RESTRICTIVE COVENANTS: A MORE REALISTIC APPROACH

CASES in nearly every jurisdiction have stated that since the law approves the unfettered use of real property, "restritive covenants, being in derogation of the fee, are not favored by the law."[1] Thus, the rule of construction has evolved that such covenants are to be strictly interpreted in favor of the free utilization of land and against those persons seeking to enforce the restriction.[2]

The case of *Leavitt v. Davis*[3] has followed this traditional rule. There, the owners of seashore property had divided the land into two lots, and had sold the back lot in 1898 to the predecessors in interest of the plaintiff. The deed contained a restrictive covenant in which the grantors agreed that upon the parcel of land lying in front of the conveyed lot, "they will erect or maintain no building or structure of such a character as to interrupt or interfere with the view over said parcel" from the rear lot. The defendants, successors to the servitude lot bordering the sea, established a public parking facility for automobiles, trucks, and busses on their property. While it was admitted by all parties that the parking of these vehicles interfered with the view to the sea from the plaintiff's lot, the decisive issue was whether such conduct by the defendants violated the restrictive covenant.

The plaintiff won a decree in equity enjoining defendants from continuing their parking lot business on the retricted premises, but the Supreme Judicial Court of Maine reversed, holding that motor vehicles are not "buildings or structures" and, thus, that their presence did not violate the covenant. The court reasoned basically that "a restrictive

[1] See McFarland v. Hanley, 258 S.W.2d 3, 4 (Ky. 1953), where the court made the above observation and then proceeded to criticize the strictness of such a view. For cases finding disfavor with restrictive covenants, see Himmel v. Hendler, 161 Md. 181, 155 Atl. 316 (1931); Tripp v. Fay, 264 Mass. 516, 163 N.E. 174 (1928); Schultheis v. Wohlleb, 231 App. Div. 851, 246 N.Y.S. 485 (1930); 26 C.J.S., *Deeds* § 163 (1956).

[2] Moses v. Hazen, 63 App. D.C. 104, 69 F.2d 842 (1934); Weston v. Foreman, 108 Cal. App.2d 686, 239 P.2d 513 (1952); Connor v. Anderson, 104 Ind. App. 628, 8 N.E.2d 422 (1937).

[3] 153 Me. 279, 136 A.2d 535 (1957).

covenant ought not to be extended by construction beyond the fair meaning of the words."[4]

The dissenting judge contended that in interpreting restrictive covenants, primary emphasis should be placed upon ascertaining the actual intent of the parties to the instrument, which intent should not be determined solely by a strict reading of isolated words used in the covenant, but rather should be discovered with the aid of all pertinent facts and circumstances known to and relied upon by the parties. He concluded that the purpose of the covenant was to insure to the covenantee an unobstructed view to the sea and that this purpose should be given full effect.[5]

From a careful examination, both of the covenant itself and of the surrounding circumstances, it would appear that the majority of the court has allowed the defendants to defeat the real purpose of the covenant through the employment of a strict, technical construction. While the court held, in accordance with the traditional view, that the parties are to be confined to the meaning of the language used and that it is improper to consider either the surrounding circumstances or the purposes of the grant or restriction in aid of its construction,[6] such a rule seems to have but little modern social value. Many jurisdictions, in line with the contemporary desire for reasonable regulation of land use, exemplified by such accepted measures as zoning and building codes, have recognized that restrictive covenants are to be regarded more as a protection to the land owner and to the public and less as a limitation upon the use of property.[7] Moreover, if this protection has been bargained for, it would seem especially desirable that the courts give effect to such covenants.

The interpretation of a bilateral agreement must be based on the intent of both parties—the normal expectations of the grantee, as well as the desires of the grantor.[8] Under the facts of the instant case, it requires

[4] 136 A.2d at 537.

[5] "The view was one of the important incidents of the transaction. . . . Obstruction and interference, of any kind, other than 'building or structure' would, in fact, destroy what the parties intended to accomplish." 136 A.2d at 540.

[6] Neptune Park Ass'n v. Steinberg, 138 Conn. 357, 84 A.2d 687 (1951); England v. Atkinson, 196 Ga. 181, 26 S.E.2d 431 (1943); Phillips v. Naff, 332 Mich. 389, 52 N.W.2d 158 (1952).

[7] Thodos v. Shirk, 248 Iowa 172, 79 N.W.2d 733 (1956); McFarland v. Hanley, 258 S.W.2d 3 (Ky. 1953); Salerno v. DeLucca, 211 La. 659, 30 So.2d 678 (1947).

