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EQUITABLE EASEMENTS.

The term " equitable easements " indicates a class of property rights, analogous to legal easements, but by reason of either informality in their creation, or the absence of privity of contract or estate, not enforceable in a court of law.

In considering the distinction between legal and equitable easements, it is to be observed that, in most cases, particularly those which relate to real property, courts of equity have generally endeavored that their decisions should bear the strictest possible analogy to the decisions of courts of law in cases of a similar or corresponding impression. In relation to estates and rights in lands, there scarcely is a rule of law or equity of a more ancient origin, or which admits of fewer exceptions, than the rule that equity follows the law, Co. Lit. L. 3, C. 8, sec. 504, n. 16; *Cushing* v. *Blake*, (1879), 3 Stew. Eq. (N. J.), 695.

An easement is a right without profit, in the land of another. A profit *a prendre*, is a right to take or sever something valuable from the land of another; and this distinguishes it from easements, which are rights merely to use, or interfere with the enjoyment of another's property. In the case of an easement there must be both a dominant and a servient tenement. The benefit must be private, irrevocable, and unattended with direct tangible profit. The burden must be imposed upon corporeal property, not upon the person of the owner, and must be either positively, or consequentially, injurious to its enjoyment. Incident to its existence, are the right of the owner of the

servient tenement to use the *locus in quo*, in every respect not interfering with the easement, and the duty of the owner of the dominant tenement to repair and amend. Such easements are acquired by grant, by prescription, and in rare cases of necessity, by implication of law.

In the case of easements created by covenant, or reservation, the distinction between legal and equitable easements is not always observed. To constitute a grant of an easement at law, it is not necessary that the word "grant" should be used in the deed; it is sufficient if the intention to grant be manifested. An easement cannot strictly be made the subject either of exception or reservation in a deed of conveyance of land, for it is neither parcel of the land granted, nor does it issue out of the land. If, therefore, an easement be incorrectly reserved to the grantor, or excepted from the land conveyed, the reservation or exception operates as a grant of a newly created easement by the grantee of the land to the grantor. Godd. Eas'mt. 108. So, an agreement under seal, for the use of a way, or of the water of a stream for the purposes of irrigation, will be construed as a grant of an easement, and not merely as a covenant: *Lord Mountjoy's case* (1584), Moo. 174; *Holms* v. *Seller* (1692), 3 Lev. 305; *Northan* v. *Hurley* (1853), 1 E. & B. 665; s. c. 22 L. J. Q. B. 183. This subject is discussed in a recent case in Massachusetts, *Hogan* v. *Barry* (1887), 143 Mass. 538. It was an action of tort, for interfering with an easement, which the plaintiff claimed by virtue of the following words, inserted after the description, and before the *habendum*, in the conveyance to him:

"And said grantors agree that no building shall be erected on said lot next east of said granted premises, nearer to the west line of said lot than four feet, being the east line of the premises hereby conveyed."

The grantor owned the adjoining land referred to and subsequently conveyed it to the defendant. The learned judge said:

"If the seeming covenant is for a present enjoyment of a nature recognized by the law as capable of being conveyed and made an easement;—capable, that is to say, of being treated as a *jus in rem*, and as not merely the subject of a personal undertaking;—and if the deed discloses that the covenant is for the benefit of adjoining land conveyed at the same time, the covenant must be construed as a

grant, and in the language of Plowden, 308, 'the phrase of speech amounts to the effect to vest a present property in you.' An easement 'will be created and attached' to the land conveyed, and will pass with it, to assigns, whether mentioned in the grant or not:" *Norcross* v. *James* (1885), 140 Mass. 188.

Over easements of this class, courts of law and of equity exercise concurrent jurisdiction. An action for damages will lie, or after the establishment of the legal right and the fact of its violation, the complainant will be entitled to a permanent injunction, to prevent the recurrence of the wrong, unless there be something special in the circumstances of the case.

An equitable easement is a right without profit which the owner of land has acquired by contract, or estoppel, to restrict, or regulate, for the benefit of his own property, the use and enjoyment of the land of another: *Whitney* v. *Union Ry. Co.* (1858), 11 Gray, (Mass.) 359. These rights, as well as the remedies for their enforcement, are purely equitable, and, as has been said, owing either to the informality of the agreement, or the relative situation of the parties, cannot be recognized in a court of law.

