2009

Sanborn v. McLean: Beyond the Limits of Inquiry Notice

Gerald Korngold
New York Law School

10

Gerald Korngold*

Sanborn v. McLean: A Strange Tale of Inquiry Notice and Implied Burdens

Life in American cities at the turn of the 20th century was a time of growth, energy, turbulence, and transformation. Industrialization of the Northern cities, a trend begun in the 19th century, continued relentlessly. The economic growth that had propelled the United States from a rural backwater in 1800 to the leading industrial power in 1900 continued, and American firms began to take a leadership role in the world economy. Thousands of immigrants from across the oceans and from the rural areas of the United States crowded into noisy, bustling cities seeking employment in the new factories and chasing their piece of the American dream. Noise, pollution, traffic, disease, and social dislocation grew exponentially in this environment.

People with resources sought housing arrangements that would serve as a refuge from the increasingly hectic commercial and industrial world. They wished for quiet residential areas, with nice homes and tree lined streets, free from the intrusions of business establishments. These owners often believed that these idyllic settings would lead to a better life and reinforce moral values for their families, and they sought to raise their families in an area with similarly-minded people.

In the late 19th and early 20th centuries, covenants recorded against land were the chief vehicle to achieve residential districts with building requirements and use restrictions. Whether enforced by injunction as "equitable servitudes" or for money damages as "real covenants," covenants could bind not only current but also future owners to the restrictive scheme, thus preserving the residential arrangement for

* Professor of Law, New York Law School; Visiting Fellow, Lincoln Institute of Land Policy, Cambridge, Massachusetts.

an unlimited period of time. These doctrines were necessary since the concepts of contract law did not allow for enforcement of promises against subsequent owners of the burdened land who never expressly agreed to be bound by subsequent owners of the benefited land who were never expressly given the promise benefit. The changes in the law that later made public land use regulation, such as zoning, a means to shape neighborhoods had not yet occurred—that would not happen until the 1920s and the 1930s. Covenants and servitudes thus offered landowners in the first part of the twentieth century the only available means to protect their neighborhoods from commercial or industrial intrusion.

To be binding, a covenant must be valid under the requirements of covenants law. But there is a key second requirement: to be bound by a covenant (or any other property interest) previously established against a piece of property, future purchasers of the burdened land must have notice of the restrictions the covenants imposed before they commit to buying the land. Notice allows them to decide whether they actually want to buy land that is limited to residential uses and, if so, to tailor their negotiating position by offering a lower price to reflect the loss of unfettered use of the land. The law is clear: if a purchaser of a lot does not have notice of covenants burdening the land's use, the purchaser is not bound.

The leading case of *Sanborn v. McLean*[1] arose in this context of late 19th century urban development, private agreements to create residential oases, and the importance of notice to constrain free use of property. *Sanborn* includes multiple stories, some official, some not. There is, of course, the narrative of the case and its decision as set out for us by the Supreme Court of Michigan. I will relate that story but also tell you why that narrative seems to have big gaps in it, both in terms of the factual background that the court chose to recite and the legal reasoning that the court applied. On the two legal issues the court faced—whether the land was bound by a residential restriction and whether the subsequent purchaser had notice of the restriction—the court made illogical, unprecedented, and (at least on the notice issue) wrong decisions.

That will lead us to other possible narratives within *Sanborn v. McLean* which I feel go a long way to explain how the case was decided and why the court's official story seems so wrong. The first seems to be a tale of zoning by judicial fiat, without the benefit of legislative process and guidelines or constitutional protections. The second appears to be a

[1] 233 Mich. 227, 206 N.W. 496 (1925). Sanborn has been cited by numerous courts. See, e.g., Roach v. West Indies Inv. Co., 94 F. Supp.2d 634, 637 (D.V.I. 2000); Clancy v. Reeker, 455 Pa. 452, 456, 316 A.2d 898, 900 (1974); Shipyard Property Owners' Ass'n v. Mangiaracina, 307 S.C. 299, 309, 414 S.E.2d 795, 802 (App.); Bowers Welding & Hotshot, Inc. v. Bromley, 699 P.2d 299, 304 (Wyo. 1985).

story of professional courtesy or sycophancy, where precedent and facts may have been sacrificed to favor a powerful person.

The Story told by the Michigan Supreme Court

The Supreme Court of Michigan issued its opinion in *Sanborn v. McLean* in December of 1925. The court's story began in 1891 in Detroit with Robert and Joseph McLaughlin subdividing land that they owned into building lots, creating the Green Lawn Subdivision. The court discussed only the 91 lots of Green Lawn that fronted on Collingwood Avenue between Hamilton Boulevard to the west and Woodward Avenue to the east, although reference to the McLaughlin's recorded plat shows that the subdivision contained a similar number of lots on a street (Lawrence Avenue) parallel to Collingwood.[2] Fifty-three of the 91 lots in the subdivision had express covenants in their deeds limiting the lots to residential uses. The case, however, only describes 21 conveyances by the McLaughlins with express restrictions, with it unclear who established the express restrictions on the other lots.

The court described Collingwood Avenue at the time of the case as "a high grade residence street between Woodward avenue and Hamilton boulevard, with single, double, and apartment houses."[3] The houses fronted on Collingwood, and an alley ran behind them, emptying into side streets. John A. McLean purchased the west 35 feet of lot 86 "in 1910 or 1911." He bought the property not from the McLaughlins directly but from owners who had bought the property after the McLaughlins had conveyed it.[4] Neither the original deed that the McLaughlins gave for lot 86 nor the subsequent deeds for that lot, including the one to McLean, contained any residential restrictive covenants.[5] At the time of purchase, there was a partly completed house on

[2] http://www.cis.state.mi.us/platmaps/dt_image.asp?BCC_SUBINDEX=10053.

[3] 206 N.W.2d at 496.

[4] Id. at 497. The stipulated facts in the Record indicate that the deed to the property was issued to John McLean (along with his wife) only in 1918, by Sarah A. Greusel . Record Before the Supreme Court of the State of Michigan, No. 32,094 (the "Record"), at 42. The 1910 or 1911 date likely refers to the date in which McLean executed a contract of sale to purchase the property. See Testimony of McLean, Record, at 117, where McLean testified that he bought the property "about fourteen years" before the 1924 litigation and that during the "first year [he] paid Walter G. Seely on the contract, later on the contract was transferred to Sarah. A. Greusel." Seely received the property in December 1910, and conveyed it to Greusel in 1913. In 1921 John McLean quitclaimed his interest in the property to his wife Christina. Record, at 41–42. Importantly, it is the time of the signing of the contract of sale when the buyer acquires his interest in the property for the purpose of notice, even though the deed follows at a later date.

