South Carolina Law Review

Volume 29
Issue 1 *Annual Survey of South Carolina*

Article 12

1977

Property

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PROPERTY

I. Implied Warranty as Applied to Real Estate Sales

In *Lane v. Trenholm Building Co.*,[1] the South Carolina Supreme Court continued the erosion of the doctrine of *caveat emptor* as governing real estate sales in this state. The court decided the novel question of whether a vendor who was not the builder of a new house may be held liable on a breach of an implied warranty theory for damages caused by a defective condition in construction. As significant as its holding that the vendor is liable is the court's analysis of this question in terms of a sale of personal property.

The plaintiff purchased a new home from the defendant who was actively engaged in the real estate business and was a principal developer of the subdivision in which the residence was located. Although the defendant was not the builder of the home, he had, however, filled the lot and sold it to a builder who paid a small down payment and executed a second mortgage in favor of the defendant that was to be retired when the house was sold.[2] The builder substantially completed the house but was unable to sell it. When it became apparent that the builder was going out of business, the defendant acquired the house and lot from the builder who in return satisfied the second mortgage. In addition, the defendant assumed the construction loan mortgage. During March 1971, the defendant sold the house to the plaintiff for $25,000.

A few months later, the plaintiff informed the defendant that the septic tank was not functioning properly. The defendant installed a new septic tank which was also unsuitable. In July 1972, Lane instituted this action against the defendant alleging that the failure of the septic tank system to function properly breached an implied warranty that the house was fit for use as a residence.[3] The lower court agreed and thus ruled "that the doctrine of implied warranty should be extended to the sales of new homes by a vendor, even though he is not the builder, where such vendor is actively engaged in the real estate business and is a

1. 267 S.C. 497, 229 S.E.2d 728 (1976).

2. Record at 161-62.

3. The plaintiff also alleged negligence or fraud. Presiding Judge Harry M. Lightsey, Jr., directed a verdict for the defendant on these causes of action. *Id.* at 204-05.

principal developer of the subdivision in which the premises are located."[4] Characterizing the implied warranty theory as a risk shifting device,[5] the lower court stressed that the defendant had "an opportunity to spread the risk of a non-negligently constructed defective building"[6] since the defendant was in the real estate business and had developed this particular subdivision. The purchaser in this case would have been "left with the entire loss if no remedy such as under implied warranty [was] provided for him."[7]

In affirming the lower court's decision, the South Carolina Supreme Court emphasized that an implied warranty results by reason of the sale: "We hold that when a new building is sold there is an implied warranty of fitness for its intended use which springs from the sale itself."[8] It is significant to note that with the exception of the leading South Carolina case of *Rutledge v. Dodenhoff*,[9] the supreme court did not cite any of the cases that appeared in counsels' briefs. Instead, the court placed reliance on several early decisions[10] which it characterized as rejecting *caveat emptor* and adopting the civil law rule of *caveat venditor* as part of the common law of South Carolina.

The court's initial acceptance of the doctrine of implied warranty as applied to real estate sales was foreshadowed in the decision of *Rogers v. Scyphers*.[11] In the *Rogers* case, the court held that the builder-vendor of a new house would be liable for injuries sustained by the purchaser or his invitees for dangerous, defective construction of which the builder either knew or in the exercise of due care should have known.[12] Although the action was not brought under an implied warranty theory, the court recognized that liability for defects in a house predicated solely on this

4. *Id.* at 207. Other jurisdictions have required that the vendor-builder be a person regularly engaged in the building business so that the sale is of a commercial nature rather than casual or personal. Kols v. Gockel, ___ Wash. 2d ___, 554 P.2d 1349 (1976).

5. Record at 206.

6. *Id.*

7. *Id.*

8. 267 S.C. at 500, 229 S.E.2d at 729.

9. 254 S.C. 407, 175 S.E.2d 792 (1970). For a discussion of this case, see *Contracts, 1971 Survey of S.C. Law*, 23 S.C.L. Rev. 513 (1971).

10. Smith v. McCall, 12 S.C.L. (1 McCord) 220 (1821); Misroon & Timmons v. Waldo & Freeman, 11 S.C.L. (2 Nott & McC.) 76 (1819); Champreys v. Johnson, 4 S.C.L. (2 Brev.) 268 (1809); Timrod v. Shoolbred, 1 S.C.L. (1 Bay) 324 (1793).

11. 251 S.C. 128, 161 S.E.2d 81 (1968). For a discussion of this case, see 20 S.C.L. Rev. 868 (1968).

