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Real Property -- Building Restrictions -- Property Rights

Leonard Selkowitz

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clear chance comes into being, if the evidence so warrants, as it does in this case.\textsuperscript{10} The trial court in the \textit{Martin} case entered judgment for the plaintiff. The case concerned an automobile-train collision, where the automobile (proceeding parallel to the tracks) attempted a turn onto the tracks. Ostensibly, the court characterized the negligence of the train's engineer, in failing to utilize the opportunity to stop upon notice of the automobile, as the sole proximate cause of the injury. The holding seems well reasoned. The court in the instant case, however, relying on eminent text authorities\textsuperscript{14} as a basis for overruling the \textit{Martin} case, stated that last clear chance instructions in such instances are without reason or justification. The reasoning by which the court reaches this conclusion is not apparent from a reading of the case.

Viewed from a policy standpoint, the court is using the comparative negligence statute as a shield for the railroad. Interestingly enough, the same statute has been criticized as being too harsh to the railroad.\textsuperscript{15} Perhaps the instant case is indicative of judicial modification of anti-railroad legislation. From the legal aspect, the doctrine of last clear chance in comparative negligence cases must be considered to determine whether or not the defendant's negligence is the sole proximate cause of the accident. If it is, there is no need to apply the comparative negligence statute, and even in situations where the negligence of both plaintiff and defendant concurred to produce the injury, the doctrine of last clear chance, used in a relative sense, is still needed to determine the degree of defendant's negligence, thus enabling an apportionment of damages according to the comparative negligence statute.\textsuperscript{16}

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Sylvan N. Holtzman
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\textbf{REAL PROPERTY—BUILDING RESTRICTIONS—PROPERTY RIGHTS}

In a suit by an incorporated town to enjoin the Board of Public Instruction from erecting or operating a public school, the question arose as to whether or not private building restrictions constitute "property" in the sense that compensation must be paid to their owners as part of eminent domain proceedings. \textit{Held}, that such restrictions are not compensable.

\begin{itemize}
  \item [13.] Id. at 512.
  \item [14.] James, \textit{Last Clear Chance—A Transitional Doctrine}, 47 \textit{Yale L.J.} 704 (1938); MacIntyre, \textit{The Rationale of Last Clear Chance}, 53 \textit{Harv. L. Rev.} 1225 (1940); Pound, \textit{Comparative Negligence}, 13 \textit{NACCA L. J.} 195 (1954); Recent Statute, 52 \textit{Harv. L. Rev.} 1187 (1938). Using text authorities as the basis for a decision is considered by many to be unusual.
  \item [15.] Loffin v. Crowley, 150 Fla. 836, 8 So.2d 909 (1942) (where the court refused to declare the statute unconstitutional merely because motor carriers were not made liable under similar circumstances).
  \item [16.] In \textit{Martin v. Sussman}, 82 So.2d 597 (Fla. 1955), the court, in citing the case under note, stated that the doctrine of last clear chance is no longer applicable in suits against a railroad company, without qualifying the doctrine and its relation to proximate cause.
\end{itemize}
The authorities are divided over whether compensation must be paid to the dominant tenement owners of an equitable servitude for the extinguishment of their rights by governmental condemnation. Several courts have denied compensation stating simply that the restrictions were not being violated. They classify such rights as being applicable only to private matters. Others have taken the view that the extinguishment of an equitable servitude is not a taking of private property for which compensation must be paid. This view received much support in the oft-cited case of United States v. Certain Lands in Jamestown, wherein it was decided that no property right whatever springs from a private covenant that the land of another shall not be used for governmental purposes:

Acts done in proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a 'taking,' within the meaning of the constitutional provision for compensation.

Another line of authority which disallows compensation is represented by those courts which refer to covenants which limit the use of property as "mere" contractual rights. These courts hold that equitable servitudes must be strictly construed and not extended by implication. A typical statement is:

... but the restrictions ... are not truly property rights, but contractual rights, which the government in the exercise of its sovereign power may take without payment of compensation.

However, by the weight of authority, these servitudes are recognized as being similar to legal easements, Judge Pound, for example, having said, "These restrictive covenants create a property right. . . ." Easements

4. 112 Fed. 622 (1899); See Aigler, Measure of Compensation for Extinguishment of Easement by Condemnation 1945 Wis. L. Rev. 5, 22, wherein it is stated that this portion of the case so heavily relied upon is dictum.
5. Id. at 623 (On motion to dismiss).
7. Wilton v. Saxon, 6 Ves. 106 (1801) (not to break up mowing land); Martin v. Nutkin, 2 P. Wms. 266 (1724) (promise not to ring a bell); Cf. Whatman v. Gibson, 9 Simons 196 (1838).
and similar rights in land, provided they are rights enforceable by the courts as against the owners of the land, constitute property in the constitutional sense. Equity will enjoin the breach of a negative covenant on the ground that an interest in land is involved. The majority takes its stand upon the proposition that a negative easement is a vested interest in land. Therefore, pursuant to this view, the owner of land for whose benefit the restriction is imposed is entitled to compensation.

In the instant case, after an exhaustive survey of the law, the court concluded that equitable servitudes "... are more properly classified as rights arising out of contract," and that "... it (the paying of compensation for the servitudes) would place upon the public an intolerable burden wholly out of proportion to any conceivable benefits to those who might be entitled to compensation." The court admits that though public policy reasons are not entirely controlling, "... they would be compelling and forceful factors in the determination in which way the scales of reason and justice incline." Justice Drew concludes that what seems to be the minority view may, in fact, be the majority, relying upon a 1939 Georgia Supreme Court decision which held that equitable servitudes do not vest in their owners a property right for which compensation must be paid.

In this writer's opinion, building restrictions, such as those encountered in the instant case, are, in fact, private property, and are interests in real estate running with the land and, consequently, property rights of value. The right to control the land of another is of itself a property right of the holder. Therefore, the rule that, "... private property may not be taken for public purposes without just compensation ..." applies here and seems to be the better rule and the one most often followed. A taking without compensation negates all principles of ownership and rights attached thereto.

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15. Board of Public Instruction v. Town of Bay Harbor Islands, 81 So.2d 637, 643 (Fla. 1955).
See also Burger v. St. Paul, Minn., 64 N.W. 2d 73 (1954) (wherein the court stated that the term "owner" in statutes relating to the exercise of eminent domain includes any person having a lawful interest in the property to be condemned).
18. See note 1 supra. See cases cited.