[5] Neither the contract nor the May 1, 1892 deed to the original purchaser of lot 86, Clark A. Serviss, contained any restriction. Brief for Defendants and Appellants, Supreme Court of the State of Michigan, No. 32,094, at 4, 34.

the lot which McLean finished and occupied at the time of the litigation with his wife, Christina McLean. The McLean property was located on the northeast corner of Collingwood Avenue and Second Boulevard.

The case arose when the McLeans began building a gasoline filling station on the back portion of their lot. Jessie Sanborn and other homeowners on Collingwood brought an action against the McLeans and their contractor before Judge George O. Driscoll in Chancery division of Wayne County Circuit Court, seeking to enjoin the construction. Judge Driscoll held for the plaintiffs and ordered the McLeans to tear down the work that already had been done. The McLeans appealed to the Supreme Court. Plaintiffs maintained on appeal that the gas station would be a nuisance per se, it would violate a "general plan fixed for use of all lots on the street for residence purposes only," and that the McLeans' land was subject to a "reciprocal negative easement" prohibiting the use as a gas station.[6] The McLeans countered that no restriction appeared in their chain of title, that they purchased without notice of any reciprocal negative easement, and denied that there was a nuisance per se.

The Supreme Court did not address the issue of nuisance. Thus, the first question for the court was whether defendants' land was bound by a restrictive covenant that would prevent non-residential uses. The court held that the land was indeed burdened by a reciprocal negative easement and upheld plaintiffs' judgment. The court declared that the 91 plats platted in 1891 were "designed for and each one sold solely for residence purpose."[7] How did this happen even though there were no restrictions in defendants' chain of title (or in 38 of the 91 lots' chains of title)? According to the court, through the doctrine of reciprocal negative easements:

> [i]f the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold.[8]

So, when the McLaughlins sold the first lots on Collinwood with restrictions, the McLaughlins' retained lots (lot 86 and all of the rest) became impressed with the same restrictions as included in the first sold lots at *that* point in time. It is *that* reciprocal negative easement that ran with the land to the initial and subsequent purchasers of lot 86 (and the other lots as well). Following the logic of the court, there was no need to re-create the restriction by placing it in the lot 86 deeds—it had already

[6] Id. at 496–497.

[7] Id. at 497.

[8] Id.

been created at the dawn of the subdivision based on the restrictions in other lots that were conveyed by the subdividers.

The court made clear that reciprocal negative easements arise out of the grantor's acts and intent in the initial stages of the development:

> Such a scheme of restrictions must start with a common owner; it cannot arise and fasten upon one lot by reason of other lot owners conforming to a general plan. If a reciprocal negative easement attached to defendants' lot, it was fastened thereto while in the hands of the common owner of it and neighboring lots by way of sale of other lots with restrictions beneficial at that time to it.[9]

What was the evidence of the McLaughlins' intent to create an implied reciprocal negative easement against the entire subdivision? The only evidence cited by the court (or in the record) was that the 21 lots sold prior to lot 86 contained residential restrictions, even though the court also noted that after the sale of lot 86 some of the McLaughlins' conveyances included express restrictions and others did not (remember only 53 of 91 had a restriction). The court was unclear on how it determined that the McLaughlins *initially* intended to create an implied restriction scheme, leaving much to surmise and a retrospective view of events to try to determine the grantors' original intent:

> The original plan was repeatedly declared in subsequent sales of lots by restrictions in the deeds, and, while some lots sold were not so restricted, the purchasers thereof, in every instance, observed the general plan and purpose of the restrictions in building residences. For upward of 30 years the united efforts of all persons interested have carried out the common purpose of making and keeping all the lots strictly for residences, and defendants are the first to depart therefrom.[10]

Once the court found that lot 86 was subject to a restriction, it then had to deal with the second issue: notice. The Michigan Supreme Court recognized the traditional rule that a purchaser of an interest in real property is only bound by prior interests and claims against the property *if* the purchaser had notice of the interest prior to buying. Bona fide purchasers (i.e., takers without notice of prior rights) take free of the prior interests. Thus, the McLeans would be bound by the reciprocal negative easement only if John McLean had notice of it before he made the agreement to purchase the land. Prevailing on this issue was essential for plaintiffs—it would do them no good to win a covenant right if they could not enforce it against a bona fide purchaser.

---

[9] Id.

[10] Id.

Notice can be "actual" or "constructive." "Actual" notice is what it sounds like—the purchaser actually knows of the prior interest, as when someone tells the purchaser of the earlier rights. There is no evidence of actual notice in Sanborn. "Constructive" notice can be one of two types—"record" notice or "inquiry" notice. A purchaser is deemed to have record notice of any interest in a properly recorded instrument in the chain of title of the property in question. Record notice was impossible in Sanborn since there was no express covenant right that could have been recorded in the chain of title for lot 86.

That left inquiry notice for the Sanborn court. Inquiry notice works as follows: the law presumes that every purchaser makes a reasonable inspection of property before buying and then makes reasonable inquiry about potential competing ownership claims that the physical inspection revealed.[11] A classic example is that a potential buyer would inspect the property, notice that someone other than seller is on the land, inquire of that person, and learn that the person holds a (prior) ten year lease. Failure to make the inspection and inquiry does not help the purchaser, as the law attributes to her the information that she would have learned whether or not she actually does what is required.

The court in *Sanborn* concluded that John McLean had inquiry notice of the reciprocal negative easement binding lot 86. The court's "logic" ran as follows as to what a reasonable "inspection" would have revealed: there was a partially built dwelling on the lot when he purchased; he had an abstract of title that told him that there had been a common grantor and that there were 97 additional lots;[12] although he was told by his seller that his lot was *not* restricted,[13] "[h]e could not avoid noticing the strictly uniform residence character given the lots by the expensive dwellings thereon."[14]

According to the court, from these facts, "the least inquiry would have quickly developed the fact that lot 86 was subjected to a reciprocal negative easement."[15] What would such an inquiry have entailed? The court explained that McLean did not have to ask his neighbors about a

[11] See, e.g., Stracener v. Bailey, 737 S.W.2d 536, 539 (Tenn. App. 1986).

[12] Here the court contemplates a total of 98 lots fronting Collingwood, rather than 91 that it used previously. 98 is consistent with the recorded plat, see http://www.cis.state.mi.us/platmaps/dt_image.asp?BCC_SUBINDEX=10053 (last visited June 28, 2008) and the Abstract of Title in the Record, supra note 4, at 202–203.

[13] It is unclear to me how being told that the lot was unrestricted helps to put one on inquiry of a restriction, yet the court cites this fact. 206 N.W.2d at 498.

[14] Id.