12. 251 S.C. at 134, 161 S.E.2d at 84.

theory is indicative of the trend of law in this field.[13]

The court in *Lane* did not discuss the impact of its decision on the earlier cases of *Cohen v. Blessing*[14] and *Frasher v. Cofer*.[15] In the *Cohen* case, an action was brought by a purchaser to recover damages from the owner-vendor for the sale of a dwelling allegedly infested with termites. The court held that the complaint stated a cause of action for fraud and deceit[16] but refused, however, to recognize an implied warranty as to fitness where the sale was by the owner-vendor rather than by the builder-vendor.[17] In the *Frasher* case, which involved the sale of a home by the owner-occupant rather than a builder-vendor, the court held that an implied warranty of fitness did not arise in such a sale.[18]

In *Lane*, the court did, however, comment on dicta that appeared in *Rutledge v. Dodenhoff*,[19] the leading South Carolina case on the implied warranty theory. In the *Rutledge* decision, the court concluded that a warranty of workmanship and fitness for the intended use of a new home would be implied where the conveyance was from a builder-vendor.[20] The court in *Lane* relied on the following language from the *Rutledge* case which analogized the purchase of a dwelling to the sale of personalty:

> Both the seller and the purchaser know that the essence of the transaction is the purchase of a habitable dwelling and that a knowledgeable inspection by the buyer is impossible. Since this

13. *Id.* at 134, 161 S.E.2d at 83. The English courts were the first to develop an exception to the doctrine of *caveat emptor* in the sales of real estate by adopting the rule that where a home is purchased during the course of construction, there is an implied warranty by the builder-vendor that it will be completed in a workmanlike manner. Miller v. Cannon Hill Estates Ltd., [1931] 2 K.B. 113. For a discussion of the introduction of *caveat venditor* to the American law of real property, see Haskell, *The Case for Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 636 (1965).

14. 259 S.C. 400, 192 S.E.2d 204 (1972).

15. 251 S.C. 112, 160 S.E.2d 560 (1968). For a discussion of this case, see 20 S.C.L. REV. 864 (1968).

16. 259 S.C. at 403, 192 S.E.2d at 205-06. Prior to the acceptance by the courts of the implied warranty theory as applied to the sale of a dwelling, actions for defects were brought often under the theories of mistake or fraud and deceit. *See* 54 N.C.L. REV. 1097, 1098-1101 (1976). *But see* Lawson v. C & S Nat'l Bank, 259 S.C. 477, 193 S.E.2d 124 (1972). In the *Lawson* decision, the court addressed the issue of the application of the doctrine of *caveat emptor*: "The appellant asserts that it was entitled to a directed verdict under the doctrine of *caveat emptor*. The short answer to this question is that the doctrine of *caveat emptor* does not apply in cases of fraud." *Id.* at 486, 193 S.E.2d at 129.

17. 259 S.C. at 403-04, 193 S.E.2d at 206.

18. 251 S.C. at 116, 160 S.E.2d at 561-62.

19. 254 S.C. at 414, 175 S.E.2d at 795.

20. *Id.*

> is true, it is proper that there should be an implied warranty that the dwelling is fit for the purposes for which it is intended.[21]

Expanding this concept of viewing the transaction as primarily the sale of a dwelling, the *Lane* court stated:

> A house is the sale of a product, similar to the sale of personalty. Once the court recognizes the essence of the transaction is the sale of a product with a clearly defined proposed use, there is little reason to apply ancient doctrines of real property law which are inconsistent with the current and historical treatment of sales of personalty in this State.[22]

The court's characterization of a house as a product permits it to dismiss the doctrine of merger of warranties in a deed, applicable to real estate sales, as having "little relevancy to the sale of a product, whether it is personalty or a building."[23] The court indicates, however, that the doctrine of implied warranty will not be expanded to reach a sale of undeveloped land:

> When land is conveyed, there is often no clearly defined objective in the transfer and it would be impossible to imply a warranty of fitness for any purpose. Even when a particular purpose is contemplated, as, for example, by restrictive covenants, the suitability of the land may depend on architectural proposals or other matters entirely independent of the conveyance.[24]

Emphasis was placed on the ability of the purchaser to inspect undeveloped land. The court stated "when the law denies the purchaser of [unimproved] real estate the benefit of an implied warranty, the consequences are generally not unfair or unjust."[25] The court recognized, however, the recent North Carolina decision of *Hinson v. Jefferson*[26] which implied a warranty of a parcel of land based on restrictive covenants in the deed.[27] In *Hinson*, the court held that when a deed contains a restrictive covenant

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21. *Id.*

22. 269 S.C. 501, 229 S.E.2d at 730.

23. *Id.*

24. *Id.*; *cf.* Lawson v. C & S Nat'l Bank, 259 S.C. 477, 193 S.E.2d 124 (1972) (action by purchasers who built on lots allegedly filled with unsuitable materials and capped with clay). *See also* Bennett v. Columbus Land Co., ___ Mich. App. ___, 246 N.W.2d 8 (1976) (court ruled that an implied warranty on the sale of an undeveloped lot was not an issue under the U.C.C.).

25. 267 S.C. at 502, 229 S.E.2d at 730.

26. 287 N.C. 422, 215 S.E.2d 102 (1975). For an analysis of this decision, see 54 N.C.L. REV. 1097 (1976).

