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Equitable Restrictions on the Use of Real Property and Their Relation to Covenants Running with the Land

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Prior to the middle of the nineteenth century, a contract not to use land in a particular manner was treated by a court of equity in the same way as were other negative contracts. Where the violation of a contract caused the plaintiff to be so injured in the enjoyment of his land that damages at law did not furnish an adequate remedy, equity would specifically enforce the contract by granting an injunction against the promisor.¹ The right thus to control the use of property in the hands of the promisor can hardly be classified as other than a property right. But since it was enforcible only against the promisor, (unless there was a covenant running with the land), it was a property right that could easily be destroyed by any alienation of the property, and therefore was of comparatively small value.

Although the doctrines of equitable restrictions and covenants running with the land serve kindred purposes, the latter are subject to limitations unknown to equitable easements, and the distinguishing characteristics are important to keep before us. The cornerstone case regarding covenants which run with the land is Spencer’s Case,² decided in 1583. Spencer and his wife demised a house and land to A for twenty-one years, A covenanting for himself, his executors, administrators, and assigns to build a brick wall upon part of the demised premises. A assigned to B, and B conveyed to the defendant who refused to build the wall. Spencer and his wife then

¹ Promise not to ring a bell, Martin et al. v. Nutkin et al., 2 P. Wms. 266 (1724); promise not to break up mowing land, Lord Grey De Wilton v. Saxon, 6 Ves. Jr. 106 (1801).
brought an action of covenant, upon which case the court held:

When the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is quodammodo annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words: but when the covenant extends to a thing not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being: as if the lessee covenanted to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is quodammodo appurtenant to houses, and shall bind the assignee although he be not bound expressly by the covenant: but in the case at bar, the covenant concerns a thing which was not in esse at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors, or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being.

The two conditions, then, which were essential in order that a covenant might run with the land and be binding upon subsequent holders were: first, privity of estate between the party seeking to enforce the covenant and the party to be charged; and second, the requirement that the thing to be done touch or concern the land in question, or something upon the land and in esse at the time the covenant is undertaken. The right of an owner to control the use of property after title had passed to others was allowed to rest within these rather narrow limits for over two hundred years.

In 1848, Lord Cottenham, following the lead of two earlier and somewhat obscure cases, rendered a decision in Tulk v. Moxhay, which was to become one of the milestones of English equity, an authoritative recognition of new rights and new obligations incidental to the owner-


4 2 Ph. 774, 41 Eng. Rep. 1143 (1848).
ship of real property. In the year 1808 the plaintiff, being then the owner in fee of the vacant piece of ground in Leicester Square, as well as of several of the houses forming the Square, sold the piece of ground by the description of “Leicester Square Garden or Pleasure Ground, with the equestrian statue then standing in the centre thereof, and the iron railing and stonework around the same,” to one Elms in fee.

In the deed of conveyance was contained a covenant by Elms, for himself, his heirs and assigns, with the plaintiff, his heirs, executors and administrators, that “Elms, his heirs, and assigns, should, and would from time to time, and at all times thereafter at his and their own cost and charges, keep and maintain the said piece of ground and Square Garden, and the iron railing around the same in its then form, and in sufficient and proper repair as a Square Garden and Pleasure Ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that it should be lawful for the inhabitants of Leicester Square, ... on payment of a reasonable rent for the same, to have keys at their own expense and the privilege of admission therewith at any time or times into the said Square Garden. . . . ”

The piece of land so conveyed passed by divers mesne conveyances into the hands of the defendant, whose purchase deed contained no similar covenant with his vendor; but he admitted that at the time he purchased he had notice of the covenant in the deed of 1808. When the defendant manifested an intention to alter the character of the Square Garden, and asserted a right, if he saw fit, to build upon it, the plaintiff, who still remained owner of several houses in the Square, filed this bill for an injunction; and an injunction was granted by the Master of the Rolls to restrain the defendant from converting or using the piece of ground and Square Garden, and the iron railing around the same, to or for any other purpose than as a Square Garden and Pleasure Ground in open state and uncovered with buildings.
It was contended for the defendant that the covenant did not run with the land so as to be binding at law upon a purchaser from the covenantor. Reliance was placed on a statement by Lord Brougham in *Keppell v. Bailey*\(^5\) that notice of such a covenant did not give a court of equity jurisdiction to enforce it by injunction against such purchaser, since, as Lord Brougham said, "The knowledge by an assignee of an estate, that his assignor had assumed to bind others than the law authorises him to affect by his contract—had attempted to create a real burthen upon property, which is inconsistent with the nature of that property, and unknown to the principles of the law—cannot bind such assignee by affecting his conscience."\(^6\) But the defendant's contention was overruled by the Lord Chancellor, who said:

That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. Here there is no question about the contract; the owner of certain houses in the square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a Square Garden. And it is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said that, the covenant being one which does not run with land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next

\(^6\) Ibid., at p. 547, p. 1053.
day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased. There are not only cases before the Vice-Chancellor of England\(^7\) . . . in which he considered that doctrine as not in dispute, but looking at the ground on which Lord Eldon disposed of the case of *The Duke of Bedford v. The Trustees of the British Museum*,\(^8\) it is impossible to suppose that he entertained any doubt of it. . . .

