Real Property -- Personal Restrictive Building Covenants

William P. Skinner Jr.

did not discuss the exception relating to part owners provided in Section (e) of the regulations since the plaintiff was not even an employee.

In spite of the clear and helpful regulations supplementing the definition of a "bona fide executive" employee, it remains difficult to draw a line with all true executives falling on one side and all remaining employees falling on the other. All of the requirements of the Administrator's definition must be met. The requirement that will probably continue to be most troublesome deals with nonexempt work tolerance. The courts must still decide on the particular facts of each case whether work is "directly and closely related," and, if it is not, then whether the amount of that work exceeds the tolerance.

F. KENT BURNS

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Although the case of *Julian v. Lawton*[1] presented for decision a very narrow question on the matter of restrictive building covenants and perhaps turned on an agency question as much as on the construction of the covenant involved, the case is of interest because of the growth of residential subdivisions in the last two decades and the almost universal inclusion of certain restrictions imposed by means of covenants in the deeds given for the lots in these developments.[2] In this case the use of the term "personal" as applied to a valid restrictive building covenant is believed to be unique.

In the principal case, the grantor, in conveying certain lands in a real estate subdivision which he was promoting, inserted in the deeds certain restrictive covenants one of which stated "that no dwelling house or other building shall be erected on the tract until the type and exterior lines of the building to be erected shall have been approved by [the grantor] or by an architect selected by him. . . ."[3] The court held that the covenant was personal to the grantor and that both the restriction and the agency of the architect ceased to be effective at the death of the grantor.

By definition, "a real covenant is one having for its object something annexed to, inherent in or connected with land or other real property";[4] it is a covenant that is said to "touch and concern" the land.[5] These

[1] 240 N. C. 436, 82 S. E. 2d 210 (1954).

[2] "The number of decisions in comparatively recent years involving the validity, construction and effect of agreements restricting the use of real property indicate the increasing use being made of them. This reflects, it has been aptly commented, the expansion of the law to meet the demands of home owners for a protection adequate to the more crowded conditions of modern life." TIFFANY, LAW OF REAL PROPERTY § 858 (3rd ed. 1939).

[3] Julian v. Lawton, 240 N. C. 436, 437; 82 S. E. 2d 210, 211 (1954).

[4] 14 AM. JUR., *Covenants* § 19, at p. 495 (1938); 21 C. J. S., *Covenants* § 22 (1940).

[5] TIFFANY, LAW OF REAL PROPERTY § 854, at p. 455 (3rd ed. 1939).

covenants "run with the land" and are enforceable for the duration of the estate without regard to the personalities involved in any specific transfer or sale.[6] Personal covenants are between individuals, binding only the covenantor and enforceable by the covenantee; their duration is said to be only the life of the covenantee.[7]

The North Carolina Supreme Court has denominated as real covenants the following: covenant of quiet enjoyment, covenant of warranty,[8] covenant securing a right of way with an annual payment,[9] covenant that an existing canal shall be maintained,[10] covenant to build and maintain a stairway,[11] and a covenant for a railroad to maintain a flag station.[12] The court has also included in this category covenants containing building and occupancy restrictions such as: those limiting the number of residences per tract; limiting ownership to members of the "white race"; forbidding factories, manufacturing establishments, commercial endeavors, tenements, apartment houses, saloons, sanatoriums, hospitals; requiring a certain minimum cost per dwelling; requiring houses a certain distance from a road or street; prohibiting the keeping of certain animals, and other like restrictions.[13]

Personal covenants in North Carolina cover such agreements as covenants of seisin,[14] covenants against encumbrances,[15] and, where no

[6] 14 AM. JUR., *Covenants* § 19 (1938); 21 C. J. S., *Covenants* §§ 54, 74 (1940).

[7] 14 AM. JUR., *Covenants* § 27 (1938); TIFFANY, LAW OF REAL PROPERTY § 854 (3rd ed., 1939).

