his property, the court found that the release created an easement. It held that if the owner could grant to another the right to make a certain use of his land, he necessarily could bind his successors in title if he executed his will so as to charge his successor with notice of such incumbrance.[33] When a covenant not to enforce a present or future right concerns land or its use, there seems to be little argument against its being construed as constituting an easement in the land concerned.[34]

Some suggestion has been made that covenants creating easements must be consistent with public policy,[35] but such a limitation has not often presented itself as an obstacle. In cases of releases executed in favor of some objectionable enterprise, such as a sewage disposal plant[36] or a coal mine trash dump which emits noxious vapors and smoke,[37] the courts have held that the land owner was not estopped to sue in a situation where the released party was acting negligently or maliciously. Indeed, the decision in the principal case[38] appears to be limited to a situation where the garbage dump is being operated in a reasonably careful and prudent manner.[39] In a North Carolina case, the court

[31] Wright v. Best, 19 Cal. 2d 368, 121 P. 2d 702 (1942).
[32] Pennsylvania R. R. v. Kearns, 71 Ohio App. 209, 48 N. E. 2d 1012 (1943).
[33] Walterman v. Village of Norwalk, 145 Wis. 663, 130 N. W. 479 (1911).
[34] "There is no doubt in modern times that an attempted release of a future right must be construed as amounting at least to a covenant not to enforce the right whenever it arises." 6 WILLISTON, CONTRACTS §1823 (Rev. ed. 1938).
[35] Wright v. Best, 19 Cal. 2d 368, 121 P. 2d 702 (1942) (release of right to sue for pollution of watercourse held binding on releasors provided the deterioration in quality of the watercourse was not so great as to constitute a public nuisance); Norfleet v. Cromwell, 64 N. C. 1, 17 (1870) (construction of a covenant creating an easement limited to a situation where the covenant was consistent with public policy).
[36] J. T. Donohue Realty Co. v. Wagner, 154 Md. 588, 141 Atl. 337 (1928).
[37] Consolidation Coal Co. v. Mann, 298 Ky. 28, 181 S. W. 2d 394 (1944).
[38] Waldrop v. Town of Brevard, 233 N. C. 26, 62 S. E. 2d 512 (1950).
[39] "We do not construe plaintiff's complaint to allege that the nuisance complained of was the result of negligent conduct. . . ." Waldrop v. Town of Brevard, 233 N. C. 26, 62 S. E. 2d 512 (1950).

refused to accept the construction of a release by a lessee which would have exempted the lessor from liability for the creation of such unsanitary conditions as would seriously impair the health of the lessee.[40] As regards releases of any claims which may arise in the future from acts of the released party which would otherwise give rise to an action in tort, such agreements do not seem to be opposed to public policy[41] if the only effect is upon the property of the releasor.[42] A railroad may even be released from liability for its negligence in damaging property placed upon a portion of its right of way which had been leased to the owner of the damaged property.[43]

North Carolina law concerning the creation of easements is relatively scarce, although it seems to be in accord with the majority of cases in other jurisdictions. In a previous case involving a release very similar to the one in the principal case, the court held that a covenant creating an easement is an interest in realty within the meaning of the Statute of Frauds, and is required to be in writing.[44] N. C. GEN. STAT. §47-27 (1950) requires all easements to be recorded in order to be binding upon bona fide purchasers for value.[45] This serves as constructive notice of the existence of the easement.[46] The North Carolina court has held along with the majority that the intent to create the easement must be clear;[47] that the creation of an easement must be needed in order to give effect to the intention of the parties;[48] and that the easement must be appurtenant to the dominant tenement in order to inure to the benefit