With respect to the observations of Lord Brougham in *Keppell v. Bailey*, he never could have meant to lay down that this court would not enforce an equity attached to land by the owner, unless under such circumstances as would maintain an action at law. If that be the result of his observations, I can only say that I cannot coincide with it.

The fact of notice to the grantee which is of such obvious significance in the mind of the chancellor is not, however, of sole importance. The mere lack of actual or constructive notice will not relieve the successor in possession from the obligation of the covenant. The subsequent taker must be a bona fide purchaser for value without notice, actual or constructive, if he would escape the obligation of his predecessor. The following cases illustrate this.

In *Mander v. Falcke*,\(^9\) the servitude was enforced against one in possession who was not a bona fide purchaser for

\(^7\) Here referring to *Whatman v. Gibson*, 9 Sim. 196 (1838), and *Schreiber v. Creed*, 10 Sim. 9 (1839). In the former case lots were sold under a restriction prohibiting the erection or operation of inns and taverns. The defendant was a grantee with actual notice of the restriction, although the deed to him was silent on that point. He was enjoined from violating the covenant of his grantor.

\(^8\) 2 My. & K. 552, 39 Eng. Rep. 1055 (1822). This case will be treated later herein.

\(^9\) [1891] 2 Ch. 554.
value, irrespective of the question of notice. The defendants were father and son. The son was the lessee of the premises in question, and the father was manager. The plaintiffs were the assignees of the reversion. The lease contained a covenant by the lessee not to do or cause or permit to be done upon the premises anything which might grow to the annoyance, damage, injury, prejudice, or inconvenience of the premises, or of the adjoining property. The evidence showed that the premises, which were ostensibly used as an oyster bar and refreshment rooms, were in fact operated as a disorderly house, to the great annoyance of the neighborhood. In opposing an injunction, counsel for the defendants contended that the restriction as to use did not extend to the father, he having no notice of it, and having no interest, legal or equitable, in the property or the lease. The court granted the injunction against both father and son on the ground that the father's interest as an occupier managing the business, with nothing more, was sufficient to bind him to the covenant; the father, by leave of the son, was in possession of the premises, and not being a purchaser for value, was bound by the same restrictive covenants as the son.

*In re Nisbet and Potts' Contract*\(^{10}\) was a case involving the obligation of an adverse possessor to observe rights vested under restrictive covenants. Here the suit arises upon a refusal of the vendee to accept a deed because of alleged defects in the title. The vendor bought a squatter's interest in free-hold land, the adverse possession having continued for longer than the statutory period. After entering into the contract and before conveyance of title, the vendee discovered, independently of the vendor, that the property had been subject to building restrictions prior to the squatter's possession. He then refused to go through with the deal, because of the uncertainty as to extinguishment of those restrictions by reason of the adverse possession. It was contended by counsel for the vendor that the squatter never was an assignee, that he

\(^{10}\) [1906] 1 Ch. 386.
never was a purchaser, and that therefore he did not come under the condition that a purchaser with notice of a restrictive covenant is bound by it; but that the squatter is a person who takes by a title given to him by law, and which, it was contended, is paramount to and overrides any such obligations as would otherwise have attached to the land; in other words, that the squatter, coming in by operation of law and not by conveyance, takes independently and free from all such collateral obligations. The court, however, held for the vendee, and denied specific performance, holding that the Statute of Limitations bars only the rights of those whose rights have been infringed. Quoting from the opinion of Master of the Rolls Collins:

Now, the Statute of Limitations ... does not purport to annul by lapse of time any rights other than those which persons might have, and ought to have, exercised during the period limited. ... In fact, unless and until the right of the covenantee has been in some way infringed, so that it becomes necessary for him to enforce that right, there is no reason ... why his right should in any way be affected. The person who stands simply with the benefit of a negative easement is certainly not put upon the assertion of his right unless and until that right has been interfered with in some way; and it is a matter of absolute indifference to him what person is the owner of the land over which that right exists until that land is used in some manner incompatible with the assertion of that right on the part of the person entitled to it.