[15] Id.

restriction but "had he inquired he would have found of record the reason for such general conformation."[16]

Thus, the Supreme Court of Michigan decided for the plaintiffs on the two key issues—first, they found that the defendants' lot was bound by a restrictive covenant barring non-residential use such as the proposed gasoline station. Then the court held that the defendants had inquiry notice of the restriction when they bought and thus were bound by it.[17]

Why the Decision is a Troubling Departure

The Michigan Supreme Court illogically stretched precedent to find for the plaintiffs in *Sanborn* on both the existence of the restriction and the determination of notice. The results are puzzling in light of existing law and sound policy. The *Sanborn* court did not have to reach these results, and certainly courts today should not repeat these errors. This section will show that *Sanborn* stands on the outer edge of decisions on reciprocal negative easements and inquiry notice, and I will offer an alternative story that the *Sanborn* court should have told. In a subsequent section I will give my surmises as to why the Michigan Supreme Court chose to tell the story that it did to render its flawed decision.

Reciprocal Negative Easement

"Reciprocal negative easements" are a subset of covenants running with the land (known more specifically as equitable servitudes and real covenants).[18] Covenants law focuses on automatically moving the burdens and benefits of promises by current landowners to successor owners of the parcels of the original covenanting parties. A typical case involves two neighbors, *A* and *B*. *A* wants to ensure that *B* will not build a store or factory on her property, so *A* pays *B* to expressly promise (in a recorded instrument) to restrict the use of her land to residences; the law of covenants allows *C*, a successor owner of *A*'s parcel, to bring an action for an injunction or damages if *D*, the successor owner of *B*'s land, violates the covenant (such as by building a gas station on a lot restricted to residential use).

---

[16] Id.

[17] Though the court upheld the plaintiffs' position, it modified the order requiring the partially built building to be torn down by allowing the defendants to retain portions that could be used for residential purposes.

[18] Older courts often use the term "negative easement" as synonymous with "covenant running with the land." See Gerald Korngold, Private Land Use Arrangements: Easements, Real Covenants and Equitable Servitudes § 8.01, 290–291 (2d ed. 2004).

This is essentially what went on in *Sanborn v. McLean* with one important difference—there was *no express* covenant binding lot 86! None of the owners of lot 86—starting with the initial grantee from the McLaughlins through the intermediate owners to John McLean—*expressly* agreed to be bound by a restriction. No such covenant appears in the chain of title—as we will see later, if it had been recorded before McLean bought, we could presume or imply that he consented to be bound. What is remarkable, therefore, about *Sanborn* is not the use of the concept "reciprocal negative easement" but that the court *implied* such a restriction against the McLeans' property. From the position of the McLeans and prior owners of lot 86, the court created a covenant where none had existed.[19]

There are many excellent reasons to enforce *express* private land use arrangements, such as covenants and easements (both collectively referred to in the parlance of the Third Restatement of Property–Servitudes as "servitudes). None, however, apply where there is no consent to the covenant by the burdened owner.

Efficiency. Enforcing freely-made agreements restricting the use of land helps to achieve an efficient allocation of our limited land resources. By allowing parties to buy and sell partial rights in land, such as covenants, the purchaser is able to acquire only the rights that she wants in the property. He does not have to overinvest and buy a fee interest when a covenant is all that he needs and wants. So, continuing with our earlier example, if the law of covenants did not validate the purchase of the restriction between *A* and *B*, *A* would have to buy a fee interest in *B*'s land in order to prevent commercial or industrial uses next door. This would divert *A*'s resources from other pursuits. Moreover, *B* is perfectly happy with continuing to own his property in fee, subject to the residential covenant, but with the extra cash from *A*—everyone gets what he or she wants.

The benefits of such efficiency-maximizing contracts will accrue not only to *A* and *B* but also to successor owners *C* and *D*. Assuming that *C* and *D* are aware of the covenant, they will adjust the price they are willing to pay for their lots accordingly. *C* will pay *A* extra for the land to reflect the value of the covenant, allowing *A* to recover his investment and *D* will pay *B* less reflecting the burden of the restriction thus preventing *B* from getting paid twice for the covenant right. To make an efficiency justification work, however, it is essential that the original parties consent to the terms of the deal. The consent of subsequent

[19] Reciprocal negative easement theory can be used in far less controversial settings. For example, when there are express covenants in all lots in a subdivision, the theory can be used to justify enforcement by prior purchasers against latter purchasers. See Korngold, supra note 17, § 9.09. Sanborn v. McLean is a far more difficult case since there was no express covenant against lot 86 and so one had to be implied.

owners to pre-existing covenants can be presumed only if they have notice of the restriction before making their deal.

These efficiency benefits will result only from consensual transactions based on good information—where the parties voluntarily exchange promises and consideration in a free market. If the law imposes additional, *unknown* obligations on the parties and re-arranges the deal, the market will not operate efficiently. This is what the court did wrong in *Sanborn*—it created a restriction that had never been agreed to and imposed it on McLean who had no notice of it. McLean suffered most immediately but the entire real estate transactions system is chilled by such decisions.

Liberty. People can exercise their freedom of choice and control over their own property by entering into consensual covenant agreements. Successor owners who buy with notice of these arrangements are deemed to be making these choices as well. These expressions of ownership rights should be respected except in rare instances where there are strong overriding public policies.[20]

When the law imposes a covenant on an owner who did not consent, the owner's property rights are being limited by the coercive power of government. This offends notions of fairness, reliance, and ownership.

Subdivision covenants. Developers who use the correct legal techniques can, and do, create large-scale covenant arrangements in subdivisions. They can subject all lots to express covenants regulating, for example, use of the properties, types and styles of building, lot arrangement and setback, etc. Such covenants would expressly provide for a mutual and reciprocal right of enforcement by each lot against the other. This arrangement would bring the benefits to all lots of a residential neighborhood, offsetting the loss of value due to the restrictions on free use of the property. Indeed, many subdivision schemes actually increase the value of the lots, since potential buyers value the restrictions imposed on their neighbors more than they value the reciprocal restrictions they accept themselves. Someone who has no intention of painting his house purple, for example, would price a covenant not to do so close to zero. That same person might be willing to pay quite a bit to ensure that none of his neighbors could paint their houses purple. These covenants would be placed in recorded instruments, providing notice of the restrictions before purchasers bought their interests. Note the key ingredients in this scenario that were missing in *Sanborn*—the express covenant and the recorded document.

Implied covenants in Sanborn. Covenant enforcement can be justified, therefore, only when they are created by consent. When there is no

[20] See Korngold, supra note 17, § 10.02 (describing racial covenants and covenants barring group homes as violating public policy).

express indicator of such consent (i.e., an express agreement, preferably written) the inference is that no consensual arrangement was made. Thus, when a court proceeds in the absence of express consent and seeks to *imply* consent, it must proceed extremely carefully.

