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Property

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PROPERTY

I. CONDEMNATION

City of Greenwood v. Psomas,[1] a condemnation proceeding, presents a property question as well as an interesting collateral problem in procedure. Pursuant to South Carolina Code section 25-161, providing for condemnation by municipalities, the city of Greenwood acquired land subject to a life estate in Pansy Psomas, a succeeding life estate in her minor son, George, with a remainder to parties unknown. Club Soda, Inc. and Ralph W. Alexander, also respondents in the case, had a short term lease on this property with an option to renew. In a jury trial the landowners were represented by counsel; however, the lessees, though entitled to be represented at their election and named as parties, were not represented. The jury returned an undivided verdict of $31,937.50, representing the fair market value of the entire property and the interests of all parties. The landowners moved for a new trial and were refused. Shortly thereafter the court adjourned *sine die* and the judge left the circuit. At no time during the trial or argument on the landowners' motion for a new trial did the lessees raise any question as to their lease or the form or amount of the jury's verdict. A month later the lessees moved to have a case as to their interest docketed for jury trial. The trial judge held a hearing a week later, and ruled that he had jurisdiction to entertain the lessees' motion after *sine die* adjournment. He then ruled that the interests of the lessees had not been adjudicated in the condemnation trial and granted their motion for a new trial as to their interests. The case came to the supreme court on an appeal from the trial judge's ruling by the City of Greenwood.

The property question is this: Did the lower court record indicate that it would or should have been possible for the jury to make divided findings as to the interests of the landowners and those of the lessees? The lessees were contending that their interests were not in any way determined by the trial. This same problem was at issue in the fairly recent case of *South Carolina Highway Department v. Hammond*.[2] In that case, the landowner rather than the lessees complained that her interest was improperly joined with those of the lessees and that the court erred in not granting a motion for separate trial for determination of her

1. 155 S.E.2d 310 (S.C. 1967).
2. 238 S.C. 317, 120 S.E.2d 21 (1961).

damages. The court pointed out that at the initiation of condemnation proceedings all owners were served with notice of condemnation. "The word 'owner,'" they said, "as used in the condemnation statute has been construed to embrace not only the owner of the fee, but a lessee and any other person who has an interest in the property . . . ."[3] The court also pointed out that in a condemnation proceeding, the Highway Department, and presumably any other entity entitled to assert the power of eminent domain, was entitled to "an assessment of all damages arising by virtue of the taking in a single proceeding,"[4] consonant with the well settled policy of avoiding multiplicity of actions. Plaintiff landowner in *Hammond* was denied a new trial.

The court in the instant case quotes *Hammond* language on the above point extensively. Analyzing the *Psomas* facts, it notes that the jury was given various estimates from appraisers who stated that their appraisals took in to account all interests including lease interests. The jury did not hear testimony either as to the fair market value of each separate interest or as to the landowners' interest to the exclusion of the lessees' interest. The court concluded that it would have been impossible for the jury to have made any finding other than one of the fair market value of the entire property and all interests in it. Further, the court observed, the lessees were well aware of this action, the case having been docketed in the usual fashion, and thus had every opportunity to participate in the litigation. This decision serves as a warning to future condemnees of whatever interest that the court will not direct the jury to bring in a divided verdict on its own motion. Therefore condemnees must participate so as to raise the valuation of the entire property instead of relying on future litigation for full compensation.

An ancillary issue in this case was the question of whether the circuit judge exceeded his authority and jurisdiction by hearing the motion after adjourning *sine die*. The court paid only the most cursory attention to this problem, giving it only a sentence of attention as they ruled: "We are also of the opinion that the circuit judge did have jurisdiction to rule upon this

3. *Id.* at 320, 120 S.E.2d at 22; *accord,* Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Power Co., 84 S.C. 306, 66 S.E. 194 (1909) (cited in the *Psomas* decision); Charleston & W. C. Ry. Co. v. Reynolds, 69 S.C. 481, 48 S.E. 476 (1904); *cf.* Ross v. Railway Co., 33 S.C. 477, 12 S.E. 101 (1890).