[8] "Conveyances which do not operate gratuitously are made upon the basis of mutual reliance by the parties to them. Each party relies upon a meaning which the other

little imagination to conclude that the grantee expected to receive an uninterrupted prospect toward the sea, unquestionably one of the more valuable attributes of seashore residence property. Although the desires of the grantor may be more difficult to ascertain, it seems plausible to conclude that he meant to make the property attractive to purchasers by guaranteeing an unobstructed view to the sea.[9] The use of the disjunctive "or" in the restriction against any "building or structure" seems to evince an intent to broaden the class of forbidden obstructions beyond the category of "buildings" to include any man-made object placed in the line of view. In light of these indications of intent, the narrow interpretation adopted by the court appears to be in complete disharmony with the dominant purpose of the covenant.

The sounder view, which is gaining considerable ground, is that archaic constructional rules operating against the restrictive use of property will not be applied indiscriminately so as to defeat the obvious purpose of a restrictive covenant.[10] Thus, the marked tendency of the courts is to extend the meaning of such a term as "building" to include structures that ordinarily would not come within the strict definition of the word when the intent of the parties seems to so dictate.[11] This trend is

appeared to indicate or express. . . . To give effect to the point of view of one in disregard of the reasonable expectations of the other would produce an obviously unfair result." RESTATEMENT, PROPERTY § 483, comment *h* (1944). *Accord*, Hannula v. Hacienda Homes, 34 Cal.2d 442, 444, 211 P.2d 302, 304 (1949), where the court said: ". . . the primary object in construing restrictive covenants, as in construing all contracts, should be to effectuate the legitimate desires of the covenating parties." See also Utah Constr. Co. v. McIlwee, 45 Idaho 707, 266 P. 1094 (1928); Blue Diamond Coal Co. v. Robertson, 243 Ky. 584, 49 S.W.2d 335 (1932).

[9] In at least two cases an intent to protect the view was found as "obvious," although no reference to the obstruction of view or prospect was even mentioned in the covenants. See Curtis v. Schmidt, 212 Iowa 1279, 237 N.W. 463, 465 (1931) (land situated near scenic river; the surrounding circumstances furnished "persuasive evidence that the grantors desired to protect the view across the restricted area."); Perkins v. Young, 266 Wis. 33, 62 N.W.2d 435 (1954).

[10] A leading case for this view is Library Neighborhood Ass'n v. Goosen, 229 Mich. 89, 201 N.W. 219, 220 (1924), where the court said: ". . . under the circumstances of this case, the rights of the parties are not to be determined by a literal interpretation of the restriction. It is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it, the location and character of the entire tract of land, [and] the purpose of the restriction—whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers. . . ." For other cases applying this reasoning, see Hallet v. Sumpter, 106 F. Supp. 996 (D.C. Alaska 1952); Brown v. Hojnacki, 270 Mich. 557, 259 N.W. 152 (1935); Perkins v. Young, *supra* note 9.

[11] Netter v. Scholtz, 282 Ky. 493, 138 S.W.2d 951, 953 (1940) ("building" in-

illustrated by a case[12] in which a covenant against the erection of any "building" was held to preclude the construction of a wooden superstructure for screening sand and gravel, the court reasoning that the apparent purpose of the prohibition was to guarantee an unobstructed view. Coming nearer to the facts of *Leavitt v. Davis*, several jurisdictions have broadly construed certain restrictions against "buildings" to include mobile trailer homes where the presence of such parked vehicles has been felt to violate the spirit of the covenants.[13] In accord with such reasoning is Wigmore's view[14] that terms employed in contracts

cludes "any character of structure according to the connection in which it is used and the purpose sought to be effected by its use"); Bagiano v. Harrow, 247 Mich. 481, 226 N.W. 262 (1929) (a wall may constitute a "building"); Perkins v. Young, 266 Wis. 33, 62 N.W.2d 435 (1954) ("building" held to include any structure obstructing the view). For other examples, see cases cited note 13 *infra*.

Contra, Jones v. Park Lane for Convalescents, 384 Pa. 268, 120 A.2d 535, 537 (1956) (". . . nothing will be deemed a violation of a restriction that is not in plain disregard of its express words."); Katsoff v. Lucertini, 141 Conn. 74, 103 A.2d 812 (1954) (although purpose of the covenant was to safeguard air, light, and view, "building" did not include billboards).

[12] Curtis v. Schmidt, 212 Iowa 1279, 237 N.W. 463 (1931). "When we consider the purpose of the restriction in this case as shown by the evidence and the facts and circumstances appearing in the case, and from all of which it satisfactorily appears that the primary purpose of the grantor was to retain a view from the grantor's premises . . . it follows, in the light of the better reasoned of the adjudicated cases, that the structures erected and maintained on the restricted area are covered by the restrictions." *Id.* at 1287, 237 N.W. 463.

