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Building Restrictions - Extinction by Acquiescence in Violations

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Notes

BUILDING RESTRICTIONS — EXTINCTION BY ACQUIESCENCE IN VIOLATIONS—A building restriction in a large subdivision provided the directions in which houses on corner lots should face. When the defendant began construction of a house facing a side street, certain neighbors sought to restrain him from breaching the restriction. *Held,* the plaintiffs had lost their right to complain by their failure to object when similar violations had occurred in the construction of every other corner house on the street. Plaintiffs' right to an injunction was made to depend on the number of violations in the immediate neighborhood. Emphasis was placed upon the situation on the particular street. *Edwards v. Wiseman,* 198 La. 382, 3 So. (2d) 661 (1941).

Building restrictions have been sanctioned in Louisiana under the freedom of contract doctrine.[1] For rules of application, Louisiana courts have resorted to the law of equitable restrictions running with the land.[2] The principal case is in harmony with the decisions of other states. Since the English case of *Tulk v. Moxhay,*[3] building restrictions have been enforced at equity whether or not they met the technical requirements of covenants running with the land.[4] Accordingly, equitable defenses come into play whenever a complainant seeks to enjoin a breach of the restrictions.[5] In balancing equities, courts consistently refuse to enforce a restriction whenever a change of conditions within[6] or without[7] the restricted area render the purpose of the scheme un-

1. Arts. 1764, 2013, 709, La. Civil Code of 1870. Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641, L.R.A. 1916B 1201, Ann. Cas. 1916D 1248 (1915) (prohibition of alienation of land to negroes was upheld).

2. Hill v. Ross, 166 La. 581, 117 So. 725 (1928); Ouachita Home Site & Realty Co. v. Collie, 189 La. 521, 179 So. 841 (1938).

3. 2 Phil. 774, 41 Eng. Reprint 1143 (1848).

4. Clark, Real Covenants and Other Interests Which "Run with Land" (1929) 148-165; McClintock, Handbook of Equity (1936) 213-224, §§ 120-124; Tiffany, A Treatise on the Modern Law of Real Property and Other Interests in Land (1940) 592-599, §§ 582-587; 7 Thompson, Commentaries on the Modern Law of Real Property (perm. ed. 1940) 104, § 3615; Note (1928) 6 N.C.L. Rev. 308.

5. See authorities cited supra note 4.

6. Schwartz v. Holycross, 83 Ind. App. 658, 149 N.E. 699 (1925); Miller v. Ettinger, 235 Mich. 527, 209 N.W. 568 (1926). Compare Kokenge v. Whetstone, 60 Ohio App. 302, 20 N.E. (2d) 965 (1938) (a few violations on border lots had not changed the nature of the restricted area).

7. Starkey v. Garner, 194 N.C. 74, 138 S.E. 408, 54 A.L.R. 806 (1927). Compare Downs v. Koeger, 200 Cal. 743, 254 Pac. 1101 (1927); Moore v. Curry, 176

attainable. The Louisiana Supreme Court recognized this rule in *Hill v. Ross.*[8]

There are still other equitable defenses. In some cases, the complainant is said to be estopped because he has violated the same restrictions that he seeks to enforce.[9] In other cases, the complainant loses his power to demand an injunction by his failure to object to other violations near him;[10] he is deemed to have waived his privilege by acquiesence. Such is the decision of the principal case. But a complainant does not lose his privilege of enjoining violations near him merely because he fails to object to violations in more distant parts of the subdivision.[11] As in the principal case, the fact that a restriction has lost its efficacy in one part of the restricted area does not necessarily render it unenforceable in another part. Many of the decisions are controlling only in respect to the particular lots in controversy.[12]

It is interesting to observe how the courts of Louisiana came to apply the rules of equitable restrictions. In *Queensborough Land Company v. Cazeaux*[13] a stipulation in a conveyance that the land should not be sold to negroes and further that this "covenant" should run with the land was held to create a real obligation. Whether such a real obligation amounted to a servitude was not discussed.[14] In the later case of *Hill v. Ross,*[15] the court incorrectly cited the *Queensborough* case as holding that building re-

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Mich. 456, 142 N.W. 839 (1913). See Notes (1927) 16 Calif. L. Rev. 58, (1928) 54 A.L.R. 812.

8. 166 La. 581, 117 So. 725 (1928).

9. Kneip v. Schroeder, 255 Ill. 621, 99 N.E. 617 (1912); McGovern v. Brown, 317 Ill. 73, 147 N.E. 664 (1925). See Nashua Hospital Ass'n v. Gage, 85 N.H. 335, 159 Atl. 137 (1932). Compare O'Neill v. Wolff, 338 Ill. 508, 170 N.E. 669 (1930) ("de minimis" doctrine was applied).

10. Bowen v. Whilden, 98 N.J. Eq. 140, 130 Atl. 1 (1925); Russell v. Harpel, 20 Ohio C.C. 127, 10 Ohio Cir. Dec. 732 (1900).

11. Goulding v. Phinney, 234 Mass. 411, 125 N.E. 703 (1920); Voorheis v. Powell, 261 Mich. 378, 246 N.W. 154, 85 A.L.R. 932 (1933); Brigham v. H. G. Mulock Co., 74 N.J. Eq. 287, 70 Atl. 185 (1908); Ward v. Prospect Manor Corp., 188 Wis. 534, 206 N.W. 856, 46 A.L.R. 364 (1926).

12. See Downs v. Koeger, 200 Cal. 743, 254 Pac. 1101 (1927); McClintock, op. cit. supra note 4, at 223-224, § 124.

13. 136 La. 724, 67 So. 641, L.R.A. 1916B 1201, Ann. Cas. 1916D 1248 (1915). See Comment (1934) 8 Tulane L. Rev. 262. See also Female Orphan Society v. Young Men's Christian Ass'n, 119 La. 278, 44 So. 15, 12 Ann. Cas. 811 (1907), holding a condition of perpetual inalienability to be void as against public policy.