[8] "The covenant for quiet enjoyment and the covenant for warranty are in their effect the same . . . in some cases the courts have noted minor distinctions between them . . . they are generally regarded as substantially equivalent or identical in operation and effect." AMERICAN LAW OF REAL PROPERTY § 12.129 (1952); quiet enjoyment: Wiggins v. Pender, 132 N. C. 628, 44 S. E. 362 (1903); Markland v. Crump, 18 N. C. 94, 27 Am. Dec. 320 (1834); warranty; Wiggins v. Pender, *supra;* Ravenel v. Ingram, 131 N. C. 549, 42 S. E. 967 (1902); RAWLE, COVENANTS FOR TITLE § 213 (5th ed. 1887); TIFFANY, REAL PROPERTY § 1022 (3rd ed. 1939). *Cf.*, Smith v. Ingram, 130 N. C. 100, 40 S. E. 984 (1902).

[9] Raby v. Reeves, 112 N. C. 688, 16 S. E. 760 (1893).

[10] Norfleet v. Cromwell, 64 N. C. 1 (1870).

[11] Ring v. Mayberry, 168 N. C. 563, 84 S. E. 846 (1915).

[12] Parrott v. Railroad, 165 N. C. 295, 81 S. E. 348 (1914).

[13] These citations are representative only and do not in each specific case hold the covenant to be real: residences per tract: Stroupe v. Medernach, 196 N. C. 305, 145 S. E. 925 (1928); Charlotte Consol. Construction Co. v. Cobb, 195 N. C. 690, 143 S. E. 522 (1928); "white race": Vernon v. R. J. Reynolds Realty Co., 226 N. C. 58, 36 S. E. 2d 710 (1945); Stroupe v. Medernach, *supra;* factories, tenements, hospitals, etc.: Huffman v. Johnson, 236 N. C. 225, 72 S. E. 2d 236 (1952); Bailey v. Jackson, 191 N. C. 61, 131 S. E. 567 (1925); minimum cost: Pepper v. West End Development Co., 211 N. C. 166, 189 S. E. 628 (1936); Huntington v. Dennis, 195 N. C. 759, 143 S. E. 521 (1928). These and other restrictions received approval by reference in Johnson v. Garrett, 190 N. C. 835, 130 S. E. 835 (1925), one of the "Myers Park cases." For earlier cases on this planned development, see: Myers Park Homes Co. v. Falls, 184 N. C. 426, 115 S. E. 184 (1922); and Stephens Co., v. Myers Park Homes Co., 181 N. C. 335, 107 S. E. 233 (1921). See TIFFANY, *op. cit. supra* note 4, § 859.

[14] Newbern v. Hinton, 190 N. C. 108, 129 S. E. 181 (1925); Eames v. Armstrong, 146 N. C. 1, 59 S. E. 165 (1907); Ravenal v. Ingram, 131 N. C. 549, 42 S. E. 967 (1902); AMERICAN LAW OF REAL PROPERTY, § 12.127 (1952); RAWLE,

scheme or plan for development was present, certain other covenants concerning the use of land[16] and Negro occupation.[17]

In other jurisdictions, the search for unenforced covenants similar to the principal case has revealed covenants requiring a lightwell to be left between buildings,[18] prohibiting a grocery business on the land,[19] forbidding manufacturing on the premises,[20] restricting location and character of improvements to be made,[21] and requiring a certain set back distance for all buildings.[22] All of these were considered personal and each lacked either *similar restrictions* in the deeds for other lots in the development or a *scheme of development,* both of which were present in the principal case.

Still another case[23] reveals a covenant prohibiting a mercantile business from being conducted on the property. The court here refused to enforce the covenant after the grantors had disposed of their nearby mercantile business. The restriction was considered personal to protect the grantor's business and served no purpose after the sale.

The combination of (1) a building restriction, (2) an area developed according to a "scheme," and (3) a refusal to enforce because the covenant was personal has not been found outside the principal case. As seen above, cases may have all but one of the features of *Julian v. Lawton.*

The case would seem to be well decided and in line with the prevailing American law on personal covenants.[24] Certainly little argument can be given the court on its decision that the covenant was personal, principally because of the use of words in the deed indicating that the grantor as an individual was to be satisfied. Such phrases used by the court as "without existence or meaning apart from the brain of" the grantor, and "his aesthetic sense," would seem a fair interpretation of the language of the deeds. However, in view of the defense advancd by the grantor's personal representative and heirs, it would seem safe to assume that the covenant was expected to run after the grantor's death. The

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op. cit. supra note 4, § 205; TIFFANY, *op. cit. supra* note 4, § 205.