[13] Brubaker v. Sauder, 52 LANCASTER L. REV. 267, 271 (Ct. C. P., Lancaster County, Pa. 1951)—"The operation of a trailer camp is not in accord with the obvious intent of the restrictions," which was to maintain the residential character of the lots by prohibiting the construction of "buildings" on the rear of the premises. *Accord*, Hallet v. Sumpter, 106 F. Supp. 996 (D.C. Alaska 1952); Grange v. Korff, 248 Iowa 118, 79 N.W.2d 743 (1956); Thodos v. Shirk, 248 Iowa 172, 79 N.W.2d 733 (1956). In all three of these cases the courts found in the restrictive covenants an implicit general plan to maintain a residential character.

Opposing such liberal construction is Foos v. Engle, 295 Ky. 114, 174 S.W.2d 5, 9 (1943), where the court refused to enjoin the operation of a mobile trailer park, saying: "While 'trailers' are aptly described by appellant as 'little houses on wheels,' they are not 'erected' within the meaning of the restriction which refers, in ordinary parlance, to a residence designed to be more or less permanent, and hence, attached to the soil."

[14] "The truth had finally to be recognized that words *always* need interpretation; that the process of interpretation inherently and invariably means the ascertainment of the association between words and external objects. . . . Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore *all the circumstances must be considered which go to make clear the sense of the words*—that is, their association

always need interpretation in order to determine the proper association between the words and the external objects to which they refer.

Authority opposed to the above reasoning contends that in interpreting restrictive covenants the courts ought not to go beyond the "plain meaning" of the terms in the instrument, since only then can there be "certainty" in such covenants.[15] Even disregarding the policy of effectuating the purpose of the parties by looking to the surrounding circumstances, however, past interpretations indicate that the court in *Leavitt v. Davis* would not have been acting aberrantly had it included vehicles within the "plain meaning" of the word "structure." In ordinary usage, "structure" refers to something constructed or built.[16] Courts have defined the term to mean "any production or piece of work artificially built up,"[17] and a product "composed of parts joined together in some definite manner."[18] Vehicles, even though movable, could arguably be held to fall within these broad definitions. Thus, in interpreting a zoning ordinance it has been held that a trailer house comes within the meaning of structure.[19] A passenger car undergoing repairs is a structure for the purpose of construing workmen's compensation laws,[20] as is a railroad car[21] or a locomotive.[22] On the other hand, courts have held that movable machinery,[23] a threshing machine,[24] and a moving train[25] do not come within the definition of structure. Thus, it appears that the "plain meaning" of a term frequently is not altogether plain and that the precise meaning must often depend upon the context

with things." 9 WIGMORE, EVIDENCE § 2470, at 227 (3d ed. 1940). See also 3 CORBIN, CONTRACTS §§ 536, 539 (1951). *Contra*, 29 CONN. B.J. 268 (1955).

[15] Katsoff v. Lucertini, 141 Conn. 74, 103 A.2d 812 (1954), noted in 29 CONN. B.J. 268 (1955); Connor v. Anderson, 104 Ind. App. 628, 8 N.E.2d 422 (1937); American Weekly, Inc. v. Patterson, 179 Md. 109, 16 A.2d 912 (1940).

[16] WEBSTER, NEW INTERNATIONAL DICTIONARY 2501 (2d ed. 1948).

[17] Detroit Trust Co. v. Austin, 291 Mich. 523, 289 N.W. 239, 240 (1939).

[18] United States Fidelity & Guaranty Co. v. Southland Life Ins. Co., 22 F.2d 731, 733 (5th Cir. 1927).

[19] City of Sioux Falls v. Cleveland, 75 S.D. 548, 70 N.W.2d 62 (1955).

[20] Caddy v. Interborough Rapid Transit Co., 125 App. Div. 681, 110 N.Y.S. 162 (1908).

[21] Corbett v. New York Cent. & H.R.R. Co., 151 App. Div. 159, 135 N.Y.S. 137 (1912).

[22] Loesch v. Long Island R. Co., 165 App. Div. 753, 151 N.Y.S. 499 (1915).

[23] Borough of Cheswick v. Bechman, 352 Pa. 79, 42 A.2d 60 (1945) (zoning ordinance).

[24] Barnes v. Montana Lumber and Hardware Co., 67 Mont. 481, 216 Pac. 335 (1923) (mechanics' liens statute).

[25] Lee v. Town of Barkhampsted, 46 Conn. 213 (1878) (tort liability statute).

in which the term is used. These variations in semantic interpretation serve to demonstrate the inadequacies of the "plain meaning rule."

