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# *Summary of the Law of Building and Use Restrictions\**

## CREATION OF RESTRICTIONS

Restrictions upon the use of land, and also those restraints upon alienation commonly associated with them under the common title of "building and use restrictions," may be created as possibilities of reverter limiting base fees; as conditions subsequent imposed upon estates in fee; as covenants real; as equitable servitudes; and in one or two instances only, as easements.

## AS POSSIBILITIES OF REVERTER

The possibility of reverter is seldom or never used to create restrictions, probably because it results in automatic forfeiture if the restriction is violated.

## AS CONDITIONS SUBSEQUENT

Attempts to use the condition subsequent are not infrequent, but many restrictions created in this form would, if passed upon, be construed as mere covenants; because the courts are hostile to conditions subsequent, do not recognize them unless the purpose to create them appears unmistakably, and, except perhaps in connection with restrictions directed against race, try to find reasons for refusing to enforce them.

This is not to say, however, that every condition subsequent is also a covenant; it is not one unless there has been an undertaking to perform the condition, which may not be the case.

The reason for the hostility of the courts to conditions subsequent is that, except when enforcement proceedings have been too long delayed, violation of the condition works

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a forfeiture at the will of the person entitled to enforce it. Equity abhors a forfeiture, and in Pennsylvania at least, equitable principles control actions to enforce a forfeiture for breach of condition subsequent.

At least unless provision to the contrary is made in the restrictive instrument, the only persons entitled to enforce a forfeiture for breach of condition subsequent are the heirs at law of the grantor of the estate which is subject to the condition, notwithstanding that the title to the dominant estate may have passed the others. At common law these heirs took by descent, and descent to them was the only way in which the right of forfeiture, known as a right of entry, could be transferred. It has been held in Pennsylvania, however, that if the right of entry has been reserved to the grantor and his assigns by the restrictive instrument, it will become available to assigns when the grantor aliens; in fact, that it will pass to a purchaser at execution sale. If the restrictive instrument mentions assigns, presumably the right is devisable as well as alienable *inter vivos*, though 'assigns' might be held not to include devisees.

#### AS COVENANTS REAL

The limits of the class of covenants real, or covenants running with the land, as they are more often called, are uncertain, but it is probable that in Pennsylvania the class includes all "building and use" restrictions created by formal instrument. Another uncertainty is whether these covenants bind assigns of a covenantor irrespective of notice. Text writers seem to assume that they do, but there is reason to think that today the contrary might be held. The latter view is desirable, as removing a cause of hardship and assimilating the rules governing covenants real to those governing equitable servitudes. Covenants real can be created only by an instrument under seal, but, anomalously, it has been held that the signature and seal need not to be those of the covenantor; if he accepts the instrument that is enough. Probably this is the law in Pennsylvania. Certainly it is common practice there to treat re-

strictions as effective although the covenantor may not have signed the deed; he seldom does, when he is the grantee. There is no risk in this practice apart from the possible application of the Statute of Frauds, to be mentioned later, for the restriction will be effective as an equitable servitude if not as a covenant real. But the desired covenant should be incorporated in the instrument of grant, and not in a separate instrument, even one executed contemporaneously. There are decisions, including two in Pennsylvania, recognizing covenants real which were not set forth in deeds of conveyance, but unless covenants real bind assigns irrespective of notice, there is the danger that they will not be effective against an assign of the covenantor having no actual knowledge of their existence. Putting such covenants on record will not necessarily give notice, for it has been held that the search need be only against the title, and not against grantor apart from the title.

#### AS EASEMENTS

The only building and use restrictions which can be said with any certainty to be easements are those providing for access and those concerning windows. This fact is not important, because easements created by instruments under seal are also covenants real.

