Supreme Court of Ohio.
WALLACE et al.
v.
CLIFTON LAND CO.

No. 14751.
July 2, 1915.

Error to Court of Appeals, Cuyahoga County.

Action by one Wallace and others against the Clifton Land Company. Judgment for defendant on appeal from common pleas to court of appeals, and plaintiffs bring error. Reversed and remanded.

On the 23d day of May, 1914, plaintiffs in error filed a petition in common pleas court of Cuyahoga county, averring that they were owners of lots in what is known as the Clifton Park Addition to the city of Lakewood; that this addition consists of about 90 acres, subdivided into 229 lots, all devoted exclusively to residence purposes; that the allotment was laid out by the Clifton Park Land & Improvement Company according to a general plan whereby uniform restrictions were imposed upon the lots thereafter sold, such restrictions running for a period of 50 years from the date of the respective deeds, it being specially covenanted by the land company in each deed 'that all sales or leases of lots in such allotment, similarly located, should be made subject to like restrictions as to the use of the same.' Plaintiffs further aver that the defendant in error has acquired title to sublots 189, 209 and parts of sublots 188 and 190, through mesne conveyances from the grantees of the original proprietors of this subdivision, and that defendant proposes to devote these lots or part thereof to road and street purposes, and pray for an injunction restraining it from making any other or different use of said lots than as provided in the original deed therefor from the Clifton Land & Improvement Company.

The defendant for answer admits that it proposes and intends to locate certain streets on the lots described in the petition; avers some streets are now located on a portion of said premises, formerly owned by said Clifton Park Land & Improvement Company, and that said streets are partially graded and sidewalks laid and are open for general use; denies the plaintiffs have any interest in or right to any portion of the premises described in the petition, and asks that petition of plaintiffs be dismissed, and that plaintiffs may be enjoined from further interfering in any manner with the defendant in its use and occupation of said premises. The cause was tried in the common pleas court, which court granted a perpetual injunction against the defendant, restraining it from using any lots described in plaintiffs' petition for road or street purposes.

An appeal was taken to the court of appeals, and that court, on the evidence submitted, made the following finding of fact:

'That in or about the year 1900, the Clifton Park Land & Improvement Company laid out and alloted for residence purposes a considerable tract of land known as 'Clifton Park' within the limits of what is now the city of Lakewood, Cuyahoga county, bounded by Lake Erie on the north, by Rocky river on the west, and on the south by the tracks of the New York, Chicago & St. Louis Railroad Company, except as hereinafter shown. A substantial copy of said plat is hereto attached and marked 'Exhibit A.' In 1904 a plat of a portion of said property was offered and the streets as thereon shown dedicated to the then hamlet of Lakewood which was approved and the streets accepted, a copy of which plat is hereto annexed and marked 'Exhibit B.' That the general plan of said allotment adopted by said company provided for the opening of certain roadways or streets, excepting a part of certain low lands bordering on Rocky river and Lake Erie and certain other lots, paths, and roads to be thereafter used and enjoyed by lot owners in Clifton Park in common; that said plan also provided for the restriction of all sublots in said allotment to use for residence purposes only, and that the same should not be used for any business purpose, or any intoxicating liquors sold or exposed for sale thereon; it also provided that no building should be placed upon any lot nearer than 10 feet to either of the side lines of said lot without the consent of the adjoining owners, nor within a given

distance from the street lines, nor that any house to be built upon any sublot should cost less than a certain fixed sum. The Clifton Park Land & Improvement Company also held out to purchasers of lots, that similar restrictions would be placed in all sales or leases of lots similarly situated thereafter made. None of said restrictions were applicable to or intended to apply to said block C, except the restrictions against business uses and the sale of liquor.