In their nature, easements of this class must be restrictive of the ordinary proprietary rights, but their exact scope it is difficult to define. In the most usual cases, they either prohibit, or regulate, the erection of buildings, or prescribe the purposes for which real property shall or shall not be used: *Coles* v. *Sims* (1854), 5 De G. M. & G. 1.; *Western* v. *Macdermott* (1866), L. R. 1 Eq. 499. Thus, courts of equity will restrain the erection of houses on land agreed to be kept open as a park: *Hills* v. *Miller* (1832), 3 Paige (N. Y.) 254; *Lenning* v. *The Ocean City Ass'n* (1886), 14 Stew. Eq. (N. J.) 606; the erection of buildings above a designated height: *Jeffries* v. *Jeffries* (1875), 117 Mass. 184; *Clark* v. *Martin* (1865), 49 Pa. 289; interference with prospect, by projection of a structure beyond a specified line: *Jenks* v. *Williams* (1874), 115 Mass. 217; will enforce compliance with a uniform building plan: *Trustees of Columbia College* v. *Lynch* (1877), 70 N. Y. 440; will protect the right of passage, light and air, in an open court: *Salisbury* v. *Andrews* (1880), 128 Mass. 336; will enforce a covenant against certain employments on the granted premises: *Whitney* v. *Union Ry. Co.* (1858), 11 Gray, (Mass.)

359; *Rolls* v. *Miller* (1884), L. R. 27 Ch. D. 71; *Richards* v. *Revitt* (1877), L. R. 7 Ch. D. 224; *Portman* v. *Home Hospital Ass'n* M. R. Dec. 1, 1879, 27 Ch. D. 81 n; or even against nuisances in general: *Barrow* v. *Richard* (1840), 8 Paige, (N. Y.) 351. In short, the doctrine has been laid down, that any restriction in the manner of using land granted, beneficial to adjacent land of the grantor, not contrary to public policy, may be enforced in equity against the grantee, or his assigns with notice: *Whitney* v. *Union Ry. Co.* (1858), 11 Gray, (Mass.) 359. In the absence of a legal remedy, relief is granted in equity, to give effect to the intention of the parties to the agreement.

METHODS OF CREATING EQUITABLE EASEMENTS.

The principal difference between a legal and an equitable easement, is in the method of its creation, and the circumstances under which the right can be enforced.

Equitable easements are in general created upon the division and conveyances in severalty of an entire tract to different grantees, and may be by reservation, by condition annexed to the grant, by covenant or by informal agreement: *Trustees of Columbia College* v. *Lynch* (1877), 70 N. Y. 445.

By Covenant or Reservation.—The enforcement in equity, of easements created by covenant, or reservation, extends to cases where the covenant does not run with the land so as to be enforceable at law. This has been settled only after some conflict of authority. In *Keppell* v. *Bailey* (1834), 2 M. & K. 517, certain land owners and owners of iron works, and among others, the lessees of the Beaufort Iron Works, formed a joint stock company, and under the provisions of the Monmouthshire Canal Act, constructed a railroad connecting a lime quarry with the several iron works. In the partnership deed of the railroad company, the lessees of the Beaufort Iron Works covenanted for themselves and their successors in interest, to procure all the limestone used in their works from the said quarry, and to convey all such limestone, and also all the iron stone, from the mines to the said works along the said railroad, at a certain designated toll. A bill was filed by the share holders of the railroad to enforce this covenant against

a purchaser of the Beaufort Iron Works with notice of the partnership deed. The injunction was denied, on the ground that the covenant did not run with the land. Lord Chancellor BROUGHAM said—

"It appears to me very clearly that the covenant does not run with the land, and therefore is not binding upon the assignees of the [covenantors] * * * * * . Between the estates of the occupiers of the three iron works, and the estates or the persons of their associates in the railway speculation, with whom they covenant, there is no privity, no connection whatever, of which the law can take notice * * * . There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets, real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed."

Keppell v. *Bailey* has been overruled by. *Tulk* v. *Moxhay* (1848), 2 Phil. 774, where the rule as now accepted, was first established. In *Tulk* v. *Moxhay*, the plaintiff, being the owner in fee of a vacant piece of ground in Leicester Square, as well as of several of the houses forming the square, sold the vacant lot to one Ems in fee, taking in the deed of conveyance a covenant from Ems for himself, his heirs and assigns, with the plaintiff, his heirs, executors and administrators, that the said piece of ground should be kept and maintained in sufficient and proper repair as a pleasure ground, in an open state, uncovered by any buildings, in neat and ornamental order. In granting an injunction to enforce the covenant against a purchaser with notice, Lord Chancellor COTTENHAM used this language—

"It is said that, the covenant being one which does not run with the 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 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 were 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."

