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contract was with the firm alone, a contract which is made by statute a joint and several obligation of the several partners, is by that statute entitled not only to priority in the firm assets as a firm creditor, but also to parity of treatment in the separate partners' individual estates with the partners' personal creditors. The rule of marshalling assets contained in G.S. § 59-70(h) does not deny firm creditors rights also as creditors of the separate partners; but it does deny them the preferred position as to individual assets which it grants to the personal creditors of the partners (just as it gives firm creditors a like preference as to firm assets).

The statute as to joint and several liability is procedural only.[27] The firm creditor with no more than a joint obligation is in truth a creditor of the separate partners; but in order to enforce his claim he must join them all as defendants. Once he has overcome this procedural obstacle and has his judgment, he may collect the whole amount out of property of any one of the judgment debtors, exactly as if his claim were joint and several.[28] There seems to be no sound reason for any difference between a joint and several creditor, as to their substantive rights.

The theory of the *Walston* case, however, is hardly consistent with this view. Until the court deals with the problem again, it cannot be concluded whether the *Casey* decision has resulted in a liberalization of the rule of marshalling assets, confusion in the application of the doctrine, or both.

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Property—Restrictive Covenants—Equitable Servitudes and Notice

In *Reed v. Elmore*,[1] a landowner subdivided a tract of land into seven lots and sold five of them with no restrictions as to use. She conveyed Lot No. 3 to plaintiff by deed stipulating that the land therein conveyed should be subject to the restriction that no structure be erected thereon by the grantee within a stipulated distance from the public road. This deed, which was properly recorded by plaintiff, contained the further provision, "This restriction shall likewise apply to Lot No. 4, retained by the grantor, said Lot No. 4 being adjacent to lands hereby conveyed." Subsequently, the owner sold this adjacent Lot No. 4, which defendant had obtained by mesne conveyances, the deed containing no reference to the restriction. The plaintiff covenantee, owner of

[27] CRANE, PARTNERSHIP 519 (2d ed. 1952).
[28] 2 WILLISTON, CONTRACTS § 316 (rev. ed. 1936); 4 CORBIN, CONTRACTS § 928 (1951).

[1] 246 N.C. 221, 98 S.E.2d 360 (1957).

Lot No. 3, brought action against the defendant, owner of Lot No. 4, to restrain him from building on Lot No. 4 in contravention of the restriction. The court held that the restrictive covenant in plaintiff's recorded deed was constructive notice to the subsequent purchasers of Lot No. 4, and that the restriction would be enforced as between this covenantee and this defendant even though no deed to Lot No. 4 contained reference to such restriction.

The *ratio decidendi* of the court was that if this restrictive covenant is to be enforced, the parties to the contract must have intended it to impose a benefit on the landowner of Lot No. 3 and a burden on the landowner of Lot No. 4; the existence of a uniform plan of development evidences such an intention, but the absence of a uniform plan does not preclude the finding of that intention.[2] Hence, the court construed the restriction as clearly indicating an intention to impose "mutual restrictive servitudes" on the land.

Although the court did not so state, it appears that the decision was reached by applying the doctrine of equitable servitudes. Generally, this doctrine works on the theory that the restrictive covenant gives the covenantee an equitable property right in the land of the covenantor.[3] In spite of the fact that the benefit and the burden are said to be appurtenant to the land and to run with it,[4] the real question is not whether the covenant runs with the land, but whether the purchaser took the land with notice, actual or constructive, of the covenant contract of the grantor with respect to its use.[5]

This doctrine has developed in courts of equity as the means by which the homeowner secures to himself a desirable place to live and the real estate developer secures to himself an enhanced value for his land.[6] The doctrine has been applied in two classes of cases. Its most frequent application has been in the cases involving a landowner seeking to develop a particular area in accordance with a uniform plan. However, it is generally held that a uniform plan is not a sine qua non for sustaining the validity of a restrictive covenant,[7] and that the

[2] *Id.* at 226, 98 S.E.2d at 364.

[3] Peck v. Conway, 119 Mass. 546 (1876); CLARK, COVENANTS AND OTHER INTERESTS RUNNING WITH LAND c. 6 (2d ed. 1947); Reno, *The Enforcement of Equitable Servitudes in Land,* 28 VA. L. REV. 951, 1067 (1942). Another theory offered for this doctrine is that equity is merely enforcing a contract by a form of specific performance. De Gray v. Monmouth Beach Club House Co., 50 N.J. Eq. 329, 24 Atl. 388 (Ch. 1892); CLARK, *op. cit. supra* at 172; Reno, *supra,* at 973-75.

[4] Bauby v. Krasow, 107 Conn. 109, 139 Atl. 508 (1927); Hayslett v. Shell Petroleum Corp., 38 Ohio App. 164, 175 N.E. 888 (1930); CLARK, *op. cit. supra* note 3, at 175.

[5] Tulk v. Moxhay, 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).

[6] Osius v. Barton, 109 Fla. 556, 147 So. 862 (1933).