The decision of the *Sanborn* court to imply a reciprocal negative easement is surprising in light of these concerns. It is also surprising in light of the precedents on covenants available to the *Sanborn* court. Courts deciding covenant cases, including those in Michigan, often express a distrust of restrictions on land. Thus, for example, the Supreme Court of Michigan declared in 1905 that "[i]t is the general rule that restrictions on property will be construed strictly against those claiming to enforce them, and all doubts resolved in favor of the free use of the property."[21] This statement has been repeated in numerous Michigan cases before and after *Sanborn*.[22] This statement teaches a powerful lesson. Covenants can indeed bring benefits. At the same time, they pose a risk of deterring sales and development if holdouts refuse to consent to release of covenants in the future or if the transaction costs of removing restrictions become excessive. Implying covenants poses an even greater disincentive to land markets and development because owners and potential buyers are now subject to vague, unpredictable, and perhaps unascertainable agreements binding the property.[23] The integrity of the record system is eroded by validating unrecorded interests.

The court opens the door to these problems in *Sanborn*, without adequately considering the cost to the system and whether the benefits to the other owners and society are worth the price. Remember that all along, if the McLaughlins had desired to create residential covenants binding all lots, they could have done so easily and inexpensively by recording provisions in all of the deeds. Purchasers could have refused to buy lots unless this scheme was expressly created.

Moreover, the cases cited by the Michigan Supreme Court in *Sanborn* do little to support the implication of a restriction against a subsequent purchaser of a lot without an express covenant. Rather, these cases deal with other issues. For example, *Allen v. City of Detroit*[24] involved an action against a subdivider who had orally expressly prom-

---

[21] James v. Irvine, 141 Mich. 376, 104 N.W. 631, 632–633 (1905).

[22] See, e.g., City of Livonia v. Department of Social Services, 423 Mich. 466, 378 N.W.2d 402 (1985); Boston-Edison Protective Ass'n v. Paulist Fathers, 306 Mich. 253, 10 N.W.2d 847 (1943); Casterton v. Plotkin, 188 Mich. 333, 154 N.W. 151 (1915).

[23] The decision also allows the creation of an interest in real property (i.e., the reciprocal negative easement) without a writing, thus contradicting the Statute of Frauds.

[24] 167 Mich. 464, 133 N.W. 317 (1911). For a similar set of facts, again different from Sanborn but yet cited for support by the Supreme Court, see McQuade v. Wilcox, 215 Mich. 302, 183 N.W. 771 (1921).

ised to bind his retained land under residential restrictions similar to those that he placed on the lots that he conveyed to the plaintiffs. The plaintiffs, who were original grantees of the subdivider, sued when he attempted to sell two retained lots without restrictions. *Allen* was a quite different case than *Sanborn*, as there was evidence of an express promise by the subdivider. It also did not involve enforcement against a remote purchaser of an unrestricted lot, but was more in the nature of an estoppel/consumer protection action against an overreaching developer who had made an *express* promise to be bound by a covenant.

Even if one were to favor the Michigan Supreme Court's test, a fair reading of the facts presented by the court do not show a clear general plan by the McLaughlins that could be the basis of implying a reciprocal negative easement. So much does not add up. For example, how could there have been a general plan if only 53 of the 91 lots had restrictions in their chains of title? This is merely 58% of the properties, and this is not a case where covenants were mistakenly omitted from a few lots. One would think that the numbers alone counter the finding of an intent to create a general plan. The opinion cites no other evidence that might support the finding of an intent to create a general plan, such as sales brochures, advertisements, testimony of real estate agents, written and oral statements of the McLaughlins, contracts of sale, etc. from the time that the McLaughlins planned and began marketing the development.[25] The evidence of a general plan in the opinion is weak or nonexistent; in fact, it is negated by that 58% number.[26] Given this dubious evidence of intent and the law's favoring of free use of land, the court's finding of a general plan—the lynchpin of the reciprocal negative easement argument—is curious and misguided.

Inquiry notice

The court took an unprecedented and wrong view of inquiry notice to find that John McLean knew of the implied covenant when he purchased the property. This is evident from the court's own rendition of the facts as well as additional information from the record.

Notice theory. One of the major advances of the American land transactions system was the development of recording acts and title operations early in our history.[27] The recording acts serve various func-

[25] Later cases relied on such evidence. See, e.g., Weber v. Les Petite Academies, Inc., 548 S.W.2d 847 (Mo. App. 1976); River Birch Assocs. v. City of Raleigh, 326 N.C. 100, 388 S.E.2d 538 (1990); Lehmann v. Wallace, 510 S.W.2d 675 (Tex.Civ.App. 1974).

[26] Ironically, Plaintiff Sanborn's lot did not even have an express covenant recorded against it. Record, supra note 4, at 57–58, 66–68.

[27] On the recording acts and the policies, see Gerald Korngold & Paul Goldstein, Real Estate Transactions: Cases and Materials on Land Transfer, Development and Finance 244–345 (4th ed. 2002).

tions. First, the recording system protects owners of property interests by providing an opportunity to record, so giving the entire world record notice of their rights and making them superior to those of others. Second, it penalizes owners who fail to record, by allowing subsequent purchasers to prevail over unrecorded interests—this creates a powerful incentive for people to record. Moreover, the common law rule of "first in time, first in right" that existed prior to the recording acts would favor the prior interest holder even if the subsequent purchaser had no knowledge of the prior interest, thus making potential purchasers reluctant to engage in exchanges. Under the recording acts, in contrast, market transactions are encouraged since purchasers can invest with confidence and potential deal makers can identify owners of potential target properties and engage in negotiations with them. An active, secure real estate market brings efficiency benefits to society.

These policies favoring the recording *system,* i.e., protecting those that follow recording procedure and punishing those that do not, are tempered by the portions of the doctrines of actual and inquiry notice based on fairness considerations. So, though *A* has not recorded, if *B* actually knows or should know of *A,* it seems wrong to allow *B* to prevail over *A*'s prior property interest. Thus, the recording acts inject inquiry and actual notice into the equation by typically requiring *B* to be a "bona fide purchaser," "good faith purchaser," or "purchaser without notice."