4. South Carolina Highway Dep't v. Hammond, 238 S.C. 317, 320, 120 S.E.2d 21, 22 (1961).

matter under all the circumstances of the case."[5] The holding is too narrow to permit any interpretation of broad authority for future circuit judges in this situation. Apparently the court agreed with the trial judge's assessment of his authority:

> Counsel for the City of Greenwood objected to the jurisdiction of the court since the court had previously adjourned *sine die*. However, the court is satisfied of its jurisdiction while still sitting as presiding judge to dispose of a question arising from such an intimate connection with a case tried before the court.[6]

However, as the appellant, City of Greenwood, pointed out, there was no dispute that the circuit court, in unusual circumstances, has the authority to grant a new trial *nisi* or a new trial on new and unusual grounds.[7] Since the respondent's motion was for *further* trial, even in the face of the unquestioned fact that all interested parties were before the court on the first trial, the judge should grant one or the other.

II. "TAKING" OF PROPERTY BY A MUNICIPALITY

Unquestionably the most interesting case in the property area for this survey period is *Kline v. City of Columbia*,[8] a decision of real iceberg proportions. On the surface, the case states a few well known and settled property axioms, but many view this case as an almost total abrogation of municipal tort immunity in the property area. Considering South Carolina's well-settled policy of stare decisis, the implications of this decision will haunt municipal and state attorneys for years to come.

Kline involves two actions by property owners Ella and Lena Kline and Kline Supply Company against the City of Columbia and South Carolina Electric & Gas Company for damages to their building and its contents, allegedly the result of an explosion in the walls and under the floor and subsequent fire in the building, caused by the contact of leaking gas with a suspended gas heater.

For some weeks prior to the accident, the city had been widening Huger Street on which Kline Supply Company is located.

5. City of Greenwood v. Psomas, 155 S.E.2d 310, 314 (S.C. 1967).

6. Record at 46, City of Greenwood v. Psomas, 155 S.E.2d 310 (S.C. 1967).

7. S.C. CODE ANN. § 10-1215 (1962). *See* Gwathmey v. Foor Hotel Co., 121 S.C. 237, 113 S.E. 688 (1922).

8. 155 S.E.2d 597 (S.C. 1967).

The complaint charged the city with: (a) negligently pulling loose a gas line which ran under Huger Street to Kline Supply, (b) failing to notify South Carolina Electric & Gas to cut off the gas supply after the city's agents and servants knew or should have known that gas was escaping, and (c) subsequently failing to notify the company after the city foreman was advised that his crew had ruptured the line. These allegations seemed to make the complaint sound in tort. In addition, the complaint alleged that plaintiff-respondent's damages amounted to a taking of property by the sovereign, which entitled them to just compensation.

In South Carolina, a municipality can be sued in tort only by leave of specific authorization from the General Assembly. The respondents claimed their authorization under South Carolina Code section 47-70[9] which provides for liability of a municipal corporation for property or personal damages resulting from defects in streets and mismanagement of anything under the municipality's control which occurs within its boundaries. This mismanagement has been interpreted to mean only that which occurs in connection with street maintenance, repair, or the city's obligation to keep streets safe.[10]

South Carolina's specific authorization requirement is somewhat unique. Traditional American tort law, as regards a municipality's right to claim governmental immunity to suits without consent, views the municipal corporation as a split personality. It has a governmental personality in which it carries out those duties delegated to it by the state, but it also has a proprietary or corporate character, just as other business enterprises do. Usually when a city is sued in tort, it is sued because of negligence which occurred in its proprietary or private role. South Carolina is one of two states which refuses to recognize this split personality. The result in South Carolina is complete municipal immunity, except for specific authorization of liability by the General Assembly.[11]

9. S.C. CODE ANN. § 47-70 (1962).

10. For a general history of the policy behind the statute and the various changes in its interpretation, *see* Jackson v. Columbia, 174 S.C. 208, 177 S.E. 158 (1934). For more recent developments in interpretation *see* Furr v. Rock Hill, 235 S.C. 44, 109 S.E.2d 697 (1959); Hicks v. Columbia, 225 S.C. 553, 83 S.E.2d 199 (1954); Abernathy v. Columbia, 213 S.C. 68, 48 S.E.2d 585 (1948); Bozard v. Orangeburg, 197 S.C. 447, 15 S.E.2d 642 (1941).

11. A concise statement of the development of this doctrine and mention of South Carolina's position can be found in W. PROSSER, LAW OF TORTS § 125, at 1004-10 (3d ed. 1964).