14. Nevertheless it might be inferred that the limitation was considered a servitude because Article 709 was used to limit the freedom of contracting real obligations to those not contrary to good morals. 136 La. at 733, 67 So. at 644.

15. 166 La. 581, 117 So. 725 (1928).

strictions were covenants running with the land.[16] Upon that basis, Louisiana courts have adopted the building restriction rules of common law jurisdictions.

Although Louisiana courts may continue to adhere to the rules of equitable restrictions,[17] it is very difficult to reconcile these rules with the articles of the Louisiana Civil Code relating to servitudes. The first paragraph of Article 756[18] provides:

> "If the right granted be of a nature to assure a real advantage to an estate, it is to be presumed that such right is a real servitude, although it may not be so styled."

The section of Toullier from which Article 756[19] was taken[20] indicates even more clearly that all real rights imposed in favor of another estate are to be considered as servitudes. Building restrictions should fall within the purview both of Article 745,[21] relating to multiple servitudes, and Article 746,[22] which defines reciprocal servitudes and provides that the rules of simple servitudes shall apply. Under the maxim *inclusio unius est exclusio alterius,* the methods of extinguishing servitudes provided by Articles 783-822[23] should be exclusive.

16. 166 La. at 583-584, 117 So. at 726:
"In Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641, L.R.A. 1916B 1201, Ann. Cas. 1916D, 1248, it was held that such restrictions, in contracts between individuals, are not unlawful in this state; that they are not personal to the vendor but inure to the benefit of all other grantees under a general plan of development, *and are covenants running with the land;* that the remedy of the other grantees is by injunction to prevent a violation of the restrictions by any of them." (Italics supplied.)

17. In the instant case, for example, counsel for plaintiffs vainly urged that these rules had no place in the civil law of Louisiana—that the rules of servitudes should apply. The point was not discussed in the opinion of the court. The dictum of Hill v. Ross, Inc., 166 La. 581, 583-584, 117 So. 725-726 (1928) was affirmed in Ouachita Home Site & Realty Co. v. Collie, 189 La. 521, 179 So. 841 (1938).

18. La. Civil Code of 1870.

19. Ibid.

20. See 1 Louisiana Legal Archives 83 (1937). Redactors' annotation refers to 3 Toullier, Droit Civil, 495, nº 588. The section of Toullier makes the additional statement: "This giving of a name to the right is not necessary, since every service imposed upon an estate in favor of another estate is essentially a servitude." Found also in 2 Toullier, Droit Civil Français (ed. 1833) 167, nº 588. For a comparison of Articles 754, 755, 756, 757, 758, La. Civil Code of 1870, with the same section of Toullier see Provosty's concurring opinion in Louisiana & Ark. Ry. v. Winn Parish Lumber Co., 59 So. 403, 419-421 (La. 1912).

21. La. Civil Code of 1870.

22. La. Civil Code of 1870.

23. La. Civil Code of 1870. Prescription and abandonment would be the two means of extinction most readily available for application. The prescription of ten years established by Articles 789, 790, La. Civil Code of 1870 has been shortened to two years by Act 326 of 1938 [Dart's Stats. (1939) §§ 2062.3-2062.4]. See discussion in Hebert and Lazarus, Louisiana Legislation of 1938

It is submitted that the court should apply the rules of conventional servitudes to building restrictions rather than import a body of law which is regarded as confused even against its natural common law background.[24] Very little hardship would be occasioned by rejecting the rules of equitable restrictions running with the land. Act 326 of 1938[25] has reduced prescription against contractual building restrictions to two years; thereby giving our rules of servitudes a commercial practicability which they lacked at the time *Hill v. Ross*[26] was decided. In addition, instruments containing restrictions in Louisiana are usually drawn up by lawyers who are familiar with the rules of civil law property. If the parties wish to include additional methods of extinction of the restrictions, there is no legal impediment.[27]

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CORPORATIONS—EX PARTE APPOINTMENT OF TEMPORARY RECEIVER—RECEIVERSHIP—In a stockholder's action for the appointment of a receiver of a defunct corporation the trial court appointed a temporary receiver without complying with the necessary formalities set forth in the Louisiana general receivership statute, Act 159 of 1898, as to notice, hearing, and recordation of the order appointing the receiver for ten days on the receivership order book. The appellant questioned the authority of the court to make such an ex parte appointment. The court held that since Louisiana courts had appointed receivers through the exercise of their inherent power prior to any statutory control, and there was no express provision in the general receivership statute forbidding the appointment of a temporary receiver, the courts retained the power to appoint an ex parte temporary receiver subsequent to the passage of the statute. *Foster v. Koretke Brass & Manufacturing Company, Limited*, 3 So. (2d) 668 (La. 1941).

(1938) 1 LOUISIANA LAW REVIEW 80, 112-114. On the other hand the extinction by tacit renunciation has remained a narrow concept due to the requirement of express verbal or written permission to build works presupposing annihilation of the servitudes. Lavillebeuvre v. Cosgrove, 13 La. Ann. 323 (1858).

24. For an excellent enumeration and analysis of the many conflicting theories of equitable restrictions see Clark, op. cit. supra note 4, at 148-165.

25. Dart's Stats. (1939) §§ 2062.3-2062.4.

26. 166 La. 581, 117 So. 725 (1928).

27. Second paragraph of Art. 709, La. Civil Code of 1870: "The use and extent of servitudes thus established are regulated by the title by which they are granted, and if there be no title, by the following rules."