RECORD NOTICE OF ENCUMBRANCES CONTAINED IN A PRIOR CONVEYANCE TO OTHER LANDS BY A COMMON GRANTOR

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There is conflict among writers as to whether the weight of American authority charges a subsequent purchaser with record notice of encumbrances in a prior recorded deed to other lands conveyed by a common grantor.[1] The question of record notice arises, for instance, where *A* owning Blackacre conveys part of it by a recorded deed to *B* and in the same instrument places an encumbrance, such as an easement or restriction, on the retained portion. Later *A* conveys this remaining portion to *C* by a deed which makes no mention of the encumbrance contained in the deed to *B*. As a matter of policy, under the recording statutes, should *C*, the subsequent purchaser, be chargeable with record notice of the encumbrance contained in the prior recorded deed to other lands of *A*? Basically, the problem appears to be whether it would be an unreasonable burden to compel the subsequent purchaser to read in full all conveyances made by his prior grantors. The courts are not in accord on this point.

Cases indicate the majority view to be that the subsequent purchaser is chargeable with record notice of an encumbrance placed on the retained lands of the common grantor, when such grantor encumbered the retained lands in a prior deed to other lands. Fourteen jurisdictions so hold with two others intimating as much,[2] while only six

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[1] It is stated in 16 A.L.R. 1013 (1922) and 5 TIFFANY REAL PROPERTY § 1266 (3rd ed. 1939), that the majority view charges a subsequent purchaser with notice, but Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. OF PA. L. REV. 125 (1944) and CLARK, COVENANTS AND INTEREST RUNNING WITH THE LAND, p. 183 (2d ed. 1944) states the majority view to the contrary.

[2] Hamilton v. Smith, 212 Ark. 893, 208 S.W.2d 425 (1948); Miles v. Hollingsworth, 44 Cal.App. 539, 187 Pac. 167 (1920); American Brass Co. v. Serra, 104 Conn. 139, 132 Atl. 565 (1926); La Cost v. Mailloux, 401 Ill. 283, 81 N.E.2d 920 (1948); Harp v. Parker, 278 Ky. 78, 128 S.W.2d 211 (1939); Lowes v. Carter, 124 Md. 678, 93 Atl. 216 (1915); Beckman v. Schirmer, 239 Mass. 265, 132 N.E. 45 (1921); McQuade v. Wilcox, 215

jurisdictions hold to the contrary with two indicating they will follow the minority.[3]

In order that we may better appraise the individual case holdings, let us first glance at the various reasons given in support of the two views. There are several reasons advanced in favor of the majority rule charging the subsequent purchaser with record notice. (1) The recording acts, as interpreted, hold a purchaser chargeable with notice of anything contained in a deed of record which was executed by a prior grantor and which concerns the land or estate which he purchases. Under this reasoning, it is said that the prospective purchaser has a duty to search all recorded conveyances of his prior grantors. (2) To hold that there is no constructive or record notice "the restriction might be to a considerable extent nugatory."[4] The thought here is that the prior grantee might as well not have the restriction if he could not enforce it once the remaining land is conveyed by a deed which does not mention the restriction. (3) The grantee in the prior deed has no way to protect his rights other than to record his deed. (4) It does not impose an unreasonable burden on the title searcher for he must read the descriptions of prior conveyances anyway and it would take only a quick glance to discover any restrictions since "the recitals of restrictive covenants [usually] follow the short habendum immediately following the description."[5]

Mich. 302, 183 N.W. 771 (1921); Friederick v. Skellet Co., 180 Minn. 382, 231 N.W. 7 (1930); King v. St. Louis Union Trust Co., 226 Mo. 351, 126 S.W. 415 (1910); Waldrop v. Town of Brevard, 233 N.C. 26 (1950); Cullison v. Hotel Seaside Inc., 126 Ore. 18, 268 Pac. 758 (1928); Finley v. Glenn, 303 Pa. 131, 154 Atl. 299 (1931); and Latimer v. Hess, 183 S.W.2d 996 (Tex.Civ. App. 1944); with Jones v. Berg, 105 Wash. 69, 177 Pac. 712 (1919) and Boyden v. Roberts, 131 Wis. 659, 111 N.W. 701 (1907) intimating the same.