[40] Godfrey v. Power Co., 190 N. C. 24, 128 S. E. 485 (1925).
[41] Brush v. Lehigh Valley Coal Co., 290 Pa. 322, 138 Atl. 860 (1927).
[42] 6 WILLISTON, CONTRACTS §1751B (Rev. ed. 1938).
[43] Southern Ry. v. Stearns Brothers, Inc., 28 F. 2d 560 (4th Cir. 1928).
[44] Clark v. A. C. L. R. R., 192 N. C. 280, 135 S. E. 26 (1926). The court and the parties in the principal case seemed to treat the question as a case of first impression in North Carolina, for the opinion and the briefs cite no North Carolina authority for the proposition that a release may constitute a covenant not to sue and create an easement.
[45] Walker v. Phelps, 202 N. C. 344, 162 S. E. 727 (1932) (covenant creating easement held binding on all persons claiming under covenantor subsequent to registration of the deed containing covenant).
[46] The principal case presents an interesting problem in this regard. There the covenant which is construed as creating an easement was not contained in any deed in the plaintiff's direct chain of title, yet such easement was binding upon him because the deed in which it was contained was recorded. This would seem to cast a greater burden of care on the part of those searching titles not only to examine carefully every deed in the chain of title, but also to carefully examine, analyze and construe all other deeds executed by each grantor in the chain. In the situation of a grantor making a large number of grants out of a single tract, any one of which might contain such a covenant binding all other realty in the same tract, the problem and task involved would approach unreasonable magnitude.
[47] Ring v. Mayberry, 168 N. C. 563, 84 S. E. 846 (1915); Norfleet v. Cromwell, 64 N. C. 1, 17 (1870).
[48] "The words are strictly of covenant, and a construction converting them into a grant can only be justified if supported by some direct authority, or very clearly 'by the reason of the thing.'" Blount v. Harvey, 51 N. C. 186, 188 (1858).

of the successors in interest of the covenantee, and not merely in gross.[49] The few cases decided in North Carolina seem to contemplate the existence of both a dominant and a servient tenement, and at least one case has held that the covenant so creating the easement must conform to public policy.[50] The North Carolina court has expressed no opinion as to whether the covenant would be objectionable if it interfered with alienation, and has had no occasion to decide whether the dominant tenement must be described with particularity; whether the dominant tenement must receive substantial benefit from the easement created; nor whether the dominant and servient tenements must be contiguous. There is, however, no indication that the North Carolina court would find itself in disagreement with these requirements, which have been dealt with in other jurisdictions, if the question were properly presented.

Regarded in the light of the foregoing discussion, the decision in the principal case does not seem to be out of line with the holdings of the majority and the court seems to have adhered to the principles announced in earlier cases in North Carolina.

WILLIAM C. MORRIS, JR.

Labor Law—Arbitration in North Carolina

Arbitration, as a means of settling commercial and property disputes without resort to the judicial system, was authorized by statute in colonial North Carolina[1] and was commonly used, as shown by the number of cases which reached the Supreme Court, in the early days of statehood.[2] However, it was not until two hundred years after the first

[49] Davis v. Robinson, 189 N. C. 589, 598, 127 S. E. 697 (1925).

[50] Covenant was held to create an easement running with the lands, and binding upon a subsequent purchaser in fee. The court added: "This decision is limited to a case in principle like this: Where the intent to create an easement is clear, where the easement is apparent, *and where the covenant is consistent with public policy,* and so qualifies or regulates the mode of enjoying the easement, that if it be disregarded, the easement created will be substantially different from that intended." (Italics added.) Norfleet v. Cromwell, 64 N. C. 1, 17 (1870).

[1] Laws of 1749, North Carolina, "An Act for determining Differences by Arbitration," adopting the English statute, 9 & 10 William III c. 15 (1698). 23 CLARK, STATE RECORDS OF NORTH CAROLINA 325 (1904). This statute is no longer in force. Simpson v. McBee, 14 N. C. 531 (1832).

[2] Compare the number of arbitration cases in recent volumes with the fact that eight cases between 1795 and 1801 are reported in the first three volumes of the North Carolina reports. Early subject matters included disputes over land boundaries, a horse, and partnership accounts. It is difficult, however, to differentiate early cases of court rules of reference by consent and voluntary *ex curia* arbitration.

The rudimentary condition of the courts may have accounted for much early resort to arbitration. Not until 1806 was there a superior court for each county. Until 1818 there was no separate supreme court. Adams, *Evolution of Law in North Carolina,* 2 N. C. L. REV. 133, 138 (1924). In 1846, Governor Graham still longed for a time when "all Law suits could be ended in one, or at most two years from their commencement, instead of being, as they often are, transmitted from father to son." JOHNSON, ANTE BELLUM NORTH CAROLINA 638 (1937).