#### AS EQUITABLE SERVITUDES

Equitable servitudes are those accessorial rights in land which are not technically covenants real, easements, or profits a prendre, and which are enforceable only in equity. If, as suggested above, covenants real include in Pennsylvania all 'building and use' restrictions created by formal instrument, equitable servitudes include only restrictions created orally or by instrument not under seal. It is a question, however, whether the Statute of Frauds permits the creation of restrictions by oral agreement. If it does not, then the only restrictions which are equitable servitudes are those created by writing signed by the party to be charged but not under seal. This makes the class of equitable ser-

vitudes so narrow that it is well to explain that the law of equitable servitudes arose in England, where the class of covenants real is much more limited than it is in Pennsylvania and in most jurisdictions in the United States.

Equitable servitudes depend upon notice. If any assign of a covenantor takes without notice of the restriction, it is at an end. Questions of notice seldom arise in connection with restrictions, because it is held that if the restrictions appear in any duly recorded instrument in the chain of title, that is notice; but when they do arise they are vital.

### ENFORCEMENT IN GENERAL

The enforcement of restrictions is almost invariably by injunction. Prohibition rather than compensation is the purpose of most persons who are entitled to the benefit of a restriction; money damages for a violation are difficult to estimate; and most restrictions are created as covenants real or as equitable servitudes rather than as possibilities of reverter or as conditions subsequent. A possibility of reverter cannot be enforced by injunction; in this respect it is like a remainder interest following a life estate; when the event—that is, the violation of the restriction—occurs, the servient estate simply terminates. A breach of condition subsequent gives a right of entry, not a contract right, and rights of entry are not enforceable by injunction; however, most conditions subsequent are accompanied by a covenant which can be enforced as such without making use of the right of entry.

### SCOPE OF INJUNCTIVE RELIEF

Injunctions may prevent a proposed violation of any kind; order the cessation of a forbidden use of a permitted structure; require the demolition of a forbidden structure, or the restoration of one unlawfully destroyed or removed; or even compel a defendant to initiate the action required by the restriction.

## DISCRETION

Although none of the recognized defenses to enforcement mentioned below may be present, the court may refuse an injunction if under all the circumstances it seems undesirable to grant one. When an injunction is thus denied the denial is an exercise of discretion. It is incorrect to say that injunctive relief is always a matter of discretion, for if no special circumstances are present, an injunction is a matter of right when a violation is proved and no standard defense appears. It is however correct to say that injunctive relief, like any other relief, is always dependent upon the view which the court may take of the facts, and that the facts may warrant the exercise of discretion rather than the application of a rule. In other words, injunctive relief is not always a matter of discretion but is always subject to the possibility of the exercise of discretion.

## DEFENSE IN GENERAL—ACTS OR OMISSIONS OF THE PARTIES OR OF THEIR PREDECESSORS

For convenience, defenses to the enforcement of restrictions may be grouped into these divisions:

First, defenses based on the acts or omissions of the parties or of their predecessors. These are the defenses of merger, release, inaction, and of violations by plaintiff. Merger and release need no special comment here. Violations by plaintiff or by his predecessors in title bar an injunction against a violation no more extensive than plaintiff's, but not an injunction against a more extensive violation. Inaction is a bar if it has occurred after plaintiff knew of the violation and there has been intervening action by defendant which would make him worse off, if an injunction were granted, than he would have been if the application to the court had been made as soon as plaintiff knew of the violation; or perhaps, apart from actual knowledge by plaintiff and prejudice to defendant, if the inaction has continued over a relatively long period. There is some con-

fusion and contradiction in the rulings, due in part to the careless use of such terms as 'laches,' 'acquiescence,' 'abandonment,' 'estoppel,' and 'waiver'.

### EXTERNAL CIRCUMSTANCES

Second, defenses based on circumstances external to the parties. In this group belong the defenses of cessation of benefits, discharge of liens by judicial sale, and private necessity. When, owing to changes of any kind, plaintiff's land would derive no benefit from the enforcement of the restriction, an injunction will not be granted, and it is doubtful whether more than nominal damages can be recovered at law. A judicial sale does not destroy restrictions. Private necessity is no defense, though it may be of weight in determining the proper interpretation of the restriction.

