The Ramblings of a Title Man

By Michael Holden

Restrictions

In the center of London, England, there is a small park called Leicester Square. If you have ever been to London, it is a popular tourist destination. This small park is actually the birthplace of all legal theory on the issue of restrictions. Over one hundred and fifty years ago, this square and some of the homes abutting it were owned by a man named Tulk. Tulk sold the square to Elms, who covenanted to keep it clear of buildings so it could continue to be used as open space. But Elms forgot or ignored his covenant and sold the square without listing any restriction on the deed to a party named Moxhay. And as you guessed it, Moxhay commenced to attempt to build houses on the square.

Tulk, who still owned some of the houses abutting the square, brought suit to prevent this. Moxhay answered the suit that his ownership of the square was unrestricted in the deed to him; he had no contract with Tulk, and that if Elms had covenanted with Tulk to keep the square open, Tulk should sue Elms for his breach of the covenant. Moxhay further motioned the court that Tulk should have no cause of action against him.

Tulk's attorney then advanced what was then a new theory in law. Namely, that when Tulk sold the square and Elms made the covenant, Tulk retained an interest or negative easement in the square itself. To put it another way, Tulk retained an easement for use and enjoyment of the park, which negated any use in contradiction to the use of the grantee. As this negative easement was a property right, or "equity" as *Her Majesty's Courts of Justice of England and Wales* called it. Tulk could prevent any assignee of the grantee from using the park in any other way. The court agreed with this contention and so Leicester Square is still a park today. The Case of Tulk v. Moxhay, 2 Phil. 774, 41 English Reprint 1143 (1848), became the leading case in the history of building and use restrictions and covenants.

We can take this theory of negative equity one step further with a modern day example. Most subdivisions today have usage restrictions. Restrictions like "must be used for residential purposes" or "no chickens or farm animals may be raised on the land". If we think about the restriction in the terms of the Tulk v. Moxhay case we see that when a person buys a lot in a subdivision, not only does he acquire fee title to the lot, but he acquires this negative equity interest in all the lots of the subdivision to be free from uses named in the restrictions.

One more point about restrictions. Certain restrictions can be held invalid for many reasons. Although the Supreme Court of the United States held in 1926 that restrictions based on race, color or religion were permissible and did not violate the constitution, the Civil Rights Act of 1964 (Pub.L. 88-352, 78 Stat. 241, enacted July 2, 1964) specifically held that such restrictions were not valid and not enforceable in the United States. In addition to restrictions being invalid by federal law, they can also be invalid by violation of the rule against perpetuities. The rule against perpetuities specifically applies to reversionary clauses. Reversionary clauses usually must follow the state statute regarding perpetuities to be valid, often limiting such reversionary clauses to 21 years or less.

"Land really is the best art" – Andy Warhol, 1928-1987, American Artist, Film Director and Producer. Known as one of the leading figures in 'pop art.'