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EQUITABLE SERVITUDES—RESTRICTION OF USE OF LAND RETAINED BY VENDOR.—In 1931 plaintiffs were induced to buy a lot upon verbal assurances that they, in conjunction with other lot owners, were securing rights to the enjoyment of an open space from the road to the Atlantic Ocean. An unrecorded plat was exhibited showing the section as being free of any plan for house lots and was marked "Community Beach". Admission tickets to the beach were distributed to the lot owners. In 1935 the area was rented to a public shore resort. In 1937 a plat was recorded showing the entire area divided into lots. Plaintiffs seek an injunction against the new use. HELD, injunction granted. *Williams Realty Co. v. Robey,* (Md. 1938), 2 A. (2d) 683.

The principal case presents the problem of restricting the use of land retained by the vendor when no mention of the restricted use is made in the deed or a recorded plat. A restriction of use in favor of adjoining land is an equitable interest in land within the purview of the Statute of Frauds and is therefore ordinarily required to be in writing.[1] In situations analogous to the principal case, however, three methods have been used whereby the Statute of Frauds has been circumvented and a desired result obtained; implied covenant, dedication, and estoppel.

In a case analogous to the principal one, the New Jersey Equity Court granted the relief prayed for on the ground that "such transactions raise an implied covenant by the grantor that he will devote the specially designated lands to the beneficial uses the declaration of which enabled him to sell his lots".[2] The New Jersey Court seems to be alone in using the term "implied covenant" to refer to something other than a provision that can be inferred from the use of certain words of conveyance.[3] If a more logical basis for relief can be found, it seems desirable as a matter of policy not to extend

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[1] Faustre v. Commonwealth (1891), 92 Ky. 34, 17 S. W. 189; Cornet v. Commonwealth (1909), 134 Ky. 613, 121 S. W. 424; Conner v. State (1858), 25 Ga. 516, 71 Am. Dec. 184; State v. Brooks (1892), 85 Iowa 366, 52 N. W. 240; State v. Carmel (1915), 36 S. D. 293, 154 N. W. 808; State v. Blaisdell (1879), 49 N. H. 81; State v. Pierre (1887), 39 La. Ann. 916, 3 So. 60; State v. Thompson (1915), 137 La. 547, 68 So. 949; Smith v. State (Tex. Crim. 1907), 102 S. W. 407.

[1] Jacksonville Public Service Corp. v. Calhoun Water Co. (1929), 219 Ala. 616, 120 So. 79; Borland v. Walters (1931), 346 Ill. 184, 178 N. E. 184; Novello v. Caprigno (1931), 276 Mass. 193, 176 N. E. 809; Giddings, Restrictions on the Use of Land (1892), 5 Harv. L. Rev. 274.

[2] Bridgewater v. Ocean City Railroad Co. (1901), 62 N. J. Eq. 276, 49 A. 801, *aff'd,* 63 N. J. Eq. 798, 52 A. 1130.

[3] McDonough v. Martin (1892), 88 Ga. 675, 16 S. E. 59; Baltimore v. Frick (1895), 82 Md. 83, 33 A. 628; Rawle on Covenants for Title (1887), Ch. XII; I Tiffany on Real Property (2nd ed., 1920) 124. The several New Jersey cases relying on an implied covenant as the basis for granting relief relate to the same piece of land. Lennig v. Ocean City Association (1886), 41 N. J. Eq. 606; Bridgewater v. Ocean City Ry. Co. (1901), 62 N. J. Eq. 276, 49 A. 801, *aff'd,* 63 N. J. Eq. 798, 52 A. 1130; Bridgewater v. Ocean

the doctrine of implied covenants beyond the present generally accepted connotation.

The Statute of Frauds is inapplicable to dedication.[4] Therefore a person may dedicate by parol his land to the use of the public for streets and roads[5] and for public squares or commons.[6] While a number of cases refer to a public dedication as a basis for recognizing a right in the vendee,[7] a more satisfactory analysis is that a dedication to the public gives no rights to a particular vendee.[8] And where, as in the principal case, the intended use is restricted to a specified group the idea of a dedication is precluded.[9]

The decision, then, can be satisfactorily based only upon the ground of estoppel.[10] An examination of the facts reveals all the necessary requirements.[11] Relying upon the representations of the vendor that the specified area would remain open for the benefit of lot owners, plaintiffs and others were thereby induced to purchase and improve their lots. A failure to grant relief would result in a substantial depreciation in value. Under these circumstances, whether there be a dedication or not, so far as the purchasers

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City Association (1915), 85 N. J. Eq. 379, 96 A. 905. The New Jersey Court has refused to apply the doctrine in a somewhat analogous case. Radey v. Parr (1931), 108 N. J. Eq. 27, 153 A. 628.

[4] Durgan v. Zurmuehlem (1927), 203 Iowa 1114, 211 N. W. 986.

[5] Appleton v. New York (1916), 219 N. Y. 150, 114 N. E. 73, *rearg. denied,* 219 N. Y. 681, 115 N. E. 1033; Michigan City v. Szczepanek (1926), 85 Ind. App. 227, 150 N. E. 374; Louisville & Nashville Ry. Co. v. Public Service Commission (1933), 206 Ind. 51, 185 N. E. 902.