Plaintiff-respondents also claimed a remedy under Article I, section 17 of the South Carolina Constitution, which provides: "Private property shall not be taken for . . . public use without just compensation being first made therefor."[12] Respondents alleged that the acts of the city constituted a taking for which they were entitled to just compensation. The case was before the supreme court on an appeal from the lower court's overruling of the city's demurrer and denial of its motion to strike the sections of plaintiff's complaint described above.

The court first considered the question of whether the plaintiffs had stated a cause of action under the constitutional provision. The court characterized the city's action of widening the street as an aggressive and willful act and stated that the city was "engaged in the exercise of a power ordinarily, though not necessarily, exercised under the power of eminent domain."[13] Since the court later reiterates the well established South Carolina position of using a broad view of "taking," equating it to the "least actual damage"[14] as opposed to the stricter federal view, in which there must be a showing of intent, it seems at first glance curious that the court would find it at all necessary to find intent here. The reason becomes clear when one reads the 1958 case of *Collins v. City of Greenville*,[15] relied on heavily by the city here. The only factual distinction between *Collins* and *Kline* is that in *Collins* the city was negligent from the beginning in that it allowed a sewer to become clogged and then damaged the plaintiff when it unclogged the main. The *Collins* plaintiff was unsuccessful. It would seem that the intent evidenced in *Kline* is no more definite than that in *Collins*.

The court characterized the city's action in *Kline* as an invasion. Yet because it approves recovery under the constitution, the court states that it is unnecessary to rule on the question of whether a valid cause of action is also stated under section 47-70, the tort action discussed above. It ruled that the specifications of negligence in those sections of the complaint must be struck.

The problem with *Kline* is that the whole case sounds in tort, whether one chooses to strike tort language in the complaint or not. Thus, *Kline* could be seen as a real turning point in the erosion of South Carolina's strict sovereign immunity doctrine.

12. S.C. CONST. art. I, § 17.

13. Kline v. City of Columbia, 155 S.E.2d 597, 599 (S.C. 1967).

14. *Id.* at 599, *citing* Webb v. Greenwood County, 229 S.C. 267, 92 S.E.2d 688 (1956).

15. 233 S.C. 506, 105 S.E.2d 704 (1958).

Except for the court's subtle distinguishing of *Collins*, *Kline* could be interpreted as an open invitation to tort suits against the sovereign in the property area.[16] *Kline* must be read with *Collins* to avoid this conclusion, and even then one is forced to infer this limitation. The court itself does not draw this line. On the basis of *Kline* sovereign immunity from tort liability as regards real and personal property damage seems to have been severely weakened if not abrogated by this "back door" property law route.

III. The Ghost of the Rule in Shelley's Case Past

Hydrick v. Greene[17] is a hybrid wills and property case in which the resolution of disputed rights to possession of land in Orangeburg County could be settled only by a construction of a provision in the will of a testatrix who died in 1920 leaving a will dated February 11th of that year. The relevant section reads as follows:

> Sixth. I give my Ninety-six Road place, containing 550 acres, more or less, and my River Road place, containing 270 acres, more or less, both in Orangeburg County . . . to my brother, Dr. D. J. Hydrick, my sister, Margaret H. Caval, my brother, John H. Hydrick, and my nephew, Jack Lawton Hydrick . . . to be divided amongst them . . . into four parts, as nearly as equal in value as possible . . . and each of them shall have the part so assigned to him for life, and after his death, it shall go to his "issue" per stirpes, as purchasers. But if any of these should die without issue, his share shall go to the survivors upon the same limitations as their original shares, and so on to the last survivor. And if all of them shall die without leaving issue, the whole shall be added to the Hydrick Memorial Scholarship fund hereinafter provided.[18]

Under this provision, John H. Hydrick received a tract of 285.8 acres of land in 1920 which was sold by the county sheriff in 1925 for delinquent taxes. Defendants Byrd and Hutto are the successors in interest of the 1925 purchaser. In 1964, John H. Hydrick died, survived by his three children, John H. Hydrick, Jr., the plaintiff, and Mary H. Greene and A. S. Hydrick, defendants only for the purpose of an ancillary partition proceed-

16. Excluding, of course, torts involving injury to person.
17. 154 S.E.2d 565 (S.C. 1967).
18. *Id.* at 565-66.

ing not in issue in this appeal. The three children claim that Byrd and Hutto held only such estate as Hydrick, Sr. had, which was, they contend, a life estate. They claim that, as remaindermen under their aunt's will, they are now entitled to the land as tenants in common. Byrd and Hutto characterize Hydrick, Sr.'s estate as a fee simple conditional and contend that the birth of children fulfilled the condition and gave him the right to alienate. The appellants reach this conclusion by arguing that since the will was executed and probated prior to the 1924 repeal of the Rule in Shelley's case, the rule operated to give Hydrick, Sr. a fee simple conditional.