Two other early English cases of primary importance in the development of the principles of equitable restrictions are The Duke of Bedford v. The Trustees of the British Museum$^{11}$ and London & Southwestern Railway Co. v. Gomm.$^{12}$ These cases will be discussed later, the former in connection with loss of benefits under restrictive covenants due to change in character of the community, and the latter with respect to the enforcibility of affirmative covenants.

$^{11}$ 2 My. & K. 552 (1822).
$^{12}$ 20 Ch. D. 562 (1882).
One of the oldest American cases in line with *Tulk v. Moxhay* was *Whitney v. Union Railway Company*¹³ which came before the Supreme Judicial Court of Massachusetts in 1860. The owner of a tract of land laid it out in lots for dwelling houses and conveyed one lot with the restriction that if the grantee, his heirs or assigns, should use or follow, or suffer any person to use or follow, upon any part thereof, the business of a taverner, or any mechanical or manufacturing, or any nauseous or offensive business whatever, then the grantors, or any person or persons at any time thereafter, who at the time might be a proprietor of any lot of land . . . within the same tract, should have the right, after sixty days' notice, to enter upon the premises, and forcibly to remove therefrom any buildings erected or used contrary to the above restrictions, and to abate all nuisances. The court held these restrictions enforcible in equity, at the suit of the original grantor against an assignee of the grantee, such assignee having notice of the restriction when he purchased.

The Supreme Court of Illinois first recognized the principle of *Tulk v. Moxhay* in the case of *Frye v. Partridge*¹⁴ decided in 1876. Lewis and another were the owners of land lying on both sides of the Illinois river, across which they were operating a ferry. These owners conveyed away part of the land on one side of the river, but, for the purpose of protecting the ferry from close competition, provided in the deed that "Coleman J. Gibson, of the second part, and his heirs and assigns, are not to establish or authorize the establishment of a common ferry-boat landing on such land, to ply between there and the opposite shore, without having permission from the said Lewis, of the first part, or his heirs or assigns." The suit arose upon the assertion of right, on the part of a grantee of Gibson, to establish a ferry-boat landing on the land so conveyed. The court enjoined the intended acts, saying that such provision is obligatory on the assignee of such grantee, and that a court of equity would, at the suit of

¹⁴ 82 Ill. 267.
a devisee of the original owner, enjoin the establishment of a ferry landing on such land.

When a vendee purchases with full notice of a valid agreement between his vendor and the original owner, concerning the manner in which the property is to be occupied, it is but a reasonable and equitable requirement to hold him bound to abide by the contract under which the land was conveyed.

The right of a covenantee to enforce the agreement, in addition to being a property right, is also of a personal nature. The grantee of the benefited, or dominant, land succeeds to the property right, but the transfer does not extinguish the personal interest of the original party to the covenant. In _Van Sant v. Rose_, the violation of a building restriction, by an assignee, was enjoined at the suit of an original party to the restrictive covenant. This party had, prior to the commencement of the suit, sold and conveyed all his holdings that could be affected by a breach of the covenant.

At this point it may be noted that while privity of estate is a _sine qua non_ of covenants which run with the

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15 260 Ill. 401, 103 N. E. 194 (1913).

16 This decision was severely criticised by George L. Clark in his article, "Equitable Servitudes," 16 Mich. L. Rev. 90. The writer there argued that relief should have been denied because the complainant no longer had property which would in any way be damaged or affected by a breach of the covenant. He says of the case (p. 97): "If this reasoning were followed to its logical conclusion the plaintiffs would have been able to enforce a restriction even though they had never owned any land in the vicinity except that which they sold to the defendant, Frank Rose, indeed, even if the plaintiffs had never owned any land whatever but had bargained with the defendant in some other way for the restriction. Whether the equity courts will take these last two steps and recognize to the full the doctrine of equitable servitudes in gross remains to be seen. The decision in _Van Sant v. Rose_ is a striking example of the tendency of equity in the United States to become mechanical." This criticism is unsupported in the law, and is based upon the erroneous assumption that a showing of damage, actual or threatened, is essential to the granting of an injunction to restrain the breach of a negative covenant. The authorities are all the other way: "The amount of damages, and even the fact that the plaintiff has sustained _any_ pecuniary damages, are wholly immaterial." _Pomeroy's Equity Jurisprudence_ (3d ed.) sec. 1341. And to the same effect: _Bispham, Equity_ (10th ed., 1922) sec. 461; _Kerr on Injunctions_, (4th ed.) p. 370; _Doherty v. Allman_, 3 App. Cas. 709 (1878); _Leech v. Schwedler_, L. R. 9 Ch. App. Cas. 463, 468 (1879) and authorities there cited. In the _Van Sant_ case the simple fact that the complainant was the covenantee was sufficient to enable him to maintain his suit in equity to restrain a violation of the covenant. He sought to enforce only a pure contractual right, independently of any property interest whatever.
land, it is quite unnecessary to the validity of equitable easements and restrictions. These servitudes, cognizable in equity alone, are binding not only between parties in the same chain of title but may even be enforced between two remote grantees of the covenantor, claiming under him by way of independent chains of title. *Parker et al. v. Nightingale et al.*\(^1\) was such a case. There, the owners of a tract of land divided it into lots and orally agreed among themselves that the same should not be used for other than dwelling houses. This condition was incorporated in the deeds by which the lots were subsequently conveyed. In a suit by one grantee against another who claimed through a different chain of title, but whose property was subject to the same restriction, the defendant was enjoined from converting a dwelling into a restaurant. The court held the defendant bound by the covenant with notice of which he bought, citing *Tulk v. Moxhay* and *Whitney v. Union Railway Company*, supra.