'On April 11, 1913, a deed to sublot No. 209 in said allotment was executed by the Clifton Park Land & Improvement Company to one J. M. Shallenberger, which deed contained the following restriction: 'In accepting this conveyance and as a part of the consideration therefor, the grantee, for himself and his heirs and assigns, covenants with the grantor that the said grantee, his heirs and assigns, will not sell or allow to be sold on either of said sublots any liquor, whether spirituous, vinous, or fermented, or use either of said sublots or cause or permit the same to be used for any business purposes whatsoever or for any other purposes than that of a private residence, or erect on either of said sublots any apartment house, tenement, or other building to be occupied by more than one family, or erect, maintain, or use or permit on said premises a carriage house, stable or other outbuilding except an automobile house without the written consent of the grantor, nor in any case nearer than 60 feet to the street or avenue on which said lots front, nor (except by agreement with the owner of the adjoining lot) nearer than 10 feet to either of the side lines of either of said lots; that no house shall be erected on either of said sublots which shall cost less than $5,000; that no house shall be erected on said sublot No. 209 which shall be located nearer than 40 feet to the street or avenue on which the same fronts or nearer than 10 feet to either of the side lines of said lot; that no house shall be erected on said sublot No. 165 any line of which shall be located nearer than 60 feet to the street or avenue on which the same fronts, or nearer than 10 feet to either of the side lines of said lot. The grantor further covenants with the said grantee that all sales or leases of lots in said allotment similarly located, shall be made subject to like restrictions as to the use of same. The said several covenants, agreements, and provisions herein contained shall run with the land hereby conveyed and be binding upon the said grantee, his heirs and assigns, for the period of 50 years from the 1st day of January, 1913.'

'On November 16, 1912, the Clifton Park Land & Improvement Company conveyed to R. E. Burdick sublot No. 189 and parts of sublots Nos. 188 and 190 in said allotment comprising 100 feet front on the easterly side of Clifton road, together with a parcel of land adjoining thereto containing about one acre and known as 'block C,' said deed containing the following restrictions: 'In accepting this conveyance and as a part consideration therefor the grantee for himself and his heirs and assigns, covenants with the grantor that said grantee, his heirs and assigns will not sell or allow to be sold on said premises any liquor, whether spirituous, vinous, or fermented, or use said premises or cause or permit the same to be used for any business purposes whatsoever, or for any other purpose than that of one private residence on each of the two parcels herein described, or erect thereon any apartment house, tenement, or other building to be occupied by more than one family, or erect, maintain, or use or permit upon said premises a carriage house, stable or other outbuilding except an automobile house on each of the two parcels herein described without the written consent of the grantor, nor in any case nearer than 60 feet to the street or avenue on which said lot fronts nor (except by agreement with the owner of the adjoining lot) nearer than 10 feet to either of the side lines of said lot; that no house shall be erected on said premises which shall cost less than $4,000, or any line of which shall be located nearer than 40 feet to the street or avenue upon which the same fronts, or nearer than 10 feet to either of the side lines of said lot. The grantor further covenants with the grantee that all sales or leases of lots in said allotment similarly located shall be made subject to like restrictions as to the use of same. The said several covenants, agreements, and provisions herein contained shall run with the land hereby conveyed and be binding upon the said grantee, his heirs and assigns, for the period of 50 years from the date hereof.'

'That by mesne conveyance the defendant, the Clifton Land Company, has succeeded in title, and is now the owner of all three parcels of land so conveyed to said Shallenberger and Burdick. That all deeds from 1900 down to the present time to purchasers of lots in Clifton Park have contained substantially the same restrictions varying only in immaterial details, such as the cost of a residence to be constructed upon a given lot and varying as to a dis-

tance which said residence should be located from the street line on the various streets, but in these two respects also, all similarly located lots were similarly restricted. All deeds in said allotment, including the deed to Shallenberger and to Burdick contain, following the granting clauses herein, the following: 'Together with the right to use in common with the other owners of the land in said allotment, all portions of said allotment which shall by the grantor be devoted to the purposes of parks or park spaces for the exclusive use and benefit of such lot owners; but such use of the parks and of any pavilion or bath or boat houses as may be erected thereon by the said company for the benefit of owners of property in said allotment, shall be subject to such rules and regulations as may be established by said company to provide for the taxes and expenses of the maintenance and preservation of the same, and the proportionate part of such taxes and expenses shall be chargeable to the lot herein conveyed and shall be a lien upon said lot to secure its payment.'