At first glance the appellant's argument seems persuasive. The requirements of the rule are: "(a) a conveyance or devise of land, (b) containing a life estate in the ancestor, and (c) a remainder in the heirs or heirs of the body of such ancestor, (d) created by the same conveyance or devise, and (e) of the same quality as the life estate."[19] These requirements seem to be met by the above described limitation. The only phrase which prevents an immediate conclusion for operation of the rule is the phrase "it shall go to his issue *per stirpes, as purchasers.*" One of the sacred axioms learned by first year property students is that, by virtue of Lord Mansfield's proclamation of 1770,[20] the Rule in Shelley's Case is a rule of law and not a rule of construction. Thus, in a limitation "to *A* for life, remainder to his heirs," or "heirs of his body" or "issue," "heirs" or "issue" are read as words of limitation, indicating the character and conditions of the estate to *A*, and not words of purchase, indicating a separate estate to the issue. As Simes points out: "If the requirements of the rule are otherwise met, no assertion in the instrument that the rule is not to apply has any effect."[21] The South Carolina Supreme Court had never been presented with this precise set of facts before, but in *Hillman v. Bouslaugh*,[22] cited as persuasive authority by the defendants,[23] the Pennsylvania Supreme Court faced a similar limitation[24] and ruled

19. L. SIMES, FUTURE INTERESTS § 23, at 48 (2d ed. 1966).

20. Perrin v. Blake, 98 Eng. Rep. 355 (K.B. 1770).

21. L. SIMES, *supra* note 19, § 24, at 52.

22. 50 Pa. 344 (1850).

23. Brief for Appellants at 16-17, Hydrick v. Greene, 154 S.E.2d 565 (S.C. 1967).

24. There were three slightly and not significantly different versions of the limitations. One of these read as follows: "to . . . Ester Bouslaugh, during her natural life, and then, after her decease, then, to the heirs of her body, to them, their heirs and assigns forever . . . ." Hillman v. Bouslaugh, 50 Pa. 344, 345-46 (1850).

against the argument for a words of purchase construction of "heirs"; stating:

> It is admitted, that the rule subverts a particular intention in perhaps every instance; for, as was said in *Roe v. Bedford*, 4 Maule & Selw. 363, it is proof against even an *express declaration that heirs shall take as purchasers.*[25]

South Carolina, however, long before the repeal of the Rule in Shelley's Case, had shown a marked tendency to restrict this intent defeating rule in cases in which additional words evidenced a clear intent *not* to use the "tainted" words to denote an indefinite line of descent.[26] This has been especially true when the word "issue" rather than "heirs of the body" has been used.[27] This position was made very clear in *Green v. Green*[28] in which the only qualifying words to the remainder clause containing the phrase "to the lawful issue of her body" was a subsequent phrase "issue to take *per stirpes*"[29] and yet the court held against application of the rule. Whether Rule in Shelley's Case purists, such as the Pennsylvania judge mentioned above, would agree with that sort of erosion of the *Perrin v. Blake* axiom, and clearly this is substantial rationalization of that axiom, the instant controversy presents an even stronger case for non-application. As the court pointed out:

> [The will under scrutiny here] was obviously prepared by a skilled draftsman who knew the meaning of the words used. . . .
>
> We are not left in doubt in this case as to the meaning of the word "issue" . . . . [T]he testatrix clearly expressed a purpose that "issue" was not used as a word of limitation but one of purchase . . . . As stated by the circuit judge, "when Mrs. Caskey [the testatrix] used the phrase 'as purchasers' in defining the word 'issue' she, in effect, said that the issue of John Henry Hydrick, Sr., shall take as a class on his death directly from me and not as his heirs."[30]

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25. *Id.* at 351 (emphasis added).