27. 269 S.C. at 502, 229 S.E.2d at 730 n.2.

that limits the use of conveyed property to one specific use, the grantor implicitly warrants that the land conveyed was at the time of the conveyance usable for the purpose to which it was specifically limited.[28]

The defendant in *Lane* asserted that it could not be liable as a matter of law because it was not the builder of the house.[29] It maintained that the warranty flowed from the builder since the defendant, as vendor, had no control over the construction.[30] Additionally, the defendant argued that its position was similar to that of the lending institution holding the first mortgage.[31] Contending that its position was also no different from that of any other purchaser, the defendant attempted to place itself within the owner-occupant exception of *Frasher*[32] and *Cohen*.[33] Because the purchaser, not knowing who constructed the dwelling, could not have relied on the skill of the defendant, the court recognized that the ratonale of *Rutledge* was not fully applicable in this case. Rejecting these arguments, the court stated there are "other, more elementary reasons, why an implied warranty should attach to the sale of this house."[34]

The supreme court then discussed the doctrines of *caveat emptor* and *caveat venditor*. Relying on several early South Carolina decisions,[35] it concluded "the court in this State has consistently rejected *caveat emptor* and adopted the civil law rule of *caveat venditor* as part of the common law of South Carolina."[36] Addressing the defendant's argument that as a matter of law it could not be held liable because it was not the builder of the house, the court stated the following:

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28. 287 N.C. at 435, 215 S.E.2d at 111.

29. Brief for Appellant at 2.

30. *Id.* The vendor's absence of control over the builder was raised as a similar defense in Bolkum v. Staab, 132 Vt. 467, 346 A.2d 210 (1975). The court held that the implied warranty arose from the business of selling.

31. Brief of Appellant at 5. *Accord*, Annot., 39 A.L.R.3d 248 (1971); *but see* Connor v. Great Western Sav. & Loan Assoc., 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968).

32. 251 S.C. 112, 160 S.E.2d 560 (1968).

33. 259 S.C. 400, 193 S.E.2d 204 (1972). The owner-occupant exception has been the subject of litigation in other jurisdictions. *E.g.*, Casavant v. Campopiano, 114 R.I. 24, 327 A.2d 831 (1974). In the *Casavant* case, the court held that the mere fact that the builder-vendor rented out a house for less than one year did not make a subsequent sale of the house a resale of a used house, thereby excluding application of an implied warranty of workmanship and habitability.

34. 267 S.C. at 501, 229 S.E.2d at 730.

35. *See* note 10 *supra*.

36. 267 S.C. at 502, 229 S.E.2d at 730.

> The law should not orphan the purchaser of a house, who has likely invested his life savings and executed a 20, 30, or 40 year mortgage, by operation of the doctrine of *caveat emptor*. Trenholm placed the house in the stream of commerce and exacted a fair price for it. Its liability is not founded upon fault, but because it has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects.[37]

The *Lane* court's analysis that the vendor should be liable because he "placed the house in the stream of commerce" can be contrasted with the use of this phrase in other decisions. One reason frequently asserted for applying strict tort liability is that the business entity which places a defective product in the stream of commerce should be liable irrespective of its classification as manufacturer, seller, or lessor.[38] In the *Lane* case, the court recognized the legislative adoption of strict tort liability upon the suppliers of defective products.[39] Although the court stated that the implied warranty extends only to the sale of new dwellings, the analysis it adopted has been used in other jurisdictions to apply this warranty in a sale to a subsequent purchaser[40] where the defects are latent and their origin can be traced to the builder-vendor.[41]

The supreme court has given considerable attention to the implied warranty theory but there are, however, several subsidiary issues which remain to be addressed. The South Carolina decisions have not clearly established the conditions which are necessary in order to have a breach of warranty. In *Rutledge v. Dodenhoff*, the court stated:

> [I]t is proper that there should be an implied warranty that the dwelling is fit for the purpose for which it is intended. We therefore hold that in the sale of a new house by the builder-vendor there is an implied warranty that the house was built in a reasonably workmanlike manner and is reasonably suitable for habitation.[42]

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37. *Id.* at 503, 229 S.E.2d at 731.

38. *E.g.*, Delaney v. Towmotor Corp., 339 F.2d 4 (2d Cir. 1964); Kregler v. Eichler Homes, Inc., 269 Cal. App.2d 224, 74 Cal. Rptr. 749 (1969).

39. 267 S.C. at 504, 229 S.E.2d at 731 n.3.

40. Barnes v. MacBrown & Co., ___ Ind. ___, 342 N.E.2d 619 (1976). *Accord*, 24 ALA. L. REV. 332, 340 (1970); 22 S.C.L. REV. 462, 466 (1970).

41. Barnes v. MacBrown & Co., ___ Ind. at ___, 342 N.E.2d at 620.

42. 254 S.C. at 414, 175 S.E.2d at 795.