To the same effect, *Bleeker* v. *Bingham* (1832) 3 Paige (N. Y.) 246; *Barrow* v. *Richards* (1840), 8 Id. 351; *Coles* v. *Sims* (1854), 5 De G. M. & G. 1, and cases cited in note (2); *Whatman* v. *Gibson* (1838), 9 Sim. 196; *Lord Manners* v. *Johnson* (1875), L. R. 1 Ch. Div. 673; *Earl of Zetland* v. *Hislop* (1882), L. R. 7 App. Cas. 427; *Gaskin* v. *Balls* (1879), L. R. 13 Ch. Div. 324; *Trustees, &c.*, v. *Lynch* (1877), 70 N. Y. 440; *Hodge, Ex'r, et al.*, v. *Sloan* (1887), 107 Id. 244; *St. Andrew's Lutheran Church's Appeal* (1871), 67 Pa. 512; *Wilson* v. *Hart* (1866), L. R. 1 Ch. 463. These covenants may be said to run with the land in equity, though not in law.

An exception to the rule, that the covenant need not run with the land at law, is made in those cases in which the promise under seal calls for the performance of some positive act on the land, either of covenantor or covenantee. Thus in *Austerberry* v. *The Corporation of Oldham* (1885), L. R. 29 Ch. D. 750, a number of the inhabitants of the borough, being desirous of constructing a new road, executed a deed of settlement, which recited that the making of the proposed new road would be of great public advantage; that the several parties thereto had agreed to form amongst themselves a joint stock company and to raise capital for the purchase of land for the formation of the road and making and maintaining the same, and that certain trustees had been appointed to carry out the work in accordance with a plan therein minutely described. The trustees purchased from one Elliott, the plaintiff's predecessor in title, a strip of land in the line of the proposed turnpike, at the same time covenanting for themselves, their heirs and assigns, that they, or some one of them would, within three years, make and fence off, in a workmanlike manner, the said tract of land into a road, to form part of the road provided for in the deed of settlement, and to form the remainder of said road, which, when completed, should be kept open and maintained by the said trustees for the use of the public, subject to such tolls as should be agreed upon. Under a Borough

Improvement Act, the defendant purchased the said road, gave notice to the plaintiff to repair the portion on which his property fronted, and upon refusal, proceeded to make the repairs itself. An attempt was made to collect the expenses from the plaintiff, who filed a bill praying *inter alia*, an injunction restraining the defendants from further prosecution. The injunction was refused. Lord Justice COTTON said—

"In my opinion, if this is not a covenant running at law, there can be no relief in respect of it in equity; it is not a restrictive covenant; it is not a covenant restraining the corporation, or the trustees, from using the land in any particular way. If either the trustees or the corporation were intending to divert this land from the purpose for which it was conveyed, that is, from its being used as a road or street, that would be a very different question. * * * But here the covenant, which is attempted to be insisted upon, * * is a covenant to lay out money in doing certain work upon this land; and, that being so, * * * it is not a covenant which a court of equity will enforce; it will not enforce a covenant not running at law, when it is sought to enforce that covenant in such a way as to require the successors in title of the covenantor, to spend money, and in that way to undertake a burden upon themselves. The covenantor must not use the property for a purpose inconsistent with the use for which it was originally granted; but, * * * a court of equity does not and ought not to enforce a covenant, binding only in equity, in such a way as to require the successors of the covenantor himself,—they having entered into no covenant—to expend sums of money in accordance with what the original covenantor bound himself to do."

The rule is now firmly established, that the court will not enforce, against the grantee of the covenantor, who has himself entered into no covenant, any covenant of his grantor in relation to the premises conveyed, which does not run with the land and which requires the expenditure of money: *Moreland* v. *Cook* (1868), L. R. 6 Eq. 252; *Haywood* v. *Brunswick Building Society* (1881), 8 Q. B. D. 403; *London & Southwestern Railway Company* v. *Gomm* (1881), L. R. 20 Ch. D. 562.

Huling v. *Chester* (1885), 19 Mo. App. 607, though an action at law, illustrates the distinction between covenants creating easements and covenants which can only be enforced where there is privity of contract. Huling and W. R. Chester, being the owners of adjoining lots, by agreement under seal, provided for the erection of a line wall by Huling, and for payment for half of such wall by Chester, within six months from the date of the agreement, or at his option, by himself or his grantees, when he or they built upon the premises using the

part of the wall standing thereon. Prior to his death, Huling placed the line wall as agreed, one half on the W. R. Chester lot. C. M. Chester, the defendant, purchased the lot from W. R. Chester, with notice of the contract, and erected a building on the lot, using the party wall. This action was brought by the heirs of Huling to recover the cost of one half of the wall. The court held that the plaintiffs could maintain an action for any interference with their enjoyment of the easement in the party wall, but could not, as owners of the Huling lot, maintain an action for the compensation which was to be paid to Huling personally. The right being personal to Huling, upon his death went to his personal representatives.

