Marquette Law Review

Volume 10
Issue 3 *April 1926*

Article 9

1926

Equity: Zoning ordinance as implied covenant in deeds

I. E. G.

and the good sense of the mule (all matters of common knowledge) may be allowed to stand over against his faults and create either an equilibrium or a preponderance in the scales in his favor." Leading the "defendant" mule by a five-foot halter was held not to be negligence *per se,* even though experts testified that such animals (this mule's little girl friend was also among those present at the time of the alleged tort but was not joined as a party defendant) should have been "necking." Although the learned Justice understood "necking" to mean halter-yoked he left nothing to the wagging of idle tongues and denounced this practice of "necking" as shameful in law and morals. What mule would not feel a glow of pardonable pride on hearing this? —a vain mule would forever after part his hair in the middle. Stronger language could not have been used against his human brother upon a charge of "Driving While Infatuated."

But enough has been said to show that the ass is not without some rights in the courts even on sentimental grounds.

In *Baumgartner v. Hodgdon,*[3] which was an assault and battery action, the provocatory remark was directed at the defendant's horse. The words of the plaintiff were either that the defendant had "a thing of a horse," or that the defendant's horse was the "damndest-looking horse he ever saw" The court said

> Both may be conceded to have been slanderous and defamatory of the horse but the most that can be said is that it was disgraceful to the horse, but the horse was not present. Moreover, we have the right to assume that the animal was endowed by nature with the usual amount of "horse-sense," and that, had the remark been overheard by him, ne would have dismissed it without reply as the opinion of one not competent to speak on the subject.

Q.E.D. The horse stands *rectus in curia.*

But lest our more cautious brethren at the bar still doubt we append the final panegyric in *Kocha v. Union Transfer Co., supra.*

> What was said, sung, and held in that decision concerning the Missouri mule, with all the storied, latent possibilities lurking in his heels, will surely support and warrant the conclusion here reached as to this Wisconsin horse. It is true that neither his pedigree, place or date of birth appear of record here, but it is disclosed that he had lived with us and worn out his shoes upon our pavements these many years; this, in view of the verity of his unimpeached character, supra, warrants, if not requires, the presumption in a Wisconsin court that he was Wisconsin bred as well as led. Then, of course, being a Wisconsin horse, he, like Webster's Massachusetts, "needs no encomium."

J. P T.

Equity · Zoning ordinance as implied covenant in deeds.—Where, at the time of a sale, there exists a restrictive zoning ordinance affecting the property, which subsequent to the sale of the land, is repealed, does such restriction become impliedly a part of the covenant and binding between both the parties and stangers? The main question hinges upon whether or not it can be enforced as an implied covenant. As an example, suppose that A sells to B. At the time of the sale there is a zoning ordinance, the effect of which is to create a thirty foot building line. After the land has gone through several hands, and the ordinance having been repealed, the last purchaser proceeds to build in a

[3] 105 Minn. 22, 116 N.W 103.

way which would violate the old ordinance, were it in effect. Can he be restrained?

Wisconsin is in accord with the jurisdictions which hold that he cannot. The ordinance cannot be enforced, after its repeal, against the property owner, on the ground that it is an implied covenant running with the land. Section 2204 of the Wisconsin Statute reads "No covenants shall be implied in any conveyance of real estate whether such conveyance contain special covenants or not." Therefore by express words of the statutes there are no implied covenants in Wisconsin, and the repealed ordinance cannot be enforced, because the very basis of its enforcement sets it up as a covenant arising by implication. New York, which has a statute similar to ours (in fact it is identical) has handed down in the numerous cases, decisions to the effect that no implied covenants will be recognized in land contracts.[1]

In *Belle Mead Lumber Co v. Turnball*[2] the court said

> An implied covenant can be justified only by legal necessity. It is not enough merely to say fairness, prudence or wisdom demand it under the circumstances. It must be necessary to the operation of the contract, or of the words found in it, or to the effectuation of the intention, of the parties, made manifest by their words.

In *Henning v. Old Colony & Newport R. R. Co.*,[3] where the defendant sold the plaintiff property which was described in express words as bounded by a street, the court said that where the defendant owns such an adjoining strip he makes an implied covenant to turn such strip over to use as a street, but he does not imply that he has built such a street, or that he will build or maintain such a street fit for travel.

In *Bechtel v. Carslake*[4] where the grantor described a lot as crossing a sixteen foot alley which he made only eight feet, the court held that there was no implied covenant in the deed to make the alley sixteen feet, mere mention of such an alley does not imply that he will make it sixteen feet. If the vendee relied upon the use of such an alley he should have had an express covenant to secure it.

Attacking the question in a slightly different manner the same conclusion is reached.

Some states hold that where there is a sale of land, with a warrant that the vendor will deliver a marketable title, and an ordinance is in effect, or goes into effect sometime subsequent to the contract but prior to the conveyance, it is not an incumbrance rendering the title not as warranted. Other states hold that it is an encumbrance, making the title non-marketable.

In New York such an ordinance is held not such an incumbrance upon the property as to make the title unmerchantable, *Lincoln Trust Co. v Williams Bldg. Corp.*,[5] and the vendee is forced to perform.

Massachusetts in *Damell v Shaw*,[6] holds the same way

---

[1] 40 N.Y. 140; 20 Barb 455, 9 N.Y. 535, 13 N.Y. 151.

[2] 87 S.E. 382.

[3] 101 Mass. 540, 100 Am. Dec. 127.