In *Lane*, the supreme court stressed that "an implied warranty does no more than fulfill the reasonable expectations of the parties."[43] Whether the court considers these standards to be synonymous is unclear. However, the *Lane* decision does indicate that the warranty is applicable only to latent defects:

> Under the rule of *caveat venditor*, a sale "raises an implied warranty (against latent defects) from the fairness and fullness of the price paid, upon this clear and reasonable ground, that in the contract of sale, the purchaser is not supposed to part with his money, but in expectation of an adequate advantage, or recompense." . . . "Selling for a sound price raises an implied warranty that the thing sold is free from defects, known and unknown (to the seller)."[44]

The court has not yet reached the question of whether an implied warranty extends to the sale of a new commercial dwelling. This question has been given limited consideration in other jurisdictions.[45]

The South Carolina Supreme Court has not considered the issue of the duration[46] of the implied warranty and has only briefly addressed the extent to which liability can be disclaimed. In a footnote in the *Lane* case,[47] the court stated that the South Carolina amendment to the Uniform Commercial Code[48] requires any disclaimer of the warranty to be specific and any ambiguity to be resolved against the seller. Although the court stressed that the sale of a dwelling is analogous to the sale of a product, the court did not directly apply the Uniform Commercial Code: "We are not unmindful that the seller may not have been a merchant as defined by S.C. Code § 10.2-314(1) [S.C. CODE ANN. § 36-2-314(1) (1976)], and, therefore, if this was a transaction covered by the UCC, perhaps a warranty would not have existed."[49] Nev-

43. 267 S.C. at 503, 229 S.E.2d at 731.

44. *Id.* at 503, 229 S.E.2d at 730 (citations omitted). Justice Ness noted that the language in parentheses was his interpolation. *Id.*

45. Dawson Indus., Inc. v. Godley Constr. Co., 29 N.C. App. 270, 224 S.E.2d 266, *discretionary review denied*, 290 N.C. 551, 226 S.E.2d 509 (1976).

46. The duration of the warranty has been held to be for a reasonable time. *E.g.*, Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966). This case is cited in Rutledge v. Dodenhoff, 254 S.C. at 413, 175 S.E.2d at 795.

47. 267 S.C. at 504, 229 S.E.2d at 731 n.3.

48. S.C. CODE ANN. § 36-2-316(2) (1976).

49. 267 S.C. at 503, 229 S.E.2d at 731. The issue of whether this warranty can be disclaimed and under what conditions has been considered by several jurisdictions. The courts have emphasized that clear and unambiguous language brought to the attention

ertheless, it would seem that any disclaimer in a real estate sale should be specific, unambiguous and brought to the attention of the purchaser. Some doubt exists as to which statute of limitations is applicable to an implied warranty action. The general six-year statute includes actions upon a contract, "express or implied."[50] However, a ten-year statute is applicable to actions against architects, engineers, and contractors to recover for any deficiency in design, planning, or supervision of construction in connection with an improvement to real property.[51]

It is certain that *Lane v. Trenholm Building Co.* will be cited frequently both for its holding that the implied warranty extends beyond the strict builder-vendor situation and for its analysis in terms of personal property concepts. There are, however, several subsidiary questions which remain to be answered by the court in subsequent cases.

II. QUANTUM OF ESTATE

County of Abbeville v. Knox[52] involved the issue of whether a deed in its granting clause created a fee simple absolute estate that could not be reduced by subsequent provisions in the deed. In 1965, the county conveyed 1.96 acres of land to the defendant for $100.00. The deed contained the following granting and habendum clauses:

> Have Granted, Bargained, Sold and Released, and by these presents do grant, bargain, sell and release unto the said James W. Knox, his heirs, assigns and successors.
>
> To Have and To Hold, all and singular the said premises

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of the buyer is a basic requisite. *E.g.*, Griffin v. Wheeler-Leonard & Co., ___ N.C. ___, 225 S.E.2d 557 (1976); Omaha Homes for Boys v. Stitt Constr. Co., 195 Neb. 422, 238 N.W.2d 470 (1976). "As is" has been held to be insufficient to meet the test of clear and unambiguous language. *See* Sallinger v. Mayer, 304 So.2d 730 (La. App. 1974).

50. S.C. CODE ANN. § 15-3-530 (1976).

51. S.C. CODE ANN. § 15-3-640 (1976) states:

> All actions to recover damages for any deficiency in the design, planning, supervision, observation of construction, construction of, or land surveying in connection with, an improvement to real property, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying in connection with, such an improvement within ten years after substantial completion of such an improvement.

52. 267 S.C. 38, 225 S.E.2d 863 (1976).

before mentioned unto the said James W. Knox, his heirs and assigns forever.[53]

After the property description, the following language appeared in the deed:

> [I]t being understood by all parties that this conveyance is being given for the purpose of further industrial development to the extent that there will be constructed, or erected, thereon a facility in keeping with the other development of the Abbeville County Industrial Park to be known as "Knox Machine Works" . . . provided that such development and/or construction shall be done within a period of five years, and if not done within this number of years the County of Abbeville may have the privilege to re-purchase said property at the above consideration ($100.00) plus any costs of development, taxes and simple interest at six (6%) percent.[54]

The county brought this action against the defendant alleging that the provision following the description in the deed constituted a fee simple subject to a condition subsequent. The lower court, relying exclusively on *Byars v. Cherokee County*,[55] agreed.