26. *See* Blythe v. Goode, 269 F. 544 (4th Cir. 1920); McIntyre v. McIntyre, 16 S.C. 290 (1881).

27. Woodle v. Tilghman, 234 S.C. 127, 129-33, 107 S.E.2d 4, 7-9 (1959). The circuit judge set out a detailed discussion of this matter in his order. Record at 23-25, Hydrick v. Greene, 154 S.E.2d 565 (S.C. 1967).

28. 210 S.C. 391, 42 S.E.2d 884 (1947).

29. *Id.* at 394, 42 S.E.2d at 885.

30. Hydrick v. Greene, 154 S.E.2d 565, 567 (S.C. 1967).

South Carolina does have an open and fair-minded approach to the Rule in Shelley's Case, but this case is a reminder that this 1924 ghost still rattles its chains occasionally raising a sufficient din to strike fear or arouse morbid curiosity in the hearts of the beleaguered South Carolina title searchers.

IV. RESTRICTIVE COVENANTS

A. At What Price Quiet Title?

McCullough v. Urquhart[31] involved an action to affirm title and declare void alleged restrictive covenants on the land in question. In 1938, a group of individuals interested in creating a residential development acquired a 236 acre tract in what is now Forest Acres, a suburb of Columbia. 100 acres of this area became Jackson Heights. In February 1946, the trustee for the developers Urquhart and plaintiff McCullough entered into a contract of sale for four lots shown on a recorded plat of Jackson Heights. In June of that year the owners, having decided to change to corporate form, conveyed all unsold lots to Jackson Heights Corporation. Through inadvertence, three of the four lots were omitted from this deed. In February of 1947, the newly formed Jackson Heights Corporation gave McCullough a deed purporting to convey all four lots. This deed contained the following restriction: "Each lot shall be used only for private residential purposes and there shall be no more than one residence on any lot."[32] McCullough was aware of this restriction at the time of sale. Since this sale he has used three of the lots commercially for the planting and selling of shrubbery.

The only issue before the court on appeal from the circuit court's affirmance of the master's report was the question of whether the property was subject to the restrictions, title having been affirmed without appeal. The plaintiff took the position that the deed was void *ab initio* and, thus, the restrictive covenants therein not binding. Their correlative contention was claim of title by adverse possession under color of the deed. The defendants' main position was that the plaintiffs cannot claim under color of the deed and at the same time attempt to escape the conditions of it. In addition the defendants made the argument that even if the title were acquired by adverse possession, the restrictions would be binding under the theory of negative equitable easements.

31. 248 S.C. 348, 149 S.E.2d 909 (1966).
32. *Id.* at 351, 149 S.E.2d at 911.

The court based its decision for the defendants on the theory of estoppel as set out in *Cruger v. Daniel*.[33] There the court stated:

> [A]ll parties and privies are bound by an estoppel. An estoppel is reciprocal, and binds both parties. Co. Lit., 352, a. A person making a conveyance, who has no title at the time, but afterwards acquires one, is estopped to deny that he was seized at the time of conveyance. So a party accepting a conveyance is estopped to deny his grantor's title.[34]

The court pointed out that though the corporation had no record title to the property at the time of conveyance, the individual owners, who were also the stockholders of the corporation, authorized it to convey title and, thus, represented that the corporation had the right to do so. The court stated: "It is patently true, as stated by the Master in Equity, that 'if they had claimed the McCullough lots because of the error in naming the grantor, no court of equity would sustain their position.' "[35] The court concluded that if the record holders are estopped to claim invalidity, so also are the plaintiffs under the *Cruger* reasoning. The court then held that the deed was effective not only to convey title, but also to bind all parties under the restrictions contained therein.

This decision seems correct if one accepts the reasoning of the estoppel theory. Because the court uses this theory, it does not find it necessary to discuss the negative equitable easement theory or the adverse possession arguments. The arguments by both sides on these questions merit at least some mention. In their brief, defendants contended that under *Pitts v. Brown*[36] a prior general scheme of development as shown by such evidence as a development plat and a pattern of restrictions in prior deeds, gives rise to a negative equitable easement, and thus, the subsequent purchaser of a lot in the general scheme takes subject to the retrictions even when they are omitted from his own deed.[37] The plaintiff had countered with the argument that when claiming adverse possession under color of title, the deed serves

33. McMul. Eq. 157 (S.C. 1841).

34. Cruger v. Daniels, McMul. Eq. 157, 193 (S.C. 1841). This language was quoted in McCullough v. Urquhart, 248 S.C. 348, 354, 149 S.E.2d 909, 912 (1966).