An early New Jersey case embodying this development of the doctrine was *Winfield v. Henning*.\(^2\) The complainant owned adjacent lots and both he and the defendant took title by mesne conveyances from one Keeney. Keeney had acquired the property by a conveyance providing for a ten foot building line. The deeds to the complainant and defendant did not refer to the restriction, but their knowledge of it was not disputed. In granting the injunction restraining the defendant from encroaching upon the ten foot strip, the court took the view that, since both lots were subject to the same easement in favor of the land of the original covenantee and both parties would be liable upon the covenant of their grantor if an action were brought against them by the covenantee, each of these two remote grantees was justly and equitably entitled to the advantage which the observance of the covenant by his neighbor may be to him.

Another phase of the reciprocal character of the right to enforce equitable easements is aptly described by the

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\(^2\) 21 N. J. Eq. 188 (1870).
Supreme Court of Michigan in the case of Sanborn et al. v. McLean et al. The court said, in part:

If 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. For want of a better descriptive term this is styled a reciprocal, negative easement. . . . It is not personal to owners, but operative upon use of the land by any owner having actual or constructive notice thereof. . . . Such a scheme of restriction 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.

The courts in many other jurisdictions, notably Massachusetts and New Jersey, have taken similar positions.

These reciprocal burdens and benefits attach to the land, and are enforceable in favor of and against individuals by virtue of their ownership of that land. If it is clear, then, that the benefit of an equitable easement is a property right, these questions may logically arise: Is it property within the meaning of the constitutional provisions, state and Federal, which prohibit the taking of private property for a public use without just compensation? May a public or quasi-public corporation having the power of eminent domain acquire the fee in property burdened with equitable restrictions, and thereafter violate those restrictions with impunity? Or must compensation be paid to the owner of the dominant tenement as well as to the owner of the fee? Answers of the authorities differ.

In Flynn v. New York, Westchester and Boston Railway Company et al., the defendant was the owner of thirty-eight lots, and the plaintiff owned two lots nearby,

21 218 N. Y. 140, 112 N. E. 913 (1916).
all situated in the same subdivision and subject to certain building restrictions. The defendant constructed railroad tracks over its property and began the operation of trains, which acts were alleged to be in violation of the restrictions to which the property was subject. The Supreme Court of New York held the benefits of the restrictive building covenants to be property rights of the plaintiff, which could not be taken for a public use without just compensation, and affirmed the lower court's order requiring the defendant to pay to the plaintiff $3370. An owner of property situated in Stamford, Connecticut was held entitled to compensation on account of the erection of a public school building in violation of certain building restrictions affecting both his own land and that used for the school.22 The case of Riverbank Improvement Company v. Chadwick,23 while not on all fours with the two previous cases, indicates that a similar result would be reached in Massachusetts.

Ohio, on the other hand, is committed to the opposite view. In the only two cases in that state which the writer was able to discover, the Supreme Court denied the claims of property owners to compensation for similar injury.24 A railroad and a street railway company were the respective defendants. The court held the restrictions invalid as to a public agency, and for authority drew upon a case decided in the Federal circuit court involving condemnation of land by the United States government.25 It