The South Carolina Supreme Court reversed the lower court's decision and determined that the estate conveyed to the defendant was a fee simple absolute.[56] The court recognized two principles which serve as guidelines in the construction of a deed. One rule is "that the intention of the grantor must be ascertained and effectuated if no settled rule of law is contravened."[57] The other is that a fee simple absolute "created in the granting clause cannot be cut down by subsequent provisions in the deed."[58] In attempting to reconcile these conflicting principles, the court distinguished two South Carolina cases raising similar questions.

In *Byars v. Cherokee County*, the grant to the county was without any words of inheritance. The habendum clause contained the following language:

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53. *Id.* at 39, 225 S.E.2d at 864.

54. *Id.* at 39-40, 225 S.E.2d at 864.

55. 237 S.C. 548, 118 S.E.2d 324 (1961).

56. 267 S.C. at 43, 225 S.E.2d at 866.

57. *Id.* at 40, 225 S.E.2d at 864 (citing Southern R.R. v. Smoak, 243 S.C. 331, 133 S.E.2d 806 (1963)).

58. 267 S.C. at 40, 225 S.E.2d at 864. For a discussion of the South Carolina law pertaining to conflicts between the granting and habendum clause, see Note, The Effect of a Conflict Between the Granting and Habendum Clauses in Deeds in South Carolina, 10 S.C.L.Q. 431 (1957).

> "TO HAVE AND TO HOLD all and singular the said premises before mentioned unto the said Cherokee County — its — successors and Assigns forever.
>
> 'Provided that in case the said lot of land shall cease to be used by the County of Cherokee for curing house purposes that the said Forrest Byars shall have the right to repurchase the said lot of land and have same reconveyed to him upon the payment of the said purchase price of $50.00. Cherokee County to have the right to remove therefrom at that time, any improvements placed on the said land if desired.' "[59]

The court in *Byars* determined that the above provision of the habendum created a fee simple subject to a condition subsequent.[60] However, a strong argument could be made that the deed contained an option to repurchase.[61] If the latter argument were accepted, the option could be void under the Rule Against Perpetuities.[62] In *County of Abbeville v. Knox*, the court cited *Byars* for the rule that where no words of inheritance or succession were used in the granting clause, this leaves the quantum of the estate subject to explanation in subsequent provisions of the deed, but concluded that the *Byars* decision was inapplicable to the deed in *Knox* because a fee simple absolute estate was conveyed in the granting clause by the "use of clear and plain words of inheritance."[63]

Rejecting the application of *Byars v. Cherokee County*, the court focused on *Stylecraft, Inc. v. Thomas*[64] in which the grantor's assignee claimed that he owned a reversionary interest in a tract of land conveyed to the trustees of a school. The parties in *Stylecraft* stipulated that the sole issue was the quantum of the estate conveyed by a deed containing the following pertinent language:

> I, T.C. Hammond . . . have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Tom McCain, James Smith and William Hammond, their successors and assigns, All that lot or parcel of land

59. 267 S.C. at 42, 225 S.E.2d at 865.

60. 237 S.C. at 555-56, 118 S.E.2d at 328.

61. 8A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY §§ 4443-4445 (1962 ed.) [hereinafter THOMPSON], *but see* THOMPSON § 1874 (1975 Supp.).

62. J. GRAY, THE RULE AGAINST PERPETUITIES 330 (1942 ed.).

63. 267 S.C. at 42, 225 S.E.2d at 865.

64. 250 S.C. 495, 159 S.E.2d 46 (1968).

> in the State & County above named . . . . It is specifically understood and agreed by all parties that the land is to be used for school purposes only — should it ever be used for other purposes the said property is to be revert [*sic*] to him the said T.C. Hammond or his heirs and assigns forever.[65]

The habendum clause contained the following provision:

> TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Tom McCain, James Smith and William Hammond, their successors and assigns forever.[66]

The supreme court held in *Stylecraft* that the restrictive words following the description of the property were ineffectual to cut down the fee simple which it considered to have been conveyed in the granting clause.[67] It has been questioned, however, whether the granting clause was sufficient to convey a fee simple.[68] The *Knox* court cited *Stylecraft* as support for the established rule that "a complete and absolute estate created in the granting clause cannot be cut down by subsequent provisions in the deed."[69]

Clearly, words of inheritance were used in the deed in the *Knox* case; the supreme court did not, however, address the issue of whether the deed could be construed so as to contain an option to repurchase the property. This point was raised by counsel in the lower court where it was asserted that if the language of the deed were construed to be an option to repurchase, the option had to be exercised within a reasonable time.[70] Since this requisite was not met, the defendant argued that the option had lapsed.[71]

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65. *Id.* at 496-97, 159 S.E.2d at 46.