[7] Osius v. Barton, *supra* note 6; Marra v. Aetna Constr. Co., 15 Cal. 2d 375, 378, 101 P.2d 490, 492 (1940) (dictum). The existence of a general scheme is necessary for the enforcement of a restriction by a prior grantee against a subsequent grantee where there is a restriction in each grantee's deed but no express

restrictions are enforced because rights have been or are about to be invaded.[8] In the principal case, the court adopted this view. The three dissenting judges based their objections on the fact that analagous North Carolina decisions[9] in this area had refused to enforce similar restrictive covenants in the absence of a uniform plan. But it would appear, from analysis of those decisions, that none of them involved an express covenant to bind the land retained by the grantor.[10]

A less frequent but equally important application of this doctrine is in the group of cases involving restrictions on only one or two parcels of land. In this group of cases, however, the complainant must show that there was a covenant to bind the remaining land and that the subsequent purchaser took that land with notice of the covenant.[11]

Although notice is recognized as essential, the courts have not agreed on what is sufficient to constitute record notice to the subsequent purchaser. The weight of authority now appears to be that the owner of land is bound by the restrictions only if they appear in some deed of record to the same land in the conveyances to himself and his direct predecessors in title.[12] This view, recognizing the practical limitations of title searching, only requires the searcher to examine deeds involving the particular lot in question.[13]

The other view, which appears to be the minority view, is that recorded deeds to other tracts of land give notice of the restrictions placed therein on the other lots retained by the grantor.[14] This is the view which the court in the principal case adopted. In reaching its decision, the court relied on two North Carolina cases, *Starmount Co. v. Memorial Park*[15] and *Waldrop v. Brevard*,[16] as indicating an inclination toward this view. From an analysis of the decisions, however, it ap-

covenant by the grantor to bind the remaining land. Beattie v. Howell, 98 N.J. Eq. 163, 129 Atl. 822 (Ch. 1925); Bessette v. Guarino, 128 A.2d 839 (R.I. 1957).

[8] Clark v. Martin, 49 Pa. 289 (1865).

[9] Craven County v. Trust Co., 237 N.C. 502, 75 S.E.2d 620 (1953); Sedberry v. Parsons, 232 N.C. 707, 62 S.E.2d 88 (1950); Humphrey v. Beall, 215 N.C. 15, 200 S.E. 918 (1939).

[10] See note 9 *supra*.

[11] Denhardt v. De Roo, 295 Mich. 223, 294 N.W. 163 (1940); Hart v. Little, 103 Misc. 320, 171 N.Y.S. 6 (Sup. Ct. 1918); Clark v. Martin, 49 Pa. 289 (1865).

[12] Hancock v. Gumm, 151 Ga. 667, 107 S.E. 872 (1921); Glorieux v. Lighthipe, 88 N.J.L. 199, 96 Atl. 94 (Ct. Err. & App. 1915); Buffalo Academy of the Sacred Heart v. Boehm Bros., 267 N.Y. 242, 196 N.E. 42 (1935); Hayslett v. Shell Petroleum Corp., 38 Ohio App. 164, 175 N.E. 888 (1930); CLARK, COVENANTS AND OTHER INTERESTS RUNNING WITH LAND 183 (2d ed. 1947); Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. PA. L. REV. 125, 171 (1944).

[13] See cases cited note 12 *supra*; Philbrick, *supra* note 12, at 175; Note, 21 CORNELL L.Q. 479 (1936).

[14] Lowes v. Carter, 124 Md. 678, 93 Atl. 216 (1915); King v. Union Trust Co., 226 Mo. 351, 126 S.W. 415 (1910); Finley v. Glenn, 303 Pa. 131, 154 Atl. 299 (1931); 2 TIFFANY, REAL PROPERTY § 567 d (2d ed. 1920).

[15] 233 N.C. 613, 65 S.E.2d 134 (1951).

[16] 233 N.C. 26, 62 S.E.2d 512 (1950).

pears that such is not the case. The *Starmount* case involved a restrictive covenant which was placed in a deed to a portion of the same tract of land purchased by the defendant. Thus it would seem that this case merely followed the majority view. The *Brevard* case involved an easement and a covenant not to sue, placed in a deed by a common grantor to another tract of land. The subsequent purchaser contended that a deed could not be record notice if it were to a parcel of land other than the one bought. Although it was held to be record notice, the court there said, "This position might be well taken if we were dealing with restrictive covenants rather than an easement."[17]

Then turning to other authorities, the court relied on a statement by Tiffany,[18] and an annotation in the *American Law Report*.[19] These authorities lend support to the view adopted by the court and to its assertion that this is the majority view. However, the statement by Mr. Tiffany was written before 1920 and the annotation was written in 1922. Since that time, it seems that the weight of authority has shifted.[20]

Hence, it would appear that the decision as to the enforcement of restrictions absent a uniform plan is in line with the weight of authority, while the decision as to what constitutes record notice is in accord with the present minority view.

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Taxation—Effect of North Carolina Inheritance Tax on a Will Compromise Agreement

Testatrix devised several tracts of land located in North Carolina to *A, B,* and *C,* a niece and two nephews, in fee simple. *D,* another niece who was specifically excluded from the will, threatened to file caveat to the probate of the will. In return for the promises of *A, B,* and *C* to convey one-fourth of the property to *D,* she did not file caveat and the will was admitted to probate. The executor paid the inheritance tax on the basis that there were four beneficiaries in accordance with the compromise agreement. The North Carolina Commissioner of Revenue filed a tax judgment against the beneficiaries for an additional assessment computed on the basis of the will with three beneficiaries instead of four. A partition sale of one parcel of the land was made by a court-appointed commissioner and the additional assessment was paid. *A, B,* and *C* then brought suit against *E,* a purchaser from *D* of the parcel of land which was sold, to compel payment of a proportionate share of the inheritance tax. It was held that the liability for the tax is on those who are in-

[17] 233 N.C. at 30.
[18] 2 TIFFANY, *op. cit. supra* note 14, at 2188.
[19] Annot., 16 A.L.R. 1013 (1922).
[20] See cases cited note 12 *supra;* Philbrick, *supra* note 12, at 173 & n.155.