[3] Judd v. Robinson, 41 colo. 222, 92 Pac. 724 (1907); Hancock v. Gumm, 151 Ga. 667, 107 S.E. 872 (1921); Glorieux v. Lighthipe, 88 N.J.L. 199, 96 Atl. 94 (1915); Buffalo Academy of the Sacred Heart v. Boehm Bros. Inc., 267 N.Y. 242, 196 N.E. 42 (1935); Yates v. Chandler, 162 Tenn. 388, 38 S.W.2d 70 (1931); and Providence Forge Fishing & Hunting Club v. Gill, 117 Va. 557, 85 S.E. 464 (1915); with Clark v. Dorsett, 157 Miss. 365, 128 So. 79 (1930) and Hayslett v. Shell Petroleum Corp., 38 Ohio App. 164, 175 N.E. 888 (1930) intimating the same.

[4] 5 TIFFANY, REAL PROPERTY § 1266 (3rd ed. 1939).

[5] 2 WALSH, COMMENTARIES LAW OF REAL PROPERTY § 221 (1947).

There are likewise several reasons given to support the minority view that a subsequent purchaser should not be charged with such notice. (1) The history of the recording acts shows that one of their purposes was to protect bona fide purchasers of land which had been previously conveyed by an unrecorded deed and to make that deed void as to such subsequent purchasers. (2) The recording acts, as interpreted, apply only to subsequent purchasers of the same land and not to subsequent purchasers of the same grantor. (3) To charge the subsequent purchasers with constructive notice would go against the usual rule that land should be free of encumbrances as much as possible. (4) To require a prospective purchaser to read fully each deed of conveyance made by all his prior grantors would impose too great a burden on the title searcher.

Although the courts may use any of the above reasons as a basis for their holdings, the stated issue in most cases is whether the prior deed is to be considered within the chain of title of the subsequent purchaser. It should be noted that in this problem we are dealing with record notice under the ordinary grantor-grantee index system as distinguished from the tract system of recording. Of course, if there is actual notice of the encumbrance, then record notice is not decisive as to whether the subsequent purchaser takes the land subject to the encumbrance.

To appreciate some of the problems involved in record notice from a transaction of this type, it seems desirable to mention the various encumbrances which are often imposed on the common grantor's retained lands and under what circumstances these encumbrances are created. The encumbrance may take the form of an easement, a restrictive covenant, or a recital of a contract to sell or otherwise affect the remaining lands. They may appear, for example, under circumstances where there are only two adjoining lots or parcels, where a part is being conveyed out of a larger tract, or where a large tract is being subdivided either with or without a recorded plat following a general scheme.

In several cases under the majority holdings, the courts were dealing with legal easements that had been created on

the remaining land.[6] The reason usually advanced to charge the purchaser with notice of the easement is that an easement is considered to be an interest in the estate itself and, that being the case, is entitled under the recording acts, to be recorded.[7] The case of *Lowes v. Carter*[8] held that where the prior deed conveyed both certain lands and an easement in the remaining lands, it was not necessary to execute a separate instrument to create the easement because the

> ". . . method adopted was practical and appropriate and was authorized by the law as a means of safeguarding the rights created by the deed against adverse interest of later origin."