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23 228 Mass. 242, 117 N. E. 244 (1917).
25 United States v. Certain Lands, 112 F. 622 (1899). This proceeding was for the acquisition, by the Government, of shore line property near Jamestown, Rhode Island, for the construction of coast defense fortifications. Part of the court's opinion is quoted: "As each owner of land holds his property subject to the devesting of his title through the action of the state or of the United States, based on public necessity, can he by any means, directly or indirectly, impose upon the state or the United States the burden of compensating him for damage resulting from that public use which does not directly invade his land? . . . Can it be possible that these owners, by mutual agreements or covenants that they or their successors in title will not do things which may be necessary for national defense, and by agreeing that
was there held that damages suffered by reason of non-observance by the government of prior restrictive covenants were not compensable under the eminent domain provision of the Constitution. After quoting at length from that case the Ohio court said, "What was said by the court in that case in reference to the state and government applies with equal force to a railroad corporation or any agency of the state which is vested with the right of eminent domain." Accepting the reasoning of the Federal court in the case cited, there would seem to be little question as to the right of the United States or a state to acquire title free and clear of equitable restrictions. But as to quasi-public corporations for profit, such as railroads and the utilities, it is submitted that the question may still be considered an open one. The weight of authority, it would seem, favors compensation.

The extent and scope that equitable easements are recognized varies in the several states. In Bryan v. Grosse et al.,\(^\text{26}\) an agreement was entered into between adjoining owners relative to building restrictions. It was stipulated that the agreement should run with the land. In a suit against a remote grantee who sought to avoid the obligation of the agreement, the court held the restric-

\[^{26}\text{155 Cal. 132, 99 P. 499 (1909).}\]
tion valid and binding in equity, declaring that the stipulation that the agreement should run with the land was immaterial since the present defendant had notice of the agreement when he purchased. And to the same effect is the often-cited New York case, *Trustees of Columbia College v. Lynch.*

While in general it may be said that equitable easements cannot arise except by written agreement, one important exception is to be noted. That is the case where lots are sold with reference to a map or plat showing the grantor's intention as to what shall be the character of the other property so platted. In *Stevenson v. Lewis* it was held:

When an owner of land makes a plat thereof, showing lots, streets and public grounds, and sells the lots with reference to the plat, the purchasers of the lots acquire, as appurtenant thereto, every easement, privilege and advantage which the plat represents as belonging to them. . . . The sale and conveyance of lots according to the plat imply a covenant that the streets and other public places indicated on the plat shall be forever open to the use of the public, free from all claim or interference of the proprietor inconsistent with such use.

The court's opinion is silent as to whether there must be actual reference to the plat in the deed. The much earlier case of *Zeering v. Raber* was similar, but the court's decision was based partly on the fact that the deed contained an express reference to the plat, although the latter had not been acknowledged or recorded. In *Tallmadge v. The East River Bank* it was held that where there was an oral agreement as to a building line, a reference to a plat showing the same, and a uniform observance of such building line by existing structures, remote grantees with notice of the oral agreement were bound. In a later case in the same state, a mere oral

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27 70 N. Y. 440 (1877).
28 244 Ill. 147, 91 N. E. 56 (1910).
29 I1. 409 (1874).
30 See Marsh et al. v. Village of Fairbury, 163 Ill. 401, 45 N. E. 236 (1896); Village of Benld v. Dorsey, 311 Ill. 192, 142 N. E. 563 (1924).
31 26 N. Y. 105 (1862).
32 Hayward Homestead Tract Ass'n v. Miller, 26 N. Y. S. 1091 (1893).
agreement, without reference to any map or plat, was held binding upon remote grantees with notice, and the Tallmadge case was cited for authority. The decision there, of course, does not support such a position, and it is submitted that the court went too far in holding a mere oral agreement, with nothing more, enforceable against remote grantees, even though they had notice that some sort of agreement had been entered into by their predecessors. Restrictions on the use of real property are not favored in the law, and doubts are usually resolved against them.8

Among the classes of cases in which the courts have refused to enforce restrictive agreements, the first to be discussed is that group in which there has been an attempt to restrain trade or commerce. In *Hodge v. Sloan*84 the complainant, owner of about forty acres of land, was in the sand business. He sold a parcel containing about one-half acre, and the grantee covenanted not to dig or sell sand. Subsequent grantees or assignees were not mentioned in the deed. The grantee conveyed to his son, no reference being made to the prior covenant. The son had actual knowledge, however, of the restriction. The court, after deciding that the restriction was not such restraint of trade as to be illegal, held that the son, as a grantee with notice of the covenant, was bound.

*Brewer v. Marshall and Cheeseman*85 is one of the outstanding cases with respect to the invalidity of covenants in general restraint of trade. In that case, the complainant and the defendant owned adjacent parcels of land, the former approximately twenty-eight acres, the latter a larger tract. Both derived title by mesne conveyances from one George Cheeseman. The latter’s conveyance to the grantor of the complainant contained this cove-

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83 In *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556 (1893), lots numbered 1 to 12 were sold “for single dwellings” on each lot of 50 feet. The restriction was liberally construed, and a four-story apartment building erected on lots 1 and 2, with a partition on the lot line was held to comply with the attempted restriction.