'And also the following covenant: 'The said grantor further covenants with the said grantee that it will, before the period of its corporate existence or any renewal or renewals thereof expires, convey the fee in the land reserved for park purposes in the allotment of the Clifton Park Land & Improvement Company, as shown by the plat thereof made and on file in the office of the secretary of the company, to a board of trustees of not less than three members, who shall be property owners in said allotment, with power to perpetuate said board of trustees, and with power to hold said property for the use and benefit of persons owning lots in said allotment subject to such rules and regulations in regard to the use thereof as hereinbefore provided, and for that purpose the said trustees shall succeed to all the rights, powers, and duties of the company as to use, maintenance, repair, improvements, and for all purposes whatsoever.'

'The court further finds that there has been substantial compliance by all purchasers and owners of lots in Clifton Park with the restrictions, and that there has been no violation thereof, but that a club house was constructed upon four several sublots leased for that purpose on November 7, 1905, and pursuant to the terms of the lease conveyed in July, 1913, to the Clifton Club; that said deed contained substantially the same restrictions as in all other deeds, save and excepting that the lots should not be used for any other purpose than that of private residence or social club. That the club has erected on said premises a large, commodious, and substantial clubhouse which it has ever since run and maintained, and that its members have not been or are not confined to residents or lot owners in Clifton Park, but is open generally to the public use so far as membership is concerned, and that a large number belonging thereto and patronizing the same are not residents or lot owners in Clifton Park. The court further finds that lying to the southeast of said Clifton Park there is a tract of about fourteen (14) acres owned by defendant which it acquired in six several parcels in February, 1914, and that defendant proposes to allot said premises together with block C and said sublots Nos. 209 and 189 and parts of lots Nos. 188 and 190 as one parcel, and to make, construct, lay out, open, improve, and dedicate, and to do any act or thing necessary to accomplish or in furtherance of the improving and dedication to the city of Lakewood of sufficient of said sublots Nos. 209, 188, 189, and 190 to make a public street or road, which shall be open and to be used by the public, without charge, in, over, and through said lots. The defendant herein, the Clifton Land Company, obtained from different parties the title to six or more pieces of land that had been and were being used for various purposes, bounded substantially as follows: On the north and west by the property owned, or formerly owned, by the Clifton Park Land & Improvement Company; on the south by the Nickel Plate Railroad; on the east by land owned by various parties; the east line being about 150 feet west of Clifton boulevard, the same containing about 14 acres of land; the only access to, and egress from which, unless street facilities can be obtained over some portion of the premises formerly owned by the Clifton Park Land & Improvement Company, as heretofore stated, or lots facing on the west side of West Clifton Boulevard, or over the said tracks on the south, is a (private) way, the status of which was fixed by this court in case No. 25 1/2, entitled 'Swingler et al. v. Zetelmeyer Coal Company et al.,' to the south across the Nickel Plate Railroad and onto Sloan avenue, a public street in which are two street car tracks, said private right of way being 12 feet wide and belonging to the owners of a part of said pieces of land above named. That this action was brought by plaintiffs as soon as the proposed making of said allotment and the proposed opening, constructing, and laying out of said roadways or streets by defendant became known to plaintiffs, and that there was no unnecessary delay or laches upon the

part of the plaintiffs in so doing.'

As conclusion of law, the court of appeals found that the plaintiffs are not entitled to the relief prayed for, and dismissed the petition at their cost. Error is prosecuted in this court to reverse that judgment.

Nichols, C. J., dissenting.

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148k44 Property Subject to Appropriation
148k45 k. In general. Most Cited Cases

A restrictive covenant in a deed will not prevent the state or any body politic or corporate having the right of eminent domain from appropriating the property to public use.

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108II(D) Covenants Running with the Land
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Owner of lot in addition sold and conveyed by deeds containing uniform restrictions is entitled to enjoin owner of other lot from violation of restrictions.

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287I(B) Joinder
287k13 Persons Who May Join
287k14 k. In general. Most Cited Cases

The owners of lots conveyed by deeds imposing uniform restrictions according to a general plan of allotment, held entitled to unite in an action against any lot owner to enforce restrictive covenants by injunction.