[15] Thompson v. Avery County, 216 N. C. 405, 5 S. E. 2d 146 (1939); Lockhart v. Parker, 189 N. C. 138, 126 S. E. 313 (1924); AMERICAN LAW OF REAL PROPERTY, § 12.128 (1952); RAWLE, *op. cit. supra* note 4, § 212; TIFFANY, *op. cit. supra* note 4, § 1022.

[16] Craven County v. First Citizens Bank & Trust Co., 237 N. C. 502, 75 S. E. 2d 620 (1953); Sheets v. Dillon, 221 N. C. 426, 20 S. E. 2d 344 (1942).

[17] Eason v. Buffaloe, 198 N. C. 520, 152 S. E. 496 (1930).

[18] Heimburge v. State Guaranty Corp., 116 Cal. App. 380, 2 P. 2d 998 (1931).

[19] Shade v. O'Keeffe, 260 Mass. 180, 156 N. E. 867 (1927).

[20] Harrington v. Joyce, 316 Mass. 187, 55 N. E. 2d 30 (1944).

[21] Jennings v. Baroff, 104 N. J. Eq. 132, 144 Atl. 717 (1929).

[22] Baker v. Henderson, 137 Tex. 266, 153 S. W. 2d 465 (1941).

[23] Allison v. Greear, 188 Va. 64, 49 S. E. 2d 279 (1948).

[24] 21 C. J. S. *Covenants* § 33 (1940).

court has thus removed one of the restrictions found in every deed in that particular real estate development.

Since more specific or definite language in the deeds[25] and the use of certain legal devices[26] can do much to clear up any doubt as to the real or personal nature of a restrictive building covenant, it is possible that in the future the careful draftsman can obviate the necessity for the court's having to designate such a covenant as personal.

WILLIAM P. SKINNER, JR.

Torts—Animals—Liability of Owner for Trespass of Dogs While Hunting

In a recent North Carolina decision,[1] the court held that the owner of dogs which had damaged crops, fences, and cattle of plaintiff in the course of fox hunts, was liable in trespass for damage done, although the hunter himself did not enter the plaintiff's property.

Plaintiff and defendant owned adjoining farms in Guilford County. The defendant, during a period of three years preceding the action, kept a pack of seven to ten foxhounds that he hunted across plaintiff's land at frequent intervals, in spite of plaintiff's repeated protests. Plaintiff's pasture lay between two creeks. The fox was wont to dash between the creeks during the hunt, and when fatigued by this exercise would dash in among the herd of cattle with the yelping pack in hot pursuit. Whereupon, the cattle would stampede, tearing down partition fences, cutting themselves on the barbed wire, and generally working themselves into whatever is the bovine equivalent of advanced neurosis.

Generally, the owner of domestic animals which stray onto property of another is liable in damages for their trespass.[2]

[25] It is suggested that the following might be sufficient: ". . . shall have been approved by the grantor *or his successors in interest,* or by an architect selected by him *or his successors in interest.*" Also, the subjective nature of the restriction could be made objective by listing architectural types not desired, *i.e.,* ranch, modern, colonial, etc.

[26] See Huntington Palisades P. O. Corp. v. Metropolitan Finance Corp., 180 F. 2d 132 (9th Cir. 1950), wherein the covenant read: "No building or other structure shall be erected or the erection thereof begun on said premises until the plans and specifications thereof shall have been first presented to and approved in writing by the Seller or by the property owners corporation, herein referred to, as to outward appearance and design." The result desired by the grantor in the principal case was accomplished here by means of the property owners' corporation which each grantee joined by acceptance of the deed.

[1] Pegg v. Gray, 240 N. C. 548, 82 S. E. 2d, 757 (1954).

[2] *E.g.,* Fox v. Koehnig, 190 Wis. 528, 209 N. W. 708 (1926); RESTATEMENT, TORTS § 504 (1934); HALSBURY'S LAWS, *Animals* § 935 (2d ed. 1931); 3 C. J. S., *Animals* § 185 (1936); Accordingly, owners have been held strictly liable for the trespasses of their turkeys: McPherson v. James, 69 Ill. App. 337 (1896); Tate v. Ogg, 170 Va. 95, 195 S. E. 496 (1938). And their chickens: Adams Bros. v. Clark, 189 Ky. 279, 224 S. W. 1046 (1920). Trespassing cattle, sheep, goats, horses, mules, oxen, and swine are governed in practically all jurisdictions by detailed statutes, which determine "legal fences," liability for trespass, local option as to