84 107 N. Y. 244, 17 N. E. 335 (1887).

nant: "Also the said George Cheeseman, his heirs or assigns, are not to sell any marl, by the rood or quantity, from off his premises adjoining the above property." The tract so burdened came into the hands of the defendant who, notwithstanding the terms of the covenant, claims and exercises an alleged right to sell marl therefrom. The court held that, although the defendant was chargeable with notice of the prior covenant because it appeared in his chain of title, the burden would not be enforced. The covenant is one in unreasonable restraint of trade, and therefore is illegal and void. In the words of the opinion, "It prohibits the sale of it [marl] at any time, in any market, either by the owner of the land or by his assigns. . . . The restraint it imposes is general, both as to time, place, and persons." In commenting upon the doctrine of equitable restrictions, and cautioning against its extension, the court laments the state of affairs where the owner of land may impress upon it any of his notions, and equity will see that the land shall retain such impress in the hands of every subsequent holder. . . . Thus incidents can be annexed to land, as multiform and as innumerable as human caprice. . . . These are the evils which I think will unavoidably result from adopting any principle which will sustain the bill in this case. . . . In my judgment, the decisions in this branch should be followed, but not transcended. If this, then, were the only objection to the case of the complainant, I should be opposed to granting him the relief for which he asks.

In addition to covenants in general restraint of trade, courts of equity may also refuse specific performance or injunctive relief where there has been such a change in circumstances since the date of the covenant as could not possibly have been in the contemplation of the parties. For example, by reason of irregular observance of a building line, all of the benefits expected from the original plan may have been lost. The court may then refuse to recognize that the restrictions still exist. In Curtis v. Rubin it was shown that a fifteen foot building line was

86 244 Ill. 88, 91 N. E. 84 (1910).
ignored by all builders on one side of a particular block in the city of Chicago. The encroachments varied from three to four feet. A corner store was begun, which when completed would extend about eight feet beyond the line. An injunction against the builder was sought, but was denied on the grounds, first, that the plan as originally adopted had obviously been abandoned by tacit, common consent, and second, that the complainants themselves were guilty of violating the very restriction they now sought to enforce. This decision was cited with approval and followed in *Kneip v. Schroeder*.

A case somewhat similar is *Ewertsen v. Gerstenberg*.

The appellant had begun an apartment building which would extend twenty-six feet over a building line. It was shown that a number of other lots so restricted were improved with buildings which extended fifteen to eighteen feet beyond the line. The lower court held that the appellant was limited to an encroachment of eighteen and nine-tenths feet, which was the largest existing at the time of the suit. But the Supreme Court, because of the previous, apparent disposition to ignore the line, and in view of the encroachments then existing, allowed the appellant to disregard the restriction entirely. In so deciding, the court said:

We do not mean to say that an easement abandoned in part will be held as abandoned altogether, for where it is abandoned *pro tanto* only, and a material and beneficial part remains, it will be protected. But while such restrictions are sometimes treated as easements, it is apparent that the value of a restriction of this character depends very largely on the uniformity of its observance in the improvement of property affected by it. In the case at bar it cannot be said there has been any uniform observance of the restriction in the vicinity of the property in question... and we are of the opinion that the value of the easement—treating it as such—for all practical purposes has been destroyed.

Thus, unchallenged violations of a restrictive covenant may be grounds for refusing equitable relief.

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37 255 Ill. 621, 98 N. E. 998 (1912).
38 186 Ill. 344, 57 N. E. 105 (1900).
There is a closely related class of cases where the exercise of the chancellor's authority is also entirely discretionary. Where there has been such a change in the character of the neighborhood or surroundings as to defeat the objects and purposes of the parties to the covenant, and to render it inequitable to deprive a grantee, or his successor in title, of the privilege of conforming his property to that changed character, injunctive relief may be denied. This principle was announced twenty-six years before *Tulk v. Moxhay* in the case of *The Duke of Bedford v. Trustees of the British Museum*.39 A century and a half before this suit two families of wealth and nobility, owning adjoining tracts, by mutual covenants restricted their lands, respectively, to a mansion and the usual gardens. The covenants were adhered to through many years and many transfers of title. However, in the course of time, one mansion was torn down, a street was extended across the property, and the character of the nearby real estate became greatly altered. In this suit, the Duke sought to prevent a proposed addition to the museum on a portion of the restricted property. The court denied his petition, and held that the equitable right which once existed had been lost by the permissive change in the use of the property years before.