Another possibility is that the court in the instant case might have effectuated the underlying intent of the covenanting parties by finding that an easement had been created by the restrictive covenant. According to many cases,[26] a negative easement may be created by words of covenant which "sound in grant." To attain such a result, the covenant, regardless of the particular form of words used, must be for the present enjoyment of a right or interest which is capable of being the subject of a grant as an easement.[27] To satisfy this requirement, the interest must be deemed a *jus in rem*, rather than merely the subject of a personal undertaking;[28] in addition, it must be generally recognized as coming within the closely limited class of interests transferable by easement.[29] That an easement of prospect or view, like that of air or light, meets such requirements has become widely accepted in recent years.[30]

[26] A leading case for this line of authority is Hogan v. Barry, 143 Mass. 538 (1887), where the court held that a covenant restricting the erection of a building on a strip of land resulted in an easement. Speaking for the court, Holmes, J., said: "There is no doubt that an easement may be created by words sounding in covenant." For other cases following this view, see Scheuer v. Britt, 217 Ala. 196, 115 So. 237 (1928); Miller v. Lawlor, 245 Iowa 1144, 66 N.W.2d 267, 272 (1954) ("Of course the claimed agreement was designed to create an interest in land. . . . It contemplated the creation of a restrictive or negative easement over defendant's premises in favor of the adjoining premises."); Pepper v. West End Development Co., 211 N.C. 166, 189 S.E. 628 (1937); Cottrell v. Nurnberger, 131 W. Va. 391, 47 S.E.2d 454 (1948).

The opposing view is that an easement in land can be created only by express grant, by operation of law, or by prescription. Moses v. Hazen, 63 App. D.C. 104, 69 F.2d 842 (1934) (restrictive covenants do not create true easements, but merely contractual rights); Hancock v. Gumin, 151 Ga. 667, 107 S.E. 872 (1921); Welitoff v. Kohl, 105 N.J. Eq. 181, 147 Atl. 390 (1929) (not an estate in land as is an easement, but purely a creature of equity arising out of contract).

[27] GALE, EASEMENTS 83 (10th ed. 1925); Hogan v. Barry, *supra* note 26.

[28] "If the seeming covenant is for a present enjoyment of a nature recognized by the law as capable of being conveyed and made an easement,—capable, that is to say, of being treated as a *jus in rem*, and as not merely the subject of a personal undertaking,—and if the deed discloses that the coverant is for the benefit of adjoining land conveyed at the same time. . . . An easement will be created and attached to the land conveyed, and will pass with it to assigns. . . ." Hogan v. Barry, 143 Mass. 538 (1887).

[29] "Whether a particular privilege of use of land in the possession of another may be deemed an entity so as to enable it to be conveyed [as an easement] depends in part upon the recognition the use has previously received. . . . Out of the infinite variety of possible privileges of use of land relatively few have received recognition in the law as property interests." RESTATEMENT, PROPERTY § 450, comment *l* (1944).

[30] Miller v. Lawlor, 245 Iowa 1144, 66 N.W.2d 267 (1954) (easement of view); Homewood Realty Corp. v. Safe Deposit & Trust Co. of Baltimore, 160 Md. 457, 154

To create an easement by covenant, the parties must further evidence an intent to confer a benefit upon the dominant land conveyed simultaneously with the execution of the covenant, with resulting creation of a burden on the remaining servient land of the grantor.[31] In determining the existence of such intention, some courts have held that the covenant should be interpreted in the light of the general purpose of the parties and of the conditions existing when the agreement was made.[32] It might well be argued under the facts of *Leavitt v. Davis* that the parties, intending such a benefit and burden, created an interest in the nature of an easement. If such a negative easement of view were found, the rights of the grantee and his assigns presumably would include protection against such unsightly obstructions as those resulting from defendant's parking lot business.

Because of the inherent imperfections of language and the resulting fact that law cannot irrevocably fix the meaning of words, perhaps the court in the present case would have been wiser in holding that the traditional rule of strict and conceptualistic interpretation of restrictive covenants should not be allowed to defeat the reasonably ascertained purpose of the covenant. The primary objective of the courts should be to effectuate the legitimate desires of the contracting parties indicated not only by the instrument itself, but by the clear direction of evidence of the circumstances surrounding the transaction.

Atl. 58 (1931) (light and air). "It is universally assumed, without controversy, that easements of light, air, and view may be created. . . ." Annot., 142 A.L.R. 467, 468 (1943).

[31] See note 28 *supra*; Beck v. Lane County, 141 Ore. 580, 18 P.2d 594 (1933); GALE, *op. cit. supra* note 27 at 83.

[32] Irving Trust Co. v. Anahma Realty Corp., 285 N.Y. 416, 35 N.E.2d 21 (1941); Murphy v. Ahlberg, 252 Pa. 267, 97 Atl. 406 (1916); Huntington Presbyterian Congregation v. Stewart, 8 Pa. D. & C. 691 (1926).