A recent case dealing with easements is *Waldrop v. Town of Brevard.*[9] A part of a larger tract was sold and conveyed in fee simple absolute to be used as a garbage disposal or dump by the defendant. The grantor covenanted for himself, his heirs, and assigns that all rights of action, as to the retained land, either legal or equitable arising out of the use of the land conveyed, would be waived. The plaintiff, Waldrop, was a subsequent purchaser of part of the grantor's retained lands. In an action against the prior grantee, the question of notice of the grantor's covenant arose. The

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[6] Hamilton v. Smith, 212 Ark. 893, 208 S.W.2d 425 (1948); Miles v. Hollingsworth, 44 Cal.App. 539, 187 Pac. 167 (1920); American Brass Co. v. Serra, 104 Conn. 139, 132 Atl. 565 (1926); La Cost v. Mailloux, 401 Ill. 283, 81 NE.2d 920 (1948); Lowes v. Carter, 124 Md. 678, 93 Atl. 216 (1915); McQuade v. Wilcox, 215 Mich. 302, 183 N.W. 771 (1921); King v. St. Louis Union Trust Co., 226 Mo. 351, 126 S.W. 415 (1910); Waldrop v. Town of Brevard, 233 N.C. 26 (1950) (in which court construed the encumbrance to be a "right in the nature of an easement"); Cullison v. Hotel Seaside Inc., 126 Ore. 18, 268 Pac. 758 (1928); and Latimer v. Hess, 183 S.W.2d 996 (Tex.Civ.App. 1944).

[7] It is interesting to note that in the cases of American Brass Co. v. Serra, 104 Conn. 139, 32 Atl. 565 (1926); Cullison v. Hotel Seaside Inc., 126 Ore. 18, 268 Pac. 758 (1928) and Latimer v. Hess, 183 S.W.2d 996 (Tex. Civ.App. 1944), the easement was a right of way over the retained lands of the grantor and could have been easily ascertained upon an inspection of the premises. In the case of La Cost v. Mailloux, 401 Ill. 283, 81 N.E.2d 920 (1948), not only could the easement have been ascertained by an inspection of the premises but the subsequent purchaser had actual notice of the encumbrance.

[8] 124 Md. 678, 93 Atl. 216 (1915).

[9] 233 N.C. 26 (1950).

plaintiff argued that the covenant made as to the other lands of the grantor was not in his chain of title and relied on the case of *Turner v. Glenn*,[10] which held:

> ". . . a subsequent purchaser is chargeable with constructive notice of restrictive covenants in his chain of title, but he is not required to investigate collateral conveyances of any of his predecessors in title."

The court, however, held that the common grantor had created "a right in the nature of an easement" in his retained lands and that "grantees take title to lands subject to duly recorded easements which have been granted by their predecessors in title." Here the court relied on the recording statute[11] to charge the subsequent purchaser with notice of the easement. It is interesting to note that the court also said the plaintiff's position might have been well taken if it had been a restrictive covenant instead of an easement. There appears to be sound objection to this label-distinction of the North Carolina court, for if a recorded deed is to give constructive notice to a purchaser, it should make no difference whether the deed contains a legal easement or a restrictive covenant, the latter being generally classified as an equitable easement.[12]

Many of the legal easements encountered in this problem of record notice are affirmative easements permitting some act to be done on the servient tenement which leaves "tracks" whereby the existence of the easement can be ascertained upon inspection of the premises, while the land use restrictions merely prohibit the owner of the servient tenement from doing some act on his land. The latter encumbrances generally cannot be ascertained by an inspection of the premises and the record must be relied upon to impart notice. Several of the legal easement cases may be explained on the basis that an inspection of the premises would have

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[10] 220 N.C. 620, 18 S.E.2d 197 (1942).

[11] N.C.GEN.STAT. §47-27 (1950). The court however cited two cases along with the statute, one of which dealt with runability of covenants.

[12] CLARK, COVENANTS AND INTEREST RUNNING WITH THE LAND, p. 175 (2d ed. 1944).

revealed the existence of some kind of easement,[13] and a purchaser is usually charged with actual notice of whatever a physical inspection of the premises would have disclosed.