*Page v. Murray*40 is a domestic example of how a change in neighborhood characteristics may affect the enforcibility of building restrictions. On May 10, 1873, the complainant, Henry Page, entered into an agreement with Marshall Ward and Peter Gerbert whereby the former granted a right of way for a road across certain of his lands, to reach lands of Ward and Gerbert. In consideration of the grant, the latter agreed not to use or permit the use of their property in enumerated businesses, all of a nuisance character. They also covenanted that for the following twenty years no building, except necessary outbuildings, should be erected costing less than $3000. In 1890 the defendant, who had acquired title

40 46 N. J. Eq. 325, 19 A. 11 (1890).
through mesne conveyances, began the erection of a house which was designed to cost about $2000. This suit was brought to enjoin construction. It appeared from the evidence that the years between 1873 and 1890 had witnessed a considerable development of the lands surrounding the tract affected by the agreement, and that some twenty-five or thirty houses had been built just outside the said tract, their costs ranging from $700 to $2500. One, larger than the others, had cost about $8000. The only building on the restricted area, other than that of the present defendant, was a $2000 greenhouse with a residence adjoining. In denying the petition for an injunction, the court said:

The evident purpose of the covenant was to protect the locality to which it applied from businesses that were likely to create a nuisance and buildings of the cheapest grade, and thereby bring to it a better class of buildings, and insure its occupation by quiet, orderly, and well-to-do people. With this intention, the covenant arbitrarily names a price that all buildings to be erected must cost . . . but now, after seventeen years have expired, and no buildings of the value contemplated have been built on the land affected by the agreement, while upon adjacent land cheaper buildings have multiplied, it appears to be too late for the covenant to secure the desired end.

In Trustees of Columbia College v. Thacher the changed character of the locality was deemed a sufficient reason for relieving an owner from the obligation of a covenant restricting certain property to residential use.

In a case where specific performance or a writ of injunction is denied, the court may leave the party to his remedy at law, or in its discretion may retain jurisdiction of the cause for the purpose of assessing damages. In Amerman v. Deane complainant and defendant took title from a common source and both parties were sub-

41 87 N. Y. 311 (1882).
42 And, according to a rather anomalous Massachusetts case, Jackson v. Stevenson, 156 Mass. 496 (1892), this is so whether or not a remedy at law existed.
ject to a covenant prohibiting the erection of a tenement house. In this action by the owner of a private residence to restrain the violation of this covenant, it was proved that, with few exceptions, the entire surrounding neighborhood had been built up with flats and tenement houses, that the tenement which the defendant had begun was a large one, and that he had already spent a considerable sum thereon. The court refused a permanent injunction, but fixed the damages as the difference in value of complainant’s premises with and without defendant’s tenement, and awarded an injunction restraining the defendant from renting the building to any tenant until such damages and costs were paid.

Thus far the discussion has been confined to negative covenants. It is proposed to turn now to covenants of an affirmative character, requiring in all cases positive acts, which courts of equity are asked to enforce by way of specific performance. This doctrine, while recognized as within the jurisdiction of equity, has its practical limitations in the reluctance of the courts to decree an act or series of acts which may be difficult of supervision. Equity will rarely decree specific performance of affirmative contracts calling for the exercise of skill, discretion, or good faith on the part of the defendant.

The early cases disclose a marked disinclination of the chancellors even to issue an order or decree in affirmative, directory, or mandatory terms. The manner of obtaining affirmative acts by a negative decree, so characteristic of the English courts, is well illustrated in Lane v. Newdigate,44 where a covenant to repair and maintain locks and stopgates in a canal was enforced. The plaintiff was the assignee of a lease, and the defendant was the lessor. The latter was currently failing to maintain a certain water level in a canal, thereby violating a covenant with the plaintiff’s assignor. Lord Chancellor Eldon, on the

44 10 Ves. Jr. 192, 32 Eng. Rep. 818 (1804). Note: The reference to this case is for the sole purpose of showing the attitude of extreme reluctance assumed by the chancellors of a century ago in matters of covenants requiring affirmative action. The case is one of a covenant running with the land, and is not to be considered a forerunner of Tulk v. Moxhay.
trial, expressed a difficulty whether it was according to
the practice of the court to order repairs to be done. He
said, further:

So, as to restoring the Stop-gate, the same difficulty occurs. The
question is, whether the Court can specifically order that to be
restored. I think I can direct it in terms, that will have that
effect. The Injunction, I shall order, will create the necessity
of restoring the Stop-gate; and attention will be had to the man-
ner in which he [the defendant] is to use these locks; and he
will find it difficult, I apprehend, to avoid completely repairing
these works.