That is all well and good. But, the rule of inquiry notice should not be expanded from protecting the legitimate interests of the first purchaser and used to surprise the subsequent purchaser. Inquiry notice should not be utilized as a means to deprive property rights from a later purchaser who could not fairly know or suspect that there was a prior interest. That is what happened, though, in *Sanborn.*

Inquiry notice in Sanborn. The Michigan Supreme Court in *Sanborn* introduced a high standard of inquiry notice, far beyond the usual. First, it required McLean to inspect and inquire about not only lot 86 (i.e., the property that he was buying) but also the entire neighborhood—far beyond the limits of usual inspection and inquiry. The court expanded the burden on purchasers without ever explaining why it did so, even though the McLaughlins were the bad actors for failing to record an express covenant that would give fair notice to potential buyers and would serve the goal of creating an accurate record system. The court got that wrong. The standard rule is that one who is searching record title only has to search the chain of title for the lot that he is buying, i.e., lot 86, not other lots owned by grantor[28]—a limit intended to reduce the

[28] See, e.g., Buffalo Academy of Sacred Heart v. Boehm Bros., 267 N.Y. 242, 196 N.E. 42 (1935).

burden of the search. To discover the basis for an implied reciprocal negative easement, however, the *Sanborn* court was in effect requiring McLean to do such a much greater search—he would have had to look at the deeds for neighboring lots.

Next, according to the court, McLean's observation of houses on other lots plus knowledge from the abstract that there had been a common subdivider of the area should have led him to conclude that there was an implied covenant burdening his lot 86 even though nothing was recorded against his property. This would been a tough task, requiring the application of scant facts to an arcane legal principle, even if the doctrine of implied reciprocal restrictions had been well known. But this would have been an especially difficult feat in 1910 or 1911 when McLean was contemplating his contract to purchase since the *Sanborn v. McLean* is arguably the first case to have declared the theory of restrictions based on implied reciprocal negative easements![29]

Moreover, even assuming that McLean had been able to forecast the Michigan court's future adoption of the concept of implied reciprocal negative easements, guessed that the court now expanded the requirement of the buyer's inspection to include the entire neighborhood, and that this inspection should had led him to speculate if there were an implied covenant burdening his lot, what would he have actually learned? If McLean had searched some of the titles of neighboring lots at random to see if there were a pattern of restrictions evidencing a general plan, he might have found no express restrictions at all in the deeds he looked at—remember only 53 of 91 had express restrictions in their chains of title! There would thus have been no hint to him of the restrictive scheme. Indeed, the reasonable inference from checking a random selection of other lots in the subdivision would be that some had restrictions but others did not. Given all of this, the finding of inquiry notice was incorrect. McLean unfairly lost property rights to a claim that there is no way that he could have known about.

Other facts not cited by the court support the view that McLean could not have fairly known about the restrictions. Plaintiff Sanborn himself testified that there were other gasoline stations a block or so away from the subdivision,[30] raising questions about what should have or have not seemed evident to McLean about the presence of an implied covenant when he bought. Moreover, the record lacks testimony about the state of the subdivision at the time McLean signed his contract of

[29] The case received notice from commentators at the time. See, e.g., Charles E. Clark, Assignability of Easements, Profits and Equitable Restrictions, 38 Yale L.J. 139 (1928–1929); Recent Cases, 10 Minn. L. Rev. 619 (1925); Sanborn v. McLean, 9 Bi-Monthly L. Rev. [U. Det.] 37 (1925–1926).

[30] Record, supra note 4, at 71.

sale. The court should have focused on *that* moment to determine what McLean could have and should have understood about the neighborhood—that is the time that inquiry is required. Subsequent changes in the area and the condition at the date of litigation are not relevant. The trial court should have found that the plaintiffs failed to meet their burden of proving that McLean did not adequately inspect at the time of purchase.

How prevalent were subdivision covenants at that time? Would a typical lot buyer expect that lots would generally be burdened by a covenant? If lots were usually sold only with covenants, then it would be an easier leap for the court to find that McLean should have inferred that the neighborhood was subject to restrictions, thus making the inquiry notice argument stronger. A review of classified advertisements in contemporary newspapers reveals no common or prevalent practice of advertising the presence of covenants in the sale of vacant lots. For example, the classified section of the *Detroit News* of Sunday, January 16, 1910 (around the time that McLean purchased his lot) had 35 ads under "For Sale–Vacant Lots," with many of the ads listing multiple properties. This section of the classifieds contained ads for individual lots, such as lot 86. Of the 35 ads (which ranged in size from 2 lines to 20 lines, with most being 6 to 10 lines), none said that the lots were under restriction, three lots specifically noted that they were not restricted, and the rest of the ads were silent on the issue.[31] Thus, the ads did not signal to consumers about covenants or restrictions, making it less likely that restrictions would be in a buyer's consciousness.

While one has to be careful to draw too many inferences from such thin evidence, it seems unlikely that the average buyer of a lot in an existing subdivision (such as McLean) would have had covenants on his mind; so, a buyer would be less likely to be on inquiry notice of implied covenants in an area. Covenants do get mentioned in large ads for new, large-scale subdivisions being mass-marketed by a subdivider,[32] but these ads appear only occasionally in the classifieds. Note that such advertisements are not for the type of lot purchased by McLean in 1910, i.e., a single lot being sold by a subsequent purchaser, rather than the original developers, in a subdivision where all the lots had already been sold by the original developers.[33]

---

[31] The Detroit News, Classified Sec., 1/16/1910, p. 5.

[32] For example, the ad for North Woodward Lots in The Detroit News, Classified Section, Sunday, 6/5/1910, p. 10 or the one for Marshland Boulevard Subdivision in The Detroit News, Classified Section, Sunday 6/12/1910, p. 6.

[33] The vast majority of the lots were initially sold before 1900 and a handful were initially sold in 1901–1907, before McLean purchased his lot. Record, at 18–23.

In light of these facts and circumstances, McLean's inspection and inquiry as a potential buyer seemed more than adequate under the law as it existed prior to *Sanborn*. His uncontroverted testimony indicated that he examined the abstract of title for lot 86 before buying and saw no restriction on the title[31] and that his seller assured him that the lot was not restricted.[35] Even the Supreme Court of Michigan stated in its opinion that "we do not say Mr. McLean should have asked his neighbors about restrictions."[36] The finding of inquiry notice is illogical and bad law.

The Real Story of *Sanborn v. McLean*?

The story that the Michigan Supreme Court told in its opinion does not add up. Facts and policy do not support the stretching of the court to imply a covenant and to find inquiry notice binding the McLeans. So what was really going on?

Not Consumer Protection

I do not think that *Sanborn* is a consumer-protection narrative—i.e., where the court protects the expectations of the consumer buyers in the subdivision and delivers to them the residential scheme that they bargained and paid for but the developer (due to malfeasance or misfeasance) failed to deliver. It does not appear to be that story for various reasons. First, 1925 is well before the advent of the era of significant pro-consumer decisions. Caveat emptor, privity rules, and non-intervention in markets were the ethos. If a court was going to innovate in consumer protection law, this would be an unlikely place to start.