The cases supporting the minority view do not seem to deal with encumbrances which are legal easements, but deal mainly with land use restrictions. As pointed out above, the record must generally be relied upon to impart notice of an encumbrance of this type since an inspection of th premises usually will not reveal its existence. A leading case supporting the minority view, *Glorieux v. Lighthipe,*[14] held that record notice of a covenant imposing building restrictions on retained land was not chargeable to the subsequent purchaser thereof. The court said, however, that this case was different from a conveyance of an easement or any interest that lies in grant. To the same effect is the case of *Hancock v. Gumm.*[15] Thus we find two of the principal cases supporting the minority recognizing a distinction between an easement and a restrictive covenant. Tiffany, in discussing this distinction,[16] states that at common law when an easement was created, it being a legal interest in land, a subsequent purchaser of the servient tenement would take subject to the easement even though he had no notice thereof, and that the adoption of a recording statute could not be regarded as having changed this rule if the easement created were on record though in connection with the conveyance of *other lands.* One may well doubt the accuracy of this statement unless it be assumed that such conveyance of other lands is within the purchaser's chain of title, which seems to be the position under the majority rule. This statement of Tiffany discusses the easement as a legal interest as distinguished from an equitable interest in

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[13] American Brass Co. v. Serra, 104 Conn. 139, 132 Atl. 565 (1926) involved an easement of right of way and was apparent because of wheel tracks and a wooden bridge over a stream. Cullison v. Hotel Seaside Inc., 126 Ore. 18, 268 Pac. 758 (1928) involved an easement of right of way where a foot path and bridge crossed the servient tenement. Latimer v. Hess, 183 S.W.2d 996 (Tex.Civ.App. 1944), involved a right of way and there was an existing alley way.

[14] 88 N.J.L. 199, 96 Atl. 94 (1915).

[15] 151 Ga. 667, 107 S.E. 872 (1921).

[16] 5 TIFFANY, REAL PROPERTY § 1266 (3rd ed. 1939).

land. It would appear that the adoption of the recording statute would make a difference. Prior to its adoption a bona fide purchaser without notice would cut off an equitable interest in land but not a legal interest, while under the statute both legal and equitable interests are cut off by a conveyance to a bona fide purchaser without notice.[17] Thus under the American recording statutes, the legal easement is no longer sacred and merits no distinction from an equitable restriction.

The cases concerned with notice of restrictive covenants have dealt mainly with building restrictions. This of course involves another aspect of importance, namely the presence of a recorded plat. Where there is a recorded plat, the majority reasons that the purchaser is put on inquiry notice concerning any general scheme of restrictions that may have been imposed on the land.[18] It then becomes his duty to search fully the deed to other lands which are contained within the platted area. This being the case, record notice would not seem to be the deciding factor since he is on inquiry notice. The minority reasons that it would impose an unreasonable burden on the title searcher, and that for the restriction to be valid it must be in the deed granting the very lands restricted. Where there is no plat involved which might put the title searcher on inquiry, but only one or two adjoining lots, the argument that it would be an unreasonable burden to compel him to read the deeds in full loses much of its force. Certainly it could not be said to be unreasonable to require the searcher to read one or two deeds to lots adjoining the lot being purchased.

There are two unique cases dealing with record notice which seem worthy of special consideration. In the first, *Providence Forge Fishing & Hunting Club v. Gill*,[19] the

[17] *Ibid.*, § 828.

[18] It is interesting to note that Miles v. Hollingsworth, 44 Cal. App. 539, 187 Pac. 167 (1920) is the only case involving a building restriction that the court talked about the apparentness of the general scheme which could have been ascertained by an inspection of the premises. The court then said that the general appearance ought to indicate some kind of restriction.

