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Vendor and Purchaser -- Restrictive Covenant -- Marketable Title

F. M. Parker

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trials upon these grounds is said to be not reviewable on appeal,[29] unless there is a gross abuse of discretion.[30] In an early case there is a dictum that a trial judge may not revise or correct the verdict of a jury, but is limited to setting it aside in a proper case.[31] However, more recent cases indicate that the judge does have the power to revise a jury's verdict, although no case affirmatively holds that a trial judge may deny a motion for a new trial upon condition that the non-moving party consent to a reduction or increase in damages, according as they are excessive or inadequate. It has been held that a trial judge may not enter a verdict for a less amount than that found by the jury without the plaintiff's consent.[32] The compelling inference to be drawn from this case is that if the plaintiff consented to a remittitur the court might deny the defendant a new trial. The same implication is found in another case.[33] Three other recent cases[34] clearly indicate that the practice of the trial judge reducing excessive verdicts upon the consent of the plaintiff is widely followed in North Carolina. These cases are based upon a statute[35] which authorizes the trial court to set aside excessive verdicts.

When the problem of the principal case is presented to the North Carolina Supreme Court, it is submitted that the court will pursue a wiser course if the majority state cases are followed. Such a result would be logically consistent with the procedure approved in the cases mentioned above. It would tend to accelerate the now sluggish processes of trial and appellate practise, thereby reducing the costs of litigation. After the jury has first determined where the liability falls, there is no serious invasion of its functions in permitting the trial judge to revise the amount of damages.

WELCH JORDAN.

Vendor and Purchaser—Restrictive Covenant—Marketable Title.

A covenant restricting the use of real property is perhaps the most widely used device for protecting residential districts from the inroads of business and industrial establishments.[1] While first enforced in

[29] See cases cited *supra*, notes 27 and 28.
[30] Pender v. North State Life Insurance Co., 163 N. C. 98, 79 S. E. 293 (1913).
[31] Shields v. Whitaker, 82 N. C. 516, 522, 523 (1880).
[32] Isley v. Virginia Bridge & Iron Co., 143 N. C. 51, 55 S. E. 416 (1906).
[33] Decker v. Norfolk & Southern R. R. Co., 167 N. C. 26, 83 S. E. 27 (1914).
[34] Bizzell v. Auto Tire & Equipment Co., 182 N. C. 98, 108 S. E. 439 (1921); Bailey v. Dibbrell Mineral Co., 183 N. C. 525, 112 S. E. 29 (1922); Hyatt v. McCoy, 194 N. C. 760, 138 S. E. 405 (1927).
[35] N. C. CODE ANN. (Michie 1931) §591.

[1] The more recent development and use of zoning ordinances offers another method of protection. For a comparison of the utility of the two methods, see

equity against a subsequent owner of the restricted property on a theory of prevention of unjust enrichment,[2] courts today enforce these covenants upon two general theories: first, as contracts concerning land;[3] and second, as easements or servitudes on the property restricted.[4] An objection to the first view is that it may result in creating a right where none should exist. Thus, where an injunction against breach of the covenant would be refused because of radical change in the character of the neighborhood, it was still held that a vendee was justified in refusing a deed on the grounds that the possibility of an action at law for damages rendered the vendor's title unmarketable.[5] Though the restriction had long been obsolete, its ghost was allowed to continue to haunt the unfortunate realty owner.[6]

But the second theory has also given some difficulty. For example, if the character of the neighborhood has so radically changed that the property is no longer useful for residential purposes, courts quite commonly refuse an injunction.[7] Yet under the proprietary theory this amounts to a deprivation of property. As a way out some courts have

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Van Hecke, *Zoning Ordinances and Restrictions in Deeds* (1928) 37 YALE L. J. 407.

[2] "Of course the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken." Tulk v. Moxhay, 2 Phil. 774 (Ch. 1848).