The report continues with the order subsequently pro-
nounced:

that the Defendant, his agents, &c., be restrained until farther
Order, from farther impeding, obstructing, or hindering, the
Plaintiff from navigating the canal . . . contrary to the cove-
nant, by continuing to keep the said canals, or the banks, gates,
locks, . . . out of good repair, order or condition; . . . or by con-
tinuing the removal of the Stop-gate, mentioned in the pleadings
in the action, brought by the Plaintiff, to have been erected; and
by means of which the water could and would have been kept
and retained. . . .

As late as 1877 the same shyness may be noticed in
Luker v. Dennis,45 where there was a covenant to buy beer
of the covenantee for use in a public house, and a sub-
sequent purchaser of the house with notice of the cove-
nant was enjoined from buying beer of anyone else. This,
it will be recognized, is but a restatement of the prin-
ciples of the well known cases of Lumley v. Wagner46 and
Lumley v. Gye.47

The decision in Cooke v. Chilcott48 registers the great-
est extent to which the English courts have gone in grant-
ing enforcement of affirmative, equitable covenants. In
that case, an agreement to supply adjoining land with

45 7 Ch. D. 227 (1877).
46 5 DeG. & Sm. 485, 64 Eng. Rep. 1209 (1852).
48 3 Ch. D. 694 (1876).
water was enforced, although it necessitated laying pipes and erecting machinery. The later English decisions have enforced only negative covenants.49 The reversal of the trend in England was so complete that only six years after Cooke v. Chilcott the court denied specific performance of a covenant to reconvey land, on the ground that it required an affirmative act. In London and Southwestern Railway Company v. Gomm,50 the railway company had sold land then believed to be superfluous, but took a covenant purporting to bind the purchaser, his heirs, assigns, etc., that the land would be reconveyed upon payment of a specified sum. The railway company was denied any right to recover the land from a grantee of the covenantee on the ground above stated.

The tendency of the courts of the empire to enforce only negative, or restrictive, covenants has not been followed generally in this country. As to matters of performance, the courts here have observed the same rules and limitations in enforcing equitable easements and servitudes that would govern the enforcement of covenants running with the land. Prominent among cases in the United States where performance of an affirmative covenant was ordered is Whittenton Manufacturing Company v. Staples.51 The owner of a dam and reservoir contracted with five proprietors upstream whereby each of the latter assumed one-fifth the liability for overflow damages to any and all strangers, in return for certain rights in the reservoir. The instant suit was brought by an assignee of the original owner of the reservoir against a remote grantee of one of the five covenantors, to recover one-fifth of certain overflow damages resulting to a third party. Relief was decreed as prayed.

In Lydick v. The Baltimore and Ohio Railway Company52 an agreement was made by the railroad company to maintain a switch track for the use of a flour mill, its

49 Austerberry v. Corporation of Oldham, 29 Ch. D. 750 (1885); Haywood v. Brunswick Permanent Benefit Building Society, 8 Q. B. D. 403 (1881).
50 20 Ch. D. 562 (1882).
51 164 Mass. 319, 41 N. E. 441 (1895).
52 17 W. Va. 427 (1880).
then owners and all subsequent owners. A remote grantee of the mill property, who took with notice of this covenant, was permitted to enforce it against the railroad company. Many similar cases are to be found in other jurisdictions.\(^5^3\)

It is suggested, in conclusion, that the scope and usefulness of equitable easements and covenants at the present day is such as to give their practical value a rank of unquestioned superiority over their ancestors—covenants which run with the land. With our system of registration of land titles, the required notice to subsequent owners is implied by law the moment the document embodying the covenant is recorded. And as to the advantage of avoiding the necessity of privity of estate between parties, comment is hardly necessary.

The history of the development of the law relating to restrictive covenants and agreements since *Tulk v. Moxhay* in 1848 is typical of the way in which doctrines developed by courts of equity continue to be a vital force in our law, by which it retains its flexibility and adaptability to new and changing conditions. It shows how these doctrines have moulded and shaped the more rigid and unyielding rules of law so as to make effective the intentions of contracting parties, and conform those rules to new standards of living and to the economic needs of the community.

\(^5^3\)Covenant to build a railroad station, *Georgia Southern Railroad v. Reeves*, 64 Ga. 492 (1880); to repair and maintain a dam, *Maxon v. Lane*, 102 Ind. 364, 1 N. E. 796 (1885); to assume and pay a mortgage, *Bowen v. Beck*, 94 N. Y. 86 (1883); to maintain a partition fence, *Kellogg v. Robinson*, 6 Vt. 276 (1834); to contribute to a party wall, *Conduit v. Ross*, 102 Ind. 166, 26 N. E. 196 (1885); to build and forever maintain a fence, *Burbank v. Pillsbury*, 48 N. H. 475 (1869). In each of these cases the affirmative acts required by the covenants were decreed to be specifically performed.