Moreover, the factual record and the subdivision homeowners do not make for a particularly strong consumer protection case for the plaintiffs. The record shows a lack of due diligence, even a lack of a minimum of care, by the homeowners to determine (before they bought) whether the subdivision was under a general plan of restrictions. Owners testified that when they purchased their lots they were "told,"[37] "advised,"[38] or "understood"[39] that the neighborhood was under restriction. This information came from their sellers (not the McLaughlins but subsequent owners) or was based on the witnesses' general impressions of the

[31] Record, supra note 4 at 117, 150.

[35] Id. at 150.

[36] 206 N.W.2d at 498.

[37] Record, supra note 4, at 66 (Sanborn's testimony).

[38] Id. at 93 (Frederick W. Minton's testimony).

[39] Id. at 108 (George S. Field's testimony).

neighborhood. None of these nine witnesses[10] consulted a lawyer or other professional for an opinion at to the existence of the neighborhood scheme. Moreover, three of the nine witnesses who testified that they thought that the whole neighborhood was restricted admitted that they had no express restrictions in their titles.[11] The testimony reveals a passive group of buyers, who accepted casual, vague statements about the area's "common reputation"[12] without following up or inquiry. Consider the example of George S. Field's testimony for plaintiffs:

> Q [direct examination]: Did you make any inquiry or receive any information at the time you bought, as to whether property on Collinwood avenue was restricted for residential purposes?
>
> A: I understood it was for residential purposes.
>
> * * *
>
> Q [cross examination]: You find in your abstract absolutely no restrictions on your lot and never had been since it was platted?
>
> A: I took it on representation of the neighborhood. It was platted and used for residential purposes only.[13]

You may be surprised to learn that Field, who based on his testimony apparently followed a "no diligence" approach, was a lawyer! In light of this passivity, the owners' reliance on a supposed scheme of restrictions seems unwarranted or suspect, making them less than ideal consumer-protection plaintiffs in 1925.

Had these owners been more assertive, they could have forced the issue earlier, prevented the situation with McLean from arising, and helped to improve the record system. Thus, when the initial lot buyers from the McLaughlins purchased their properties they could have asked to see a legally binding instrument creating the restrictive scheme in the neighborhood and requested that it be recorded as a condition of their purchase. That would have made the covenants express against all of the lots and a matter of record for all potential purchasers. Even subsequent buyers from original purchasers should have required recorded documentation of the supposed restriction, which would have avoided the problem and made the recording system better. Instead, they chose to ignore the problem—which ultimately landed in the McLeans' lap.

---

[10] Sanborn, Minton, Elmer W. Voorheis, Frederick A. Matthews, Field, Arthur Tuttle, Francis G. Harvey, George W. Hurd, Edmund D. Jackson, Id. at 66–140.

[11] Id. at 57–58 (Sanborn), 95 (Minton), 108 (Field).

[12] Id. at 93 (Minton).

[13] Id. at 108, 109.

When courts innovate by creating new rights and duties, they usually do so in cases with sympathetic plaintiffs whose circumstances help make the case for the legal innovation. But of the three groups of actors in this story—the McLaughlins, the subdivision owners, and the McLeans—placing liability on the McLeans makes the least sense in terms of moral blameworthiness and efficiency considerations. I have discussed the roles of the owners and the McLeans. As to the McLaughlins, the record is unclear why they acted the way that they did and created an ambiguous common scheme development. On one hand, they may have been playing it both ways—including residential restrictions in deeds where that would please a residential buyer but omitting restrictions in deeds where a potential commercial user might come along and seek an unrestricted lot (at a premium price). They may have been unsure if the project would sell as a residential development, so they may have been trying to keep flexibility by being vague and inconsistent about the restrictive scheme. On the other hand, these were the early days of residential subdivisions and the state of the art was not well developed.[14] In later times a more sophisticated practice would develop where the subdivider would record a declaration of restrictions against the entire subdivision before any conveyances are made and create a binding scheme—but that may not have yet been a common practice.[15] It does not appear from the record that the McLaughlins had legal counsel in the conveyancing and so perhaps the McLaughlins were just careless in preparing the deeds. They, like many developers, may have run into financial problems and had to sell lots at any terms in order to keep afloat. Much is unknown.

What we do know is that *Sanborn v. McLean* does not look like a consumer protection story. This was not a pro-consumer era and these consumers are not great plaintiffs. Two other narratives may be the true story of *Sanborn*.

Zoning by Judicial Fiat

By the late 19th century, Detroit had become a major industrial city. The discovery of iron ore in the upper peninsula of Michigan, good canal connections to Detroit, and extensive public utilities were key factors in the city's emergence as a center for heavy industry.[16] It produced and wholesaled goods for the national and international markets.[17] Auto

[14] For a history of large-scale subdivision, see Marc A. Weiss, The Rise of the Community Builders (1987).

[15] See Korngold, supra note 17, § 9.03.

[16] Arthur M. Woodford, This is Detroit: 1701-2001 75-77, 85-86 (Wayne State Univ. Press 2001).

[17] Sidney Glazer, Detroit: A Study in Urban Development 50 (Bookman Associates, New York, 1965).

manufacturing was a huge engine driving the local economy, beginning in the 1890s and growing into the early decades of the 20th century. For example, employment in auto manufacturing in Detroit rose from 7,200 workers in 1908 to 120,000 in 1916.[18]

During the early twentieth century, the population of Detroit was migrating away from the central core of the city to newly developed portions of the city, "out Woodward"—to the area in which Green Lawn Subdivision was located.[19] Various factors contributed to this. First, the population of the Detroit metro area boomed during that time, and more housing was needed. The area had 340,843 people in 1900, 524,615 in 1910, 1,186,282 in 1920, and 1,974,471 in 1930—a 479% increase in 30 years.[50] Newcomers were both native-born and immigrants, drawn by economic opportunities.[51]

Additionally, special factors in Detroit drew population away from the central city. The Detroit metro area had higher automobile use than other cities, leading to an outward movement of population.[52] Henry Ford built his automobile plants outside the prior metro area, pulling people along with them.[53] Neighborhoods thus developed outside of the central core.

As in other American cities, workers sought residential settings as a refuge from the noise, pollution, and activity of commercial and industrial life. It was in these areas that citizens sought to raise their families and find peace and self-fulfillment.[54] Although today there are competing views as to the benefit of isolating residential from other activities,[55]

---

[18] Glazer, supra note 46, at 76.

[19] Glazer, supra note 46, at 76; see Woodford, supra note 45, at 88; Heather B. Barrow, The American Disease of Growth: Henry Ford and the Metropolitization of Detroit, 1920–1940, in Robert Lewis (ed.), Manufacturing Suburbs: Building Work and Home on the Metropolitan Fringe 200–220, at 211 (Temple Univ. Press 2004).

[50] Michigan Planning Commission, A Study of Subdivision in the Detroit Metropolitan Area (Lansing, MI 1936).