66. *Id.* at 497, 159 S.E.2d at 46.

67. *Id.* at 498, 159 S.E.2d at 47.

68. *Id. Cf. Property, 1968 Survey of S.C. Law*, 20 S.C.L. REV. 650 (1968) (noting court's silence about omission of words of inheritance).

69. 267 S.C. at 40, 225 S.E.2d at 864.

70. Record at 53.

71. *Id.* The supreme court reviewed the requirements for the creation and exercise of an option incident to a lease in the recent case of Cotter v. James L. Tapp Co., ___ S.C. ___, 230 S.E.2d 715 (1976). The order of the lower court in the *Cotter* case was adopted as the directive of the supreme court. The following language from that decision is indicative of the court's attitude toward the construction of options:

> Finally, the courts have recognized that harsh results in option cases are necessary to further more compelling considerations of public policy. When an individual grants an option, he ties up his rights and property for a specified period of time without binding the other side. For this reason he is entitled to strict compliance with the limits and other terms of the option. Thus, if the

The court addressed briefly the argument asserted by the appellant pertaining to the intent of the grantor. Stressing that it is essential that "long established law affecting title to real estate be maintained,"[72] the court then quoted from *Creswell v. Bank of Greenwood*:[73]

> The [intent of the grantor] is to be achieved in the construction of writings, if ascertainable therefrom and consistent with applicable legal principles; but intention is unavailing to avoid [the intent of the grantor] where words of settled legal import are used and contrary principles are encountered.[74]

Although the court decided the issue correctly in *County of Abbeville v. Knox*, the cases upon which it relied continue to be vulnerable to criticism.

III. Restrictive Covenants: Failure to Show a Common Scheme

Vickery v. Powell[75] was initiated as a class action by owners and the landowners' association of a subdivision known as "Rolling Acres" in Anderson County against other landowners. The plaintiffs sought injunctive relief based on the contention that restrictions against the use of mobile homes were enforceable *inter sese* on the theory of mutual covenants or negative equitable easements.

The following restrictions were incorporated into all the deeds to land sold between two creeks in Rolling Acres subdivision:

> For the benefit of the Grantor and Grantee, the following restrictions are hereby imposed on the above described property: (a) no limitations of size of dwellings; (b) all dwellings to be constructed of new materials on the outside and all wooden or frame exposed areas are to be painted; (c) no tin roofs permitted on any dwellings; (d) no outside sanitary buildings; (e) no outbuildings or sheds or barns to be permitted on building lots

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optionee fails to comply with the terms of the option, even though he may have an excuse, he must bear the responsibility and not the optionor.

___ S.C. at ___, 230 S.E.2d at 719. For a discussion of this case, see *Contracts, 1976 Survey of S.C. Law*, 29 S.C.L. Rev. ___ (1977).

72. 267 S.C. at 43, 225 S.E.2d at 865.

73. 210 S.C. 47, 41 S.E.2d 393 (1947).

74. *Id.* at 55, 41 S.E.2d at 397.

75. 267 S.C. 23, 225 S.E.2d 856 (1976).

> unless they are completely painted . . . ; (h) no trailer home or mobile home will be allowed; . . . .[76]

Although most of the defendants lived in mobile homes, the action was dismissed against one Vickery (not the plaintiff) whose home, having the appearance of a mobile home, was found by the referee not to be within the prohibition of the deed.[77]

In the report of the special referee, which became the order of the lower court, it was determined that the plaintiff had proved a common scheme of development in the area between the two creeks, in that there was absolute consistency in the restrictions, without a single departure.[78] The supreme court reversed and framed its analysis in terms of "whether a uniform set of restrictions imposed in deeds to an identifiable portion of a subdivision created a common scheme of development initiating mutually restrictive covenants enforceable by any grantee of a restricted deed against any other grantee."[79]

Crucial to the court's determination that the restrictions did not embody a common scheme of development giving rise to covenants enforceable *inter sese* was the fact that there was no dedication to residential use embodied in the deeds.[80] Furthermore, there was no statement of purpose other than the language that the restrictions were for the benefit of the grantor and grantee. The court noted that the record revealed that the property was available for commercial purposes and at the time of the suit, a repair garage and a nursery were operating within the area.[81]

The court distinguished two earlier cases upon which the special referee relied. In *Martin v. Cantrell*,[82] the deed prohibited the use of land for "purposes other than residential" and there had been only one minor exception since the establishment of the subdivision. The second decision relied upon by the lower court was *Pitts v. Brown*[83] in which the deed contained no restrictions. The court found, however, that twenty-eight years of acquiescence by all owners in a common scheme subjected subsequent

76. *Id.* at 26, 225 S.E.2d at 857-58.
77. *Id.* at 25, 225 S.E.2d at 857.
78. Record at 118. Thus the lower court ordered that the mobile homes situated on the restricted area be removed. *Id.* at 124.
79. 267 S.C. at 24-25, 225 S.E.2d at 857.
80. *Id.* at 26-27, 225 S.E.2d at 858.
81. *Id.* at 27, 225 S.E.2d at 858.
82. 225 S.C. 140, 81 S.E.2d 37 (1954).
83. 215 S.C. 122, 54 S.E.2d 538 (1949).

unrestricted deeds to the scheme which was visually apparent.[84] In *Vickery v. Powell*, the court emphasized that the record showed that mobile homes had been used in Rolling Acres since its inception.