[3] Wiegman v. Kusel, 270 Ill. 520, 110 N. E. 884 (1915); Windemere-Grand Improvement Ass'n v. American Bank, 205 Mich. 539, 172 N. W. 29 (1919); Stone, *The Equitable Rights and Liabilities of a Stranger to a Contract* (1918) 18 COL. L. REV. 291; 2 TIFFANY, REAL PROPERTY (2nd ed. 1920) §396.

[4] Weil v. Hill, 193 Ala. 407, 69 So. 438 (1915); Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N. E. 244 (1917); Pound, *The Progress of the Law, 1918-1919; Equitable Restrictions* (1919) 33 HARV. L. REV. 813.

[5] Bull v. Burton, 227 N. Y. 101, 124 N. E. 111 (1919) (Covenant of 1864 against use of lot on Fifth Avenue for "any stable either public or private." In 1919 the lot was worth $19,700 a foot on the Avenue. Though the restriction would not have been enforced in equity, it was thought to be yet sufficiently alive "at law" to make the owner's title unmarketable.); see Genske v. Jensen, 188 Wis. 17, 205 N. W. 548 (1925); *cf.* Postley v. Kafka, 213 App. Div. 595, 211 N. Y. S. 382 (1925).

[6] Another objection which has been raised to this theory is that even with a very liberal application of the third party beneficiary doctrine it is difficult to justify the right of action commonly given certain parties. "It seems an unreal conclusion to say that when A promised a realty development company not to conduct a business upon Blackacre, a contract was made of which an intended beneficiary was A's son, B, in a suit against A's daughter C, upon descent and division of Blackacre." CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND (1929) 151. While this objection might have some weight in a state such as New York where the right of a third party beneficiary to a contract to sue is narrowly confined, it should not present any difficulties in states where that right is not so limited.

[7] Hurt v. Hejhal, 259 Ill. App. 221 (1930); Klug v. Kreisch, 246 Mich. 14, 224 N. W. 339 (1929); Trustees of Columbia College v. Thacher, 87 N. Y. 311 (1882); Starkey v. Gardner, 194 N. C. 74, 138 S. E. 408 (1927); Notes (1928) 54 A. L. R. 812; (1933) 85 A. L. R. 985.

suggested a recovery of damages after denial of the injunction.[8] But this is in effect to force a sale of a property right for a private purpose.[9]

In view of these difficulties the following has been suggested as a better solution: while these restrictions are servitudes on the land itself, and should be enforced as such, when the purpose of the restriction can no longer be carried out the servitude comes to an end for all purposes; i.e., the duration of the servitude is determined by its purpose.[10]

The North Carolina Court has in effect reached this very result. In *Starkey v. Gardner*[11] an injunction was denied on the ground that changed conditions had made impossible the fulfillment of the purpose for which the restriction was imposed. The judgment of the lower court, affirmed on appeal, was that "the restrictions created in said deed . . . *are no longer in effect,* and the property of the defendant *is no longer subject to said restrictions,* . . . and that the said defendant, her agents or assigns, *are not bound by the terms of said restrictions,* and they are permitted to use said lands and property for any lawful purposes."[12] There is here no hint of the possibility that the restriction is still alive for the purpose of collecting damages for its breach. This conclusion receives additional support in the recent case of *Snyder v. Caldwell.*[13] This was an action by the vendor for specific performance of a contract to exchange lands. The vendee had refused to accept a deed on the ground that the plaintiff could not convey good title since there was a restrictive covenant. But the court held for the plaintiff, basing its decision on the *Starkey* case, and holding that the restriction was no longer enforceable because of changed conditions. While the case does not specifically exclude the possibility that damages might still be collected at law, it is a familiar rule that the purchaser of land is not required to accept a title which invites or exposes him to

[8] Ewertsen v. Gerstenberg, 186 Ill. 344, 57 N. E. 1051 (1900); Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691 (1892); Page v. Murray, 46 N. J. Eq. 325, 19 Atl. 11 (1890); McClure v. Leaycraft, 183 N. Y. 36, 75 N. E. 961 (1905).