[51] Woodford, supra note 45, at 85–86.

[52] June Manning Thomas, Redevelopment and Race: Planning a Finer City in Postwar Detroit 14 (The Johns Hopkins Univ. Press 1997).

[53] Barrow, supra note 48, at 201.

[54] See Gerald Korngold, Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations, 56 Amer. U.L. Rev. 1525, 1536–1537 (2007); see generally John Stilgoe, Borderland: Origins of the American Suburb, 1820–1939 (1988).

[55] See Andres Duany, Elizabeth Plater-Zyberk & Jeff Speck, Suburban Nation: The Rise of Sprawl and the Decline of the American Dream 115–133 (paperback ed. 2001)

throughout much of the 20th century this represented consumer preferences and was considered socially beneficial.

The rapid expansion of Detroit, however, was not easy. The growth was largely unregulated. Although discussions about instituting zoning began in Detroit soon after New York City passed its zoning ordinance in 1916,[56] Detroit did not enact a zoning ordinance until 1940.[57] Thus the city had no real tools with which to plan, control, and manage land use and growth. The city's rapid unplanned expansion concerned many of Detroit's leading citizens. Harvey Whipple, the chief executive of the American Concrete Institute, in 1919 called for the passage of a Detroit zoning ordinance to address unregulated growth:

> Detroit's growth has been like Topsy's; it has been without plan; it has *happened;* it has *occurred* as the immediate occasion dictated and individual development has always been paramount to the public good. . . . There has been no scheme by which investors could be reasonably sure of the values of their property.[58]

Some thought the private sectors' market's response insufficient to deal with the rapid industrialization and expansion.[59] A 1936 study by the Michigan Planning Commission described excessive subdividing that left surplus subdivided land, tax delinquencies, and problems with local government finance.[60] The study noted that "[a] few well planned subdivisions are to be found, but on the whole the platted lands are cut up into lots designed for the immediate advantage of speculative operators, and are not patterned for the best ultimate use."[61] The study

---

(criticizing sprawling residential areas); Robert Bruegemann, Sprawl: A Compact History (2005) (favoring expansion of residential areas).

[56] See Edward M. Bassett, Spreading of Zoning Law: Cities All Over Country Follow Example of New York, The New York Times, 1/4/1920, p. S12; Jan Krasnowiecki, Abolish Zoning, 31 Syr. L. Rev. 719, 723–724 (1980).

[57] http://www.detroitmi.gov/Legislative/BoardsCommissions/CityPlanningCommission/planning_mission.htm (last visited 7/3/08).

[58] Harvey Whipple, City Plan Commission Begins Its Great Task of Bringing Order Out of Detroit's Chaos, Detroit Saturday Night, 3/5/1919, p. 2, quoted in Barrow, supra note 48, at 218–219. See also Daniel M. Bluestone, Detroit's City Beautiful and the Problem of Commerce, 47 Journal of the Society of Architectural Historians 245 (1988). For background on Harvey Whipple, see http://www.concrete.org/general/AHistoryofACI.pdf., last visited October 16, 2008.

[59] For a discussion of the dawn of the zoning era, see the chapter by David Callies in this volume, Village of Euclid v. Ambler Realty Co.; William T. Bogart, "Trading Places": The Role of Zoning in Promoting and Discouraging Intrametropolitan Trade, 51 Case W. Res. L. Rev. 697 (2001).

[60] Study, supra note 49, at 1.

[61] Id. at 2.

maintained that "low quality residence sections, many of which may be characterized as rural slums, have sprung up over the entire area, and these not only give rise to difficult relief, education, and health problems, but also have a strangulating effect upon the development of higher grade residential areas."[62]

It is in this setting that Judge Driscoll tried the case of *Sanborn v. McLean*. And here entered the key actor, in my view, of the *Sanborn v. McLean* story—T. Glenn Phillips. Phillips gave a bravura performance at the trial, shaped the story of the case, and sold it to Judge Driscoll. Phillips' version is the story that the trial court adopted and the Michigan Supreme Court ratified.

Phillips was called as a witness by the plaintiffs. His testimony indicated that he was an architect and city planner and had previously served for nine years as a commissioner on the Detroit City Planning Commission.[63] Since 1919 and continuing at the time of the trial, Phillips was a consultant with the Commission. Phillips had done work with other communities on city planning issues, including zoning questions. He testified that he had familiarity with the nature and use of properties in the Green Lawn Subdivision area.[64] While not discussed in the record, Phillips was an author of articles and reports on traffic problems and solutions in Detroit[65] and city tree planting.[66] Subsequent to the decision in *Sanborn*, he consulted to Grosse Pointe Village, Grosse Pointe Farms, and Gross Pointe Park, Michigan to advise in the preparation of those villages' zoning ordinances.[67] He was also a successful practitioner of landscape architecture.[68]

In my view, however, Phillips' testimony had nothing to do with the key issues of the case. He first testified on direct that allowing a gas station would be "detrimental to the community"[69] as it would intrude

---

[62] Id. at 3.

[63] Record, supra note 4, at 76.

[64] Id. at 77.

[65] T. Glenn Phillips, The Automobile: Its Province and Its Problems, 116 Annals of the Amer. Academy of Political and Social Sci. 241 (1924).

[66] T. Glenn Phillips, City Tree Planting, Detroit City Plan Commission, Report No. 1, Rev. (Dec. 1914).

[67] Grosse Pointe Civic News, vol.4, no.3, Sept., 1926, at 2; Gross Pointe Civic News, vol. 5., No. 10, April, 1928, at 3.

[68] See, e.g., photo of Henry and Clara Ford home, http://detroit1701.org/FordHome.htm.

[69] Record, supra note 4, at 77, 78, 79, 80.

into "a highly developed residential section."[70] This might be sound advice to a subdivider and part of a recommendation to include *express* reciprocal residential covenants in a subdivision, but it does not address the issue of the case: i.e., whether McLean's lot was subject to a covenant. Moreover, Phillips' general testimony that there should be no commercial uses in residential districts shed no light on the nuisance issue, since nuisance law is all about balancing competing uses in the same neighborhood.

Phillips, though, did more—he advocated for the techniques used by public zoning and extolled the virtues of this model. Phillips' testimony supported the typical zoning practice of his time—i.e., the division of the city into separate zones, each with specified uses. This segregation of residential, commercial, and manufacturing activities was a key aspect of early zoning.[71] He testified that the Green Lawn area "is a highly developed residential section of the city and should be specialized as such and any intrusion allowed to come in there would break down that residential character."[72] As a planner, he thought he knew what the city needed and how land should be allocated for particular uses: "We have enough business, commercial use in the City of Detroit for four and one-half million people."