The supreme court then relied on the fact that an owner was able to build a residence that resembled a mobile home as further evidence of the lack of a scheme or purpose. This implied that a covenant excluding mobile homes might be unenforceable even if there were a restriction to residential use. In his concurring opinion, Associate Justice Ness clarified this language in the majority's opinion:

> I expressly do not join the portion of the majority opinion which intimates that properly drafted covenants restricting land to residential use and excluding mobile homes within the meaning of residential use would be invalid if a person can build a permanent home which resembles a mobile home. I do not believe the majority opinion will be so interpreted, but if it is, I do not share that position.[85]

Justice Ness stressed that the restrictions did not prohibit the property from being developed for industrial, commercial, or residential use. This negated any scheme of development which was essential for the remedy being sought.

The court did not cite *Heffner v. Litchfield Golf Co.*,[86] in which the deed recited that the covenants were made solely for the benefit of the grantor and grantee. Additionally, provisions in the deeds from the common grantor restricted the lots to residential use and stated that the covenants could be changed at any time by mutual consent of the parties. The court in *Heffner* determined that these provisions negated the implication of a common scheme.[87] Unless the common grantor manifested his intention to subject the parcels conveyed to common restrictions for the bene-

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84. *Id.* at 129, 54 S.E.2d at 541.

85. 267 S.C. 29, 225 S.E.2d 859 (Ness, J., concurring).

86. 258 S.C. 477, 189 S.E.2d 3 (1972).

87. *Id.* at 451, 189 S.E.2d at 5. The court in *Heffner* emphasized that its decision did not apply to incompatible uses:

> We add that the use to which Litchfield proposes to put these lots is consistent with the combined recreational and residential character of the development. We do not intend to imply that the residents of this subdivision would be without remedy against an incompatible use. That question has not been presented.

Id. at 452, 189 S.E.2d at 5.

fit of all parties, a common scheme could not be implied. In *Vickery v. Powell*, the court did not address the issue of the effect of the language in the deed which stated that the restrictions were imposed for the benefit of the grantor and grantee. The court in *Heffner* emphasized the presence of similar language in the deeds, and thus it could have been argued in *Vickery* that the absence of the retention by the developer of a right to modify the restrictions as to any property was evidence of an intent to impose a common scheme.

Since it was apparent, however, from the record that numerous exceptions had occurred in the subdivision, the court could have approached the question of enforcement from this perspective. In this connection, the appellants had maintained that even "if a negative equitable easement does exist, or if there is mutuality of covenant and consideration between the grantees, the respondents should be denied injunctive relief on the ground of laches and estopped from enforcing such."[88] The court referred to this argument but used it as further evidence of the lack of a common scheme. The importance of the existence of a common scheme is also reflected in *Circle Square Co. v. Atlantis Development Co.*,[89] which was also decided last year. If a common scheme is intended, *Vickery v. Powell* indicates there should be provisions in the deed which clearly evidence that intention.

IV. Restrictive Covenants: Effect of Past Violations on Enforcement *Inter Sese*

In *Circle Square Co. v. Atlantis Development Co.*,[90] the supreme court addressed several important questions pertaining to the enforcement of restrictive covenants where prior unchallenged violations of those covenants existed. This case originated as an action seeking to enjoin permanently the construction of a proposed shopping center.

In 1956 Hilton Head Company, owner of property in the Forest Beach subdivision of Hilton Head Island, executed and recorded a declaration of covenants which "established a plan or scheme of development for the property."[91] The subdivision was divided into categories according to usage: residential, semi-

88. 267 S.C. at 23, 225 S.E.2d at 857.
89. ___ S.C. ___, 230 S.E.2d 704 (1976), discussed in Part IV of this survey.
90. ___ S.C. ___, 230 S.E.2d 704 (1976).
91. *Id.* at ___, 230 S.E.2d at 705.

residential, commercial for private use, and roadside areas and parks for public use. The semi-residential areas were designed to form a buffer between residential and commercial areas. Semi-residential use was defined in the declaration as "buildings in the nature of motels, multiple-unit apartment houses and any accompanying facilities, such as restaurants and swimming pools."[92] Additional restrictions were placed upon each use category. Furthermore, the declaration specifically provided that the restrictive covenants were to run with the land and were to be enforceable by persons subsequently acquiring property in the subdivision. Written consent of the owners of two-thirds of the acreage was necessary to change any of the restrictions imposed by the declaration.