[6] Doe v. Attica (1856), 7 Ind. 641; President and Fellows v. Central Power Corp. (1928), 101 Vt. 325, 143 A. 384.

[7] Cole v. Minnesota Loan and Trust Co. (1908), 17 N. D. 409, 117 N. W. 354; Morse v. Whitcomb (1909), 54 Ore. 412, 102 Pac. 788; King v. North Chesapeake Beach Land and Improvement Co. (1923), 143 Md. 693, 123 A. 455. In the converse situation a dedication has been in favor of the public where representations have been made to prospective purchasers. Attorney General v. Abbott (1891), 154 Mass. 323, 28 N. E. 346; Bennett v. Seibert (1894), 10 Ind. App. 369, 35 N. E. 35. *Cf.* Kelly v. West Seattle Land and Improvement Co. (1892), 4 Wash. 194, 29 P. 1054.

[8] Prescott v. Edwards (1897), 117 Cal. 289, 49 P. 178; McCleary v. Lourie (1922), 80 N. H. 389, 117 A. 730; 2 Tiffany on Real Property (2nd ed., 1920), 1321.

[9] Gund Realty Co. v. City of Cleveland (1927), 26 Ohio App. 590, 160 N. E. 101 (Private park for benefit of those who purchased lots); Faulk v. City of Louisville (1937), 270 Ky. 828, 110 S. W. (2d) 665.

[10] In a decision holding that interests in land may pass by estoppel the United States Supreme Court has said, "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted". Dickerson v. Colgrove (1879), 100 U. S. 578, 580.

[11] For an estoppel to exist there must be an intentional representation of a material fact, the estoppel-asserter must rely thereon, and injury would occur unless the person making the representations is estopped to deny the truth of the representations. Ewart on Estoppel (1900) 10; 3 Williston on Contracts (Rev. ed., 1936) Sec. 692. A promise to abandon an existing right satisfies the requirement of a representation of fact. Jones Store v. Dean (1932), 56 F. (2d) 110, *cert. denied,* 286 U. S. 559, 52 S. Ct. 641; Dickerson v. Colgrove (1879), 100 U. S. 578; Vogel v. Shaw (1930), 42 Wyo. 333, 294 P. 687.

are concerned the owner should be estopped to deny the grant of the specified uses.[12]

Apparently there have been no Indiana decisions on the precise problem involved in the principal case. It has been indicated, however, that should the problem arise relief would be given.[13] It is hoped that if the case arises the court will grant relief and base its decision on the ground of estoppel rather than confuse the issue by relying on implied covenant or public dedication. E. O. C.

GUARDIAN AND WARD—DE FACTO GUARDIAN.—While East Chicago State Bank was legal guardian of a certain minor child, insurance moneys belonging to the ward were collected by the guardian and held in trust. Upon expiration of the charter of East Chicago State Bank, a new bank was organized. The latter bank took over all assets and assumed all liabilities of the former including a deposit in the trust department of East Chicago State Bank as property of the ward. The reorganized bank, although never judicially appointed guardian, continued to act in fact as guardian of said ward, subsequently filing an inventory and appraisement of property belonging to the ward, in which it designated itself as guardian, and later a guardian's account current with the Superior Court. The reorganized bank was taken over by the Department of Financial Institutions of the State of Indiana and at time of closing had on hand a fund belonging to said ward. Appellant is legal guardian, and in a liquidation proceeding by the state, filed a petition based upon Chapter 167 of the Acts of 1931, which gave preference to any property held in a fiduciary capacity, to have the claim of guardian allowed as preferred. Lower court disallowed the preference but allowed a general claim. Held, reversed with instruction that claim be allowed as preferred. *Bank of Whiting, etc. v. The East Chicago State Bank* (Ind. 1938), 17 N. E. (2d) 491.

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[12] McCleary v. Lourie (1922), 80 N. H. 389, 117 A. 730; Hille v. Nill (1929), 58 N. D. 536, 226 N. W. 635; David v. Griswald (1913), 23 Cal. App. 189, 137 P. 619; Nave v. City of Clarendon (Tex. Civil App. 1919), 216 S. W. 1110.

[13] In Bennett v. Seibert (1894), 10 Ind. App. 369, 378, 35 N. E. 35, the Court said, "If one owning lands lays out a town thereon, and makes and exhibits a map or plan thereof, with spaces marked public squares, parks, etc., and sells lots with reference to such map or plan (though unrecorded) the purchasers of lots in such town acquire, as appurtenant thereto, every easement privilege which the map or plan represents as a part of the town, . . .". The actual controversy before the court concerned the apportionment of street assessments between a purchaser and the city. See also; Rhoades v. Town of Brightwood (1896), 145 Ind. 21, 43 N. E. 942 (action to quiet title by grantor. Held, where lots are sold with reference to a plat rights of both public and purchasers of lots intervene so there is an irrevocable dedication); Pittsburgh, Cincinnati, Chicago and St. Louis Ry. Co. (1897), 148 Ind. 101, 47 N. E. 332 (action for damages caused by obstruction of public highway. The Court says that secret intentions cannot prevail against conduct upon which the public or those dealing with a person have relied [p. 107] and also recognizes that landowners have rights distinct from rights in the public [p. 108].)

[1] See discussion in Martin's Admr. v. Fielder (1887), 82 Va. 455, 4 S. E. 602.