Phillips not only advocated a vision consistent with zoning concepts, but also in his testimony he directly favored the passage of a zoning ordinance in Detroit. He painted an attractive picture of Detroit if such a governmental zoning scheme came into existence:

> [T]he proposed zoning ordinance which places the city in districts and allows the city to grow in orderly manner, with business in certain sections and residences in others, specialize the whole community, and allows it to grow, because as a city grows there are a great many specialized districts. . . .[73]

And Phillips had the self-confidence, or was it the arrogance, to sell his dreams. He believed that planners and zoning officials, rather than markets, could best set the value and success of properties. Consider this exchange during cross examination:

Q: Out on Second avenue there are a number of gas stations?

---

[70] Id. at 78.

[71] See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Traditional "Euclidean" zoning contemplated separate zones. In contrast, current planning theory favors mixed-use, to encourage neighborhood shopping and community cohesion. See Duany et al., supra note 54.

[72] Record, supra note 4, at 79.

[73] Id. at 80.

A: Yes, sir; shouldn't be there.

Q: But they are there now?

A: Yes, sir.

Q: It is your opinion that they shouldn't be there?

A: No, basing it on statistics, facts what other people—[71]

His expert opinion, not people's preferences expressed through market choices, were what mattered to him.

Moreover, in Phillips' mind, zoning was inevitable, it was the future, it was coming to Detroit, and so it was time to get on board:

Q: [cross examination]: You don't propose to tell this court you can tell the court certain districts in this City of Detroit that are going to be good districts and those that are not?

A: Never can tell but there is going to be a plan very soon which will allow a certain district to be allowed for residential, others for manufacture, and so on.

Q: You are not familiar enough at the present time to tell this court or anyone else, what certain districts in Detroit are going to be business districts and what not in the next ten or twenty years?

A: Yes, I think we are.[75]

Judge Driscoll certainly seemed to be a believer in the planning gospel Phillips preached. He wanted to hear Phillips' story. Defense counsel made five lengthy, and correct in my view, objections during Phillips' direct testimony claiming that the testimony was not material or relevant to the legal issues before the court.[76] Counsel also objected to the latitude that the court gave Phillips to spin out his story in "narrative form."[77] Counsel was again right on this issue—Phillips' testimony reads like a professor lecturing on the virtues of zoning and planning. But Judge Driscoll wanted to hear Phillips tell his tale and ruled against the defense each time it objected.

Phillips' vision may have been a good one, and may have seemed especially appealing in 1920s Detroit. But it had nothing to do with the case of *Sanborn v. McLean*. The issue in the case was whether the parties, by consent and using *private* law, had created restrictions on McLean's property. Phillips instead told a story of the supposed benefits of *public* regulation of land, through the imposition of zoning by government on a non-consenting individual. One can only speculate, but

[71] Id. at 83.

[75] Id. at 82.

[76] Id. at 77, 78, 79, 80.

[77] Id. at 77; see also at 80.

Phillips' utopian picture of a future with uses of land segregated and controlled could well have motivated the court to imply a covenant on the defendant's land, despite the legal and policy weaknesses of such a decision. Did Phillips thus encourage Judge Driscoll to engage in improper "judicial zoning?"

Even if one agrees with the notion that the public should regulate land, this should be the province of the legislature not the courts. Judge Driscoll should not have been imposing non-consensual land regulation on individual owners as the agent of government. Under our Constitutional system, such decisions are left to democratically-elected and accountable legislatures, who can best represent the will of the people on how our precious land resources should be utilized and regulated. Public regulation of land involves hard choices, evolving conditions, needs, and techniques, and accounting for different world views. Regulatory decisions balancing these competing interests should not be arrogated to futurist judges or unelected expert bureaucrats such as Phillips.

So, one alternative story of *Sanborn v. McLean* may be that of a compelling proponent of public zoning convincing the court that regulating land and segregating residential uses was essential for social and economic success, with the court then misapplying that lesson to a private dispute over a consensual restrictive covenant. This narrative would explain the bizarre result at the trial and appellate levels.

Professional Courtesy

There is another likely story in *Sanborn v. McLean*—professional courtesy or what we might perhaps better term sycophancy. Arthur J. Tuttle, Judge of the United States District Court for the Eastern District of Michigan was one of the other homeowners on Collingwood Avenue. He testified as a witness for the plaintiffs, stating that he occupied the house with his family and desired to "live and die" there.[78] He bought a vacant lot there since it was a "high-grade neighborhood."[79] He said that a gasoline station would decrease his property's value and that he would have not purchased his lot if he had not thought that it was a residential-only neighborhood.[80]

This was a powerful witness for the plaintiffs—a sitting federal judge with twelve years on the bench appearing in a state court proceeding, defending his home.[81] Even better, both Judge Tuttle[82] and Judge

[78] Id. at 118–119.

[79] Id. at 119.

[80] Id. at 119–120.

[81] Judge Tuttle had been appointed in 1912. History of the Sixth Circuit, http://www.ca6.uscourts.gov/lib_hist/courts/district%20court/MI/EDMI/judges/ajt-bio.html (last visited July 17, 2008).

[82] Id.

Driscoll[83] were Republicans. Judge Tuttle was active in electoral politics, even running unsuccessfully in 1924 for the U.S. Senate nomination while still on the bench.[81] So, did Judge Driscoll, holding an elective office, stretch to accommodate the wishes of this impressive and important fellow party member? Perhaps the McLeans were up against forces far greater than the legal issues at hand. We cannot know, but this may be another story that explains the *Sanborn v. McLean* result.

The Final Story

In *Sanborn v. McLean*, the Supreme Court of Michigan took an overly expansive view of implied covenants and inquiry notice. This version has been binding precedent in Michigan and influential on courts in other jurisdictions. But the story that the court told is troubling for legal and policy reasons. I have suggested that there may have been other narratives—zoning by judicial fiat and professional courtesy—that may better explain how the court reached its decision. This may be of some comfort to those struggling to understand the illogical story that the court told, but is less solace to those who must live with the reality of the court's strange holdings.[85]

---

[83] http://politicalgraveyard.com/bio/driscoll.html#0PU0QJDJA (last visited July 15, 2008).

[81] http://www.ca6.uscourts.gov/lib_hist/courts/district%20court/MI/EDMI/judges/ajt-bio.html (last visited July 17, 2008).

[85] If you want to see the McLean lot today, look at Google satellite. http://maps.google.com/maps?sourceid=navclient&aq=Collingwood%20Avenue&ie=UTF-8&rlz=1T4GFRC_enUS218US218&q=Collingwood + Avenue&oe=UTF-8&um=1&sa=N&tab=wl, last visited October 17, 2008. Note the single residential building on the lot (on the northeast corner of the intersection of Collingwood and Second), as well as the houses and vacant lots currently on Collingwood.