[19] 117 Va. 557, 85 S.E. 464 (1915).

prior deed was to a large tract of land. That deed excepted a ten acre tract and set forth a contract agreement whereby the ten acres were to be sold to the plaintiff Gill. Thereafter the same ten acres were sold to the defendant Pollock. Gill brought an action to obtain specific performance of the contract stated in the prior deed and contended that Pollock was chargeable with constructive notice of the contract. The court, in holding that Pollock was not chargeable with record notice, stated that for a deed to give record notice it had to be in the chain of title to the land itself. This reasoning has been advanced by some of the other courts supporting the minority view. But looking at the particular situation involved, the holding appears harsh for Pollock was bound to read at least the descriptions in the conveyances made by his grantor, and when reading the description of the tract conveyed in the prior deed, he would have found the entire tract conveyed with an exception of the land he was about to purchase. This should have imparted notice of some kind.

The second of these cases is *Lent & Graff Co. v. Satenstein.*[20] In that case there was a prior recorded lease for the first five floors of a building with the right to use the outside wall space between the tenth and twelfth floors for bill board advertisement. A subsequent lessee leased the eleventh floor. The court classified the right to use the wall space as an easement and used as authority *Holt v. Fleishman*[21] to charge the subsequent lessee with record notice of the easement. The *Holt* case has been often cited by jurisdictions following the majority view, but after *Buffalo Academy of the Sacred Heart v. Boehn Bros.*,[22] the law of New York seems to follow the minority. In the latter case, which involved an equitable restriction, a higher court having this question of record notice before it decided that one must take notice only of deeds in the direct chain of his predecessors in title and that to require a search of each chain from the common grantor would seem to negative the recording act.

[20] 210 App.Div. 251, 205 N.Y. Supp. 403 (1924).
[21] 75 App.Div. 593, 78 N.Y.Supp. 647 (1902).
[22] 267 N.Y. 242, 196 N.E. 42 (1935).

From what has been said concerning the reasons behind the two lines of authority, there is little wonder the courts have split so widely in their holdings. Though the courts have made distinctions between land use restrictions and legal easements, there is no reason such distinction should be adhered to under our recording system. It has been stated that "restrictions under our American recording system become encumbrances indistinguishable from recognized easements."[23] The recording acts, as a whole, are themselves broad enough in their language to cover not only legal interests in land but also equitable interests or any other interests affecting or concerning the estate or title.

Courts should not close their eyes to the realities involved in this problem of record notice, and find record notice or no such notice by the device of technical classification of the interest involved when the recording factors are identical. The practical result of the holdings of the court should be more important than the labeling of the encumbrances. The problem facing the court often involves the burden of title search as compared to the preservation of land values. Thus, the loss of value to a highly restricted development may far outweigh the burden of searching all of the grantors' conveyances. Then there is the problem of the desirability of freedom of land use as against the preservation of the restrictions. Here there is no question of the grantor's intent for it is clear from the prior deed that his intention was to restrict the retained lands. All of these problems seem to present an issue of the relative social value of enforcing the encumbrances or removing them.

When this particular problem of record notice arises, there are two innocent parties one of whom is bound to suffer a loss. Professor Philbrick is of the opinion[24] that the subsequent purchaser is the more desirable one to protect, and he would prefer to have the loss cast upon the prior purchaser. This is not a just solution in light of the fact that the prior purchaser is wothout means of protection

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[23] CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND, p. 176 (2d ed. 1944).

[24] Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. OF PA. L. REV. 125 (1944).

other than placing his deed on record. Once this has been done to safeguard the rights under the prior deed, the subsequent purchaser, by thoroughly searching the record, can ascertain the true status of the title to the remaining lands of the grantor. Thus, we have one of two innocent parties with a means of protecting himself. It would appear unjust to place the loss on a party with existing rights and no further means of protecting those rights, while the party who has as yet suffered no loss has it within his means to prevent any loss whatsoever. There is also nothing involved whereby the doctrine of estoppel may be invoked to cast the loss on the prior purchaser who has recorded. For the reasons stated, the grantee under the prior conveyance should be protected by charging the subsequent purchaser with record notice of any encumbrance contained in the prior deed to other lands made by a common grantor. The concept, chain of title, should be made sufficiently elastic if need be to achieve this result.