35. McCullough v. Urquhart, 248 S.C. 348, 353, 149 S.E.2d 909, 912 (1966).

36. 215 S.C. 122, 54 S.E.2d 538 (1949).

37. Brief for Defendants-Appellants-Respondents at 7, McCullough v. Urquhart, 248 S.C. 348, 149 S.E.2d 909 (1966).

only to describe the physical boundaries of the property. Further, they argue, in order to apply *Pitts*, the court would have to find that the plaintiff possessed by virtue of a deed from the common grantor, and, the plaintiff contends, this deed is void. Of course the court ruled out both these arguments by using estoppel to deny validity of the deed, but assuming the plaintiffs could claim by adverse possession, the argument that they could use the deed for physical description and ignore the restrictions therein seems extremely weak. Though there are no South Carolina cases exactly in point, the master in equity below indicated that he would have held the plaintiff bound by the restrictions even if he were to sustain the adverse possession under color of title claim.[38] If the issue were ever squarely before the Supreme Court of South Carolina it seems entirely likely that they would take the same view.

The net result of this decision is that McCullough now has a quiet title, but at what price?

B. Subdivision Restrictions

Donald E. Baltz, Inc. v. R. V. Chandler & Co.,[39] also involved an alleged violation of a restrictive covenant. Plaintiff Baltz was the developer of a residential subdivision. The defendant, owner of a forty acre tract abutting a portion of the subdivision, admittedly bought a lot in the subdivision for the purpose of connecting his property to a street entirely within the subdivision. The road through the lot was intended to connect a trailer housing defendant's son and daughter-in-law. The subdivision lots were all subject to the following restrictive covenants:

> 1. No lot shall be used except for residential purposes . . . . 3. No trailer . . . shall at any time be used as a residence temporarily or permanently. . . . 8. This property shall be used for single family residences only . . . .[40]

The plaintiff contended that the defendant's use of the lot as a street was in violation of the restrictive covenants and successfully petitioned for a permanent injunction against this use. Defendant characterized the connection as a driveway, not a

38. Record at 41, McCullough v. Urquhart, 248 S.C. 348, 149 S.E.2d 909 (1966).

39. 248 S.C. 484, 151 S.E.2d 441 (1966). Adopting the method employed by the court in this case, the defendant and plaintiff will be referred to individually, rather than by their corporate identity.

40. *Id.* at 487, 151 S.E.2d at 442.

street, and contended that the "use" of the lot was for general residential purposes, even though the actual residence was not located thereon.

The question of whether the use of a subdivision lot as a means of access to adjacent property is a violation of the restrictive covenant limiting use to residential is a novel one in South Carolina. The court points out that under general property and contract law in this area, it is well established that "restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property; such covenants, however, should not be construed so as to defeat the plain and obvious purpose of the contractual instrument."[41] Thus, though this particular use had never been litigated prior to this case, the contract under discussion seemed to the court too clear for quarrel when covenants one and eight were read together as the court does. The court points to the strong language of both covenants, particularly the use of the word "shall."

Defendants urged the court to consider *Bove v. Giebel*,[42] a very similar factual situation litigated in Ohio, as pursuasive authority. The defendant emphasized the following language from *Bove*:

> If it had been the intention of those who prepared these restrictions to require use not merely "for residence purposes only" but "for residence purposes in the subdivision only," it is apparent that they did not express such an intention.[43]

The South Carolina court makes short shrift of this argument by comparing the very vague language of the *Bove* covenants with the emphatic language of the instant restrictions.

Though the court says nothing about the trailer as an influential factor, one is tempted to conclude that had the defendant's residence been something closer to the other $19,000 to $25,000 homes instead of a direct affront to the dignity of the subdivision the court might not have seen these covenants as quite so emphatic, clear, and unambiguous.

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41. *Id.* at 487, 151 S.E.2d at 443, *quoting* McDonald v. Welborn, 220 S.C. 10, 19, 66 S.E.2d 327, 331 (1951).

42. 169 Ohio St. 325, 159 N.E.2d 425 (1959).

43. *Id.* at 329, 159 N.E.2d at 428.