### PUBLIC POLICY—IN GENERAL

Third, defenses based on public policy: the Statute of Frauds, the Parol Evidence Rule, illegality, unreasonableness, monopoly or restraint of trade, restraints upon alienation, social policy against discriminations, and the Rule against Perpetuities.

### STATUTE OF FRAUDS

The Statute of Frauds applies to restrictions created as possibilities of reverter, rights of entry, or easements, for all these are interests in land. Whether it applies to covenants real or to equitable servitudes is theoretically doubtful, for these are considered by some authorities not to be interests in land, but the courts might apply the Statute to them also on grounds of convenience and uniformity irrespective of their nature. The Statute of Frauds requires a writing signed by the party to be charged, but acceptance of a deed seems to be held equivalent to signature. If so, the only restrictions which the Statute would touch are those created by oral agreement. In only one Pennsylvania

case was there an oral agreement, and there the possible application of the Statute was not noticed by the court.

#### PAROL EVIDENCE RULE

The Parol Evidence Rule has only this effect upon restrictions: that if they are set forth in a written instrument they must stand as written. A kind of bastard Parol Evidence Rule, sometimes mentioned in opinions, to the effect that what has been created by deed can only be varied or released by deed, is not law.

#### ILLEGALITY

If compliance with a restriction would contravene a statute or ordinance, compliance cannot be compelled so long as the statute or ordinance is in effect.

#### UNREASONABLENESS

Restrictions must be reasonable: that is, they must not impose a burden which brings no corresponding social benefit. But commercial considerations take care of this: unreasonable restrictions seldom or never occur.

#### MONOPOLY OR RESTRAINT OF TRADE

If restrictions produce a monopoly or an unreasonable restraint of trade they are unenforceable, but "building and use" restrictions of this character do not seem yet to have been attempted in Pennsylvania.

#### RESTRAINTS ON ALIENATION, AND SOCIAL POLICY AGAINST DISCRIMINATIONS

An important though seldom litigated question in connection with restrictions is whether restrictions directed at race or religion are invalid. The answer involves the rules governing restraints on alienation and the Federal and State Constitutions.

Such restrictions may govern transfer, or use and occupancy, or both. The rules as to restraints on alienation

affect only transfer; but the social policies represented by the Fourteenth Federal Amendment, and by sections one and three of the present Constitution of Pennsylvania, apply to use and occupancy as well as transfer. These constitutional provisions evidence a social policy against discriminations of certain kinds among citizens. The Federal provisions probably do not reach discriminations effected by citizens in their private capacities, and supported by the State only indirectly through judicial decisions recognizing their validity. But to this statement one important qualification must be made. In the present state of development of the rules governing restraints on alienation, prohibitions upon transfer to persons are probably void or valid according as they do or do not appreciably affect marketability. In most of the United States, including Pennsylvania, whites, or "Caucasians," greatly preponderate and negroes are in a small minority. Accordingly a prohibition against transfer to negroes would not be an invalid restraint upon alienation, but a similar prohibition as to whites would. This inherent inequality of effect might be a reason for judicial declaration that privately-imposed restraints upon transfer to negroes necessarily create a discrimination such as the Fourteenth Federal Amendment forbids. It may be said, then, that although restraints upon transfer directed at race are not necessarily invalid under the rules governing restraints on alienation, they may be invalid under the Federal Constitution. But the current of authority at present upholds them under both. These considerations would not apply to restraints upon occupancy, for they are not subject to the rules governing restraints on alienation; and so, operating equally upon all races, probably do not offend the Federal Constitution. They may however offend the Constitution of Pennsylvania by limiting the "inherent and infeasible" right "of acquiring, possessing and protecting property."

Restraints upon transfer directed against religion have been declared invalid under the Pennsylvania Constitution, and the decision would be the same as to occupancy. It is

therefore unnecessary to consider their validity under the Federal Constitution.

**RULE AGAINST PERPETUITIES**

The rule against Perpetuities might well be applied to rights of entry but probably does not apply to them in Pennsylvania. It cannot apply to possibilities of reverter, or to covenants real, easements, or equitable servitudes, for all of these are present interests.

**SPENCER ERVIN.**