Atlantis Development Company, respondents, having acquired property subject to the semi-residential restriction, had, prior to this action, constructed a condominium complex. Across the street from this complex was a motel owned by the respondents. The proposed shopping center was to have been located in front of the condominium complex. The following two issues were submitted to the lower court for determination:

> [W]hether the proposed use by respondents constituted an allowed usage of the property under the semi-residential restrictions imposed by the Declaration of The Hilton Head Company, and if not, were the appellants barred by laches, waiver or estoppel from asserting objections to such use.[93]

Relying on Hilton Head Company's reservation in the declaration of the right to prior approval of all architectural plans, the lower court concluded that the proposed use was permissible and thus denied injunctive relief since the shopping center had received this requisite approval. Furthermore, the lower court noted that a shopping area had been operating for an undetermined number of years in connection with another motel. No court action had been brought to enforce the restrictions against the owner. This fact was interpreted by the lower court as being indicative of the intent of the parties regarding the construction of the restrictions.

The supreme court reversed the lower court's decision. Addressing the lower court's reliance on the architectural approval, the supreme court stated that this approval cannot be equated

92. *Id.*
93. *Id.* at ____, 230 S.E.2d at 706.

with approval of the use of the property.[94] Hilton Head Company merely was exercising a reserved right to review architectural standards. As to the lower court's statement that the proposed shopping center would be similar to one already being operated in the same area, the supreme court replied:

> The scheme of development is not ambiguous and requires no resort to matters not within the four corners of the Declaration. Appellants and respondents have agreed that the present shopping center on the premises of The Hilton Head Inn is a major deviation from the terms of the restriction [*sic*] covenant. However, it is also clear that it is the only main deviation in an otherwise uniform pattern of motel, hotel, and multi-unit apartment development.[95]

The court further emphasized that "resort to the construction of a contract by a party to it is only done where . . . there is doubt as to the intended meaning . . . ."[96]

In analyzing the issue of whether the proposed shopping center was an allowed usage, the supreme court stated that the scheme of development as evidenced by the declaration must be viewed in its entirety. The court rejected the argument that the shopping center could be considered as falling within the term "accompanying facilities" as used in the declaration.[97] Furthermore, the absence of space limitations regarding density in the semi-residential area led the court to conclude that, by the terms of the declaration, projects such as that proposed by the respondents were "clearly contrary to the expressed scheme of the declarants."[98]

Having recognized that violations of the restrictions had occurred, the court then addressed the issue of whether this action was barred by laches, waiver, or estoppel. Since these violations had not occurred prior to 1963 when the respondent acquired the property at issue, the court stated no evidence existed to support any reliance by the respondents regarding the permissibility of retail shops in the semi-residential area.[99] The court then addressed the question of the extent to which violations of the cove-

94. *Id.* at ____, 230 S.E.2d at 707.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at ____, 230 S.E.2d at 708.

nants within a general scheme of development affect the present enforcement of those covenants by a court of equity. The court quoted from *Pitts v. Brown*[100] in which it was determined that there was a general scheme of development even though previous violations of the covenants had been established: "But the violation of some of the restrictions by some of the purchasers of lots in the tract, without action by appellant, does not affect his right to enforce the restrictions against the respondents."[101]

Stressing that the deviations in *Circle Square* were insufficient to set aside the declaration, the court stated:

> A study of the record convinces us that even the existence of the shopping complex at the Hilton Head Inn together with the other five businesses located within the restricted area have not imposed such a radical change in the area that the object and purpose of creating a buffer zone between strictly residential and commercial has been destroyed.[102]

Therefore, restrictive covenants will continue to be enforced if they "remain of substantial value, even though because of changed conditions, a hardship will be visited on the servient estate."[103] The court emphasized that property owners are currently relying on the restrictive covenants and, consequently, the court cannot "endorse a change while the development scheme accomplished by the restrictive covenants is still useful and working."[104]

Circle Square and *Vickery v. Powell*[105] are significant because they indicate the requisites for enforcing restrictive covenants *inter sese*. In *Vickery*, the deeds contained no other restrictions in addition to the eleven set forth in the court's opinion. Therefore, the court did not find a common scheme of development which was essential for *inter sese* enforcement. The simplicity of the restrictions in *Vickery v. Powell* can be contrasted with the elaborate and comprehensive scheme evidenced in the deeds involved in the *Circle Square* case. With these decisions, the supreme court considered both ends of the spectrum regarding enforcement *inter sese* of restrictive covenants.

Kathleen E. Crum

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100. 215 S.C. 122, 54 S.E.2d 538 (1949).
101. *Id.* at 132, 54 S.E.2d at 543.
102. ___ S.C. at ___, 230 S.E.2d at 709.
103. *Id.*
104. *Id.*
105. 267 S.C. 23, 225 S.E.2d 856 (1976).