[4] 11 N.J.E. 500.

[5] 128 N.E. 209.

[6] 166 Mass. 583, 127 N.E. 525.

Pennsylvania holds *contra*. In *Coues v. Hallahan*,[7] the court said that a purchaser of a city lot, entitled by his contract to a conveyance free from all restrictions, may refuse to accept title where there is a restriction in a deed in the chain of title, restraining the erection of buildings within five feet of the line of the abutting street. Subsequent to the deed, but prior to the contract between the plaintiff and the defendant, the city passed an ordinance which had the same restriction. The court said

> There are two restrictions upon the property either of which would bar a recovery by the plaintiff. The restriction by the ordinance did not absorb or supercede the restriction by the deed, for, even if the ordinance should be repealed, the covenant in the deed would still restrict.

In other words, upon the removal of the ordinance, the restriction could not be enforced as an implied covenant.

Wisconsin holds *contra* to New York and in accordance with Pennsylvania.[8] Where the title was warranted to be merchantable and the deed contained restriction of thirty foot building line and against the sale of liquor on the premises. The court held that this was an encumbrance which did not present a merchantable title, and which the purchaser could not be compelled to accept, even though a court of equity would not enforce the restrictions because conditions have changed since the restrictions were made, or because they have become obsolete and inoperative by reason of the non-observance. It then expressly states if an ordinance or statute imposed this restriction it would be an encumbrance of sufficient significance to entitle the vendee not to perform.

The Supreme Court of Wisconsin said that the restriction would not be enforced in equity, having outlived its usefulness, and since equity would not enforce an express covenant running with the land because of no further usefulness, it certainly would not enforce a repealed ordinance, as an implied covenant, where it would not enforce an express covenant, for if the law saw fit to repeal it, there certainly must no longer be any necessity for it.

Wisconsin and Pennsylvania hold that such an ordinance is such an encumbrance upon the title as to render it unmerchantable. But in the states where it is held not to be an encumbrance it is so held on the grounds that the ordinance comes within the governmental power, under its police powers.

Even in the states, New York and Massachusetts, should the vendor have such an express covenant in his chain of title, it is the rule of law that the title is not merchantable as warranted. Therefore how can the vendor in those states seek to enforce the contract in equity, after having represented that the title is as warranted, by turning about on its repeal and contending that it is an implied covenant? Would it not in that case assume the proportions of a fraud upon the vendee? *Is* the title as warranted? Is it not inconsistent for him to insist upon the covenant and contend that he offers a merchantable title? The inconsistency of recognizing the binding nature of the restriction, on the

---

[7] 209 Pa. St. 224, 58 Atl. 158.

[8] 205 N.W 548.

grounds of implied covenant, is apparent. Neither can the vendor enforce performance or can the ultimate purchaser be restrained from "violating" the repealed restrictive ordinance.

I.E.G.

Highways Cutting corner in making left turn negligence per se. Automobilists not justified in violating statute because following directions of highway officers.—There is no doubt but that the decision by the Supreme Court of Wisconsin in the case of *Day v. Pauly*,[1] 186 Wis. 189, 202 N. W 363, should have received some attention soon after it was handed down on February 10, 1925, but, through some oversight it was missed. However, the delay has given the reviewer an opportunity to show how subsequent legislation may be influenced by decisions of the courts of last resort.

The automobile collision out of which the action grew occurred at the intersection of highways 15 and 55. (Highway 55 runs north and south, highway 15 runs east and west) Pauly was driving south on 55 and Day east on 15. At the intersection Day made a left turn and, in following white arrows painted on the concrete pavement by county traffic officers, he cut the corner and drove out in front of Pauly who became confused and turned to the left side of highway 55 where the crash took place. Day brought an action against Pauly for damages and the jury found Day guilty of contributory negligence and decided in favor of the defendant. The trial judge, on motion of the plaintiff, set the verdict aside and granted a new trial. From this the defendant appealed and the superior court reversed the order and directed judgment on the verdict for the defendant.

The Supreme Court, after disposing of the case, continued with dicta which furnishes the principal material for this comment. Justice Rosenberry cited section 85.01, subd. 3 of the Wisconsin Statutes and held the plaintiff guilty of negligence *per se* in that he had violated the provisions of that statute by cutting the corner, and went on as follows

> In this connection we think it our duty to call the attention of highway officials and police officers to the fact that they have no right or authority to divert or direct public travel in a manner contrary to that prescribed by the act of the Legislature. It was apparently indicated to the plaintiff that he should travel in substantially the path he took, *but travelers are not warranted or justified in proceding according to the direction of highway officials, police authorities or local municipal bodies, where such directions are contrary to the express provisions of the law,* and travelers are afforded no protection because they are thus induced to violate the law. If it is thought best that the rigid rule prescribed by the statute should be varied in particular cases where the facts warrant such variation, then the Legislature should authorize some one to establish lawful departures from the general rule. We find no such authority under the law of this state and none has been cited to our attention. It is a matter of common observation that by painting arrows and by other signs and indications, travelers are led into violation of the plain provisions of the statute. Local authorities who take upon themselves the doing of such acts assume a considerable *moral* responsibility at least. This is particularly true with reference to travelers from outside the state, who ought to have a right to depend upon signs and directions for travel placed upon highways by those in charge of them. We feel it our duty to call this matter to the attention of those having to do with the enforcement of the laws relating to highways as well as to the Legislature.

[1] 186 Wis. 189, 202 N.W 363.