[9] A statute which sought to provide expressly for the procedure adopted offhand by the decisions was held unconstitutional as depriving the dominant owners of rights in real property for a private use contrary to the Bill of Rights, in Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N. E. 244 (1917).

[10] "When such burdens are terminated by change in the character of the neighborhood—now a recognized form of termination—or otherwise, the interest definitely ceases. No pale relics are left to trouble and not to benefit the property owners." CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND (1929) 153; Pound, *The Progress of the Law, 1918-1919; Equitable Servitudes* (1919) 33 HARV. L. REV. 813.

[11] 194 N. C. 74, 138 S. E. 408 (1927). This case is followed in Higgins v. Hough, 195 N. C. 652, 143 S. E. 212 (1928); Oldham v. McPheeters, 203 N. C. 141, 164 S. E. 731 (1932).

[12] Italics added.

[13] 207 N. C. 626, 178 S. E. 83 (1935).

litigation.[14] It would seem inferentially, therefore, that the title of the plaintiff in the instant case was now clear of the restriction even to the extent of being free from the possibility of liability for damages because of breach of the restriction. In short, the net effect of the North Carolina cases is that the restriction may be terminated by changed conditions, and when so terminated it is ended for all purposes.

F. M. PARKER.

Wills—Remainders—Life Tenant Vested with Absolute Power of Disposal.

The testator devised his real property to his wife giving her the "right and privilege to use, sell or dispose of the same as she may see fit during her lifetime," and he further provided that any property remaining at his wife's death should belong to the plaintiff. At her death the wife devised the property to the defendant. The West Virginia Supreme Court of Appeals adhered to an "ancient rule" in holding that the testator's will vested a fee simple estate in the wife thereby cutting off the plaintiff's remainder.[1]

It is generally accepted that a remainder over after a devise of an unlimited estate plus an absolute power of disposal is invalid since the first taker is vested with a fee simple.[2] A few jurisdictions, including West Virginia, have held that a devise of a *life estate* and the attachment thereto of an unlimited power of disposition created a fee simple in the life tenant to the exclusion of any remainder.[3] The fee simple estate thus vested was subject to all incidents normally attended upon

[14] Wesley v. Eells, 177 U. S. 370, 44 L. ed. 811, 20 Sup. Ct. 661 (1900).

[1] Hustead v. Murray, 177 S. E. 898 (W. Va., 1934).

In this case note the author has endeavored, in so far as it was possible, to consider only those cases in which a life estate in realty was expressly limited to the first taker and in which his power of disposal was unlimited. However, some of the difficulties involved in any classification or generalization concerning the construction of wills are indicated in the following quotation: "Seldom, if ever, will two wills be found the exact counterpart of each other, either in language or circumstances. We may look to cases for general rules as guides, but, after all, each case must be decided upon the language used by the testator, and upon his intention, to be gathered from the whole instrument." Jones v. Denning, 91 Mich. 481, 51 N. W. 1119 (1892).

[2] Hambright v. Carroll, 204 N. C. 496, 168 S. E. 817 (1933); see Gildersleeve v. Lee, 100 Ore. 578, 198 Pac. 246 (1921). ROOD, WILLS (2nd ed. 1926) 534. Note (1931) 75 A. L. R. 71.

[3] Gibson v. Gibson, 213 Mich. 31, 181 N. W. 41 (1921); Van Deventer v. McMullen, 157 Tenn. 571, 11 S. W. (2d) 867 (1928); Steffey v. King, 126 Va. 120, 101 S. E. 62 (1919); National Surety Co. v. Jarrett, 95 W. Va. 420, 121 S. E. 291 (1924); Notes (1925) 36 A. L. R. 1218; (1932) 76 A. L. R. 1166.

However, the attachment of a limited power of disposition would not enlarge the life tenant's interest to a fee. Waller v. Sproles, 160 Tenn. 11, 22 S. W. (2d) 4 (1929); Woodbridge v. Woodbridge, 88 W. Va. 187, 106 S. E. 437 (1921); Note (1930) 8 TENN L. REV. 209.