Syllabus by the Court

Where uniform restrictions are imposed, according to a general plan of allotment, upon all the lots therein, the owner of the allotment covenanting in the deed of conveyance of each separate lot that all sales or leases of other lots in that allotment, similarily located, shall be sold or leased subject to such restrictions, an owner of any lot or lots in such addition may maintain an action to enjoin the owner of any other lot or lots in that allotment from using the same for purposes other than the uses to which they are restricted.

The owners of other lots in that allotment, or any number of them, may unite in an action against any lot owner, to enforce by injunction the restrictive covenants written into each deed, in pursuance of the general plan of allotment.

No contract or covenant in a deed restricting the real estate conveyed to certain uses and prohibiting other uses thereof, will operate to prevent the state or any body politic or corporate, having the authority to exercise the right of eminent domain, from appropriating such property to public use.

***358 **942** Cushing, Siddall & Lamb and Treadway & Marlatt, all of Cleveland, for plaintiffs in error.

***359** Smith, Taft, Arter & Smith and D. M. Bader, all of Cleveland, for defendant in error.

DONAHUE, J.

From the facts found by the court of appeals, it is clear that this allotment was laid out by the Clifton Park Land & Improvement Company according to a general plan imposing uniform restrictions for a period of 50 years upon all the lots in this addition, and that, in consideration of the acceptance by the purchaser of the conditions imposed, the Clifton Park Land & Improvement Company agreed that all sales or leases of other lots in that allotment, similarly located, should be subject to like restrictions as to the use of the same.

That being true, it follows that the purchasers and present owners of any of these lots have the right to enforce the restrictions imposed upon these lots in the deeds from the original proprietors, for there could be no purpose in writing such restrictions in the deeds, if any one or more of the purchasers or their subsequent grantees or lessees were permitted to disregard the same and devote the property to a use prohibited by the restrictions, regardless of the rights of other lot owners. These restrictions were ****943** not imposed for the benefit of the original proprietor, further than the fact that the general and uniform plan of restricting the allotment to resident purposes might contribute to a readier sale of the lots. The real purpose of the restrictions was to guarantee to the purchasers a quiet residence locality, where they might build their homes and live apart from the ***360** noise of manufacturing and the bustle and confusion of the marts of trade. The great majority of these purchasers undoubtedly bought with this idea in view. Their grantor kept faith and imposed like restrictions upon all the lots in this allotment that were similarly located. The purchaser who bought with the intent or purpose of disregarding the restriction and devoting the property purchased by him to any purpose that might suit his whim or his business needs, regardless of the restrictions written in his deed, has no standing in a court of equity.

It is insisted, however, that this is to be devoted to a public use, that the public has the right to take private property for public use whenever it becomes necessary, and that no contract can be made that will prevent the state or any body politic or corporate, having the right of eminent domain, from appropriating private property to public use. That is a self-evident proposition, but it is not the case presented for review. These private proprietors have undertaken to create a public thoroughfare through this addition and over the lands subject to these restrictions. Public ways cannot be established in this manner. The need of such thoroughfares is a question to be determined by the public authorities. When these authorities have determined the necessities of such ways, private property can be taken for such use, regardless of restrictions or limitations placed upon the same by deed, contract, or otherwise, and when established, these ways come under the control of the public authorities, whose duty ***361** it is to keep them in repair, free from nuisance and open for public travel. The question whether the owners of other lots in this addition have any property interest in these lots that would require them to be compensated before being taken for public use does not arise in this case.

It is said in argument that these lots have already been deeded to the city of Lakewood for street purposes, but no presumption obtains that the city will accept such grant, for this carries with it burdens of construction, maintenance, care, and control that the city authorities may not care to assume. The only question presented in this record is the question of the right of the Clifton Land Company to devote these lots, covered by these restrictions, to street purposes, and that question must be answered in the negative.

The judgment of the court of appeals is reversed, and judgment entered for plaintiffs in error, upon the facts found by that court.

Judgment reversed, and judgment for plaintiffs in error.

JOHNSON, NEWMAN, WANAMAKER, MATTHIAS, and JONES, JJ., concur. NICHOLS, C. J., dissents.

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