There is a class of cases in which equity grants relief by compelling the expenditure of money in the performance of the covenant, but in these cases the remedy is sought against the original covenantor, and relief is granted by way of specific performance, and is regulated by principles affecting that branch of equitable jurisdiction. Of this class of cases, *Randall* v. *Latham* (1869), 36 Conn. 48, is an example. In that case, the complainant claimed a right, under one Thomas, to the water from a raceway. Thomas and the respondent, Latham, who was the original covenantor, were respectively the owners of mills on the same stream. Thomas conveyed to Latham a tract of land adjoining the mill of the latter. The deed contained a reservation that the grantor should have the privilege of drawing water from the ditch of Latham's mill, and that Latham and his successors should keep a spout ten inches square in the inside at the bottom of the ditch, to which the grantor should at all times have access for the purpose of drawing water. The ditch was never owned by Thomas, and he had no interest in it, beyond that acquired by this provision in his deed to Latham. The Court sustained the complainant's bill, saying—

"The deed purports to require the respondent to put in the spout upon land not conveyed, and the question is whether a court of equity can compel him to do it under the circumstances of the case. That the respondent, by accepting the deed containing the provision, thereby agreed to perform this duty, there can be no doubt. This duty was a part of the consideration of his deed. The respondent has received full compensation, and it is difficult to see why he is not bound to perform it."

In the case of easements created by reservation, courts of equity are more liberal than courts of law. On technical grounds, there is doubt whether at law, a reservation in a deed of conveyance, will create an easement in other lands of the grantee than the lands granted and conveyed to him. In equity there is no embarrassment on this subject. Thus, in *Case* v. *Haight* (1829), 3 Wend. (N. Y.) 632; s. c. 1 Paige (N. Y.) 447, Schuyler owned the south side of the lower falls in the outlet of Lake George, and also the land under the bed of the stream. Deals and Nichols were the owners of the lands on the north shore, and to them he made a grant of the bed of the stream, reserving to himself, his heirs and assigns, the right to abut any dam, or dams, on both sides or shores of the said waters. An injunction was granted to restrain a breach of the covenant. In construing this reservation, SUTHERLAND, J., said—

"The reservation can have no effect as an exception. * * * * * The deed of Schuyler did not convey, or profess to convey, any part of the north shore; he could not therefore reserve a right to build a dam against it. But, though void as an exception, the reservation is binding upon the grantees and their assigns, and becomes operative either as an implied covenant or by way of estoppel. The deed is to be construed as though the parties had mutually covenanted that each should have a right to butt a dam upon the shore of the other."

By Parol Agreement.—In *Tulk* v. *Moxhay* (1848), 2 Phil. 774, it was said, that if there was a mere parol agreement, and no covenant, the court would enforce it against a party purchasing with notice, on the ground that if an equity be 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. The agreement may be either written or oral. Thus, in *Tallmadge* v. *The East River Bank* (1862), 26 N. Y. 105, the owner of lots on both sides of a city street made a plan exhibiting the street as widened eight feet on each side, and represented to several vendees of different lots that all the buildings to be erected on the lots he had sold and should sell, should stand back eight feet from the line of the street. The vendees erected buildings in conformity with this plan: none of them being restricted by their conveyances or bound by any covenant in respect to the extent or mode of

their occupation. An injunction was granted to restrain a subsequent purchaser of one of the lots, with constructive notice of the facts, from building upon the eight feet adjoining the street. The Court said—

"From the facts found by the judge at special term, it appears * * * that the strips of eight feet in width on both sides of the street should not be built upon, but kept open. It is to be presumed that they [the purchasers] would not have bought and paid their money except upon this assurance. It is to be presumed that, relying upon this assurance, they paid a larger price for the lots than otherwise they would have paid. Selling and conveying the lots under such circumstances and with such assurances, though verbal, bound Davis [the vendor] in equity and good conscience to use and dispose of all the remaining lots, so that the assurances upon which Maxwell [a purchaser and one of the plaintiffs in the suit] and others had bought their lots, would be kept or fulfilled. This equity attached to the remaining lots, so that any one subsequently purchasing from Davis any one or more of the remaining lots, with notice of the equity as between Davis and Maxwell and others, the prior purchasers, would not stand in a different situation from Davis, but would be bound by that equity."

To the same effect, *Parker* v. *Nightingale* (1863), 6 Allen (Mass.) 341; *Newman* v. *Nellis* (1884) 97 N. Y. 285; *Lenning* v. *The Ocean City Ass'n* (1886), 14 Stew. Eq. (N. J.) 606. The mere exhibition, however, of a plan, with proposed streets and buildings marked upon it, or representing the land as laid out in a particular manner, will not create a contract, in the absence of any stipulation affecting the course of improvements: *Squire* v. *Campbell* (1836), 1 Myl. & Cr. 458. The apparent conflict between these cases is explained by difference in the facts involved. In the New York case, the facts found by the judge at special term, and the facts admitted by the pleadings, showed that the lots were bought upon the assurance or agreement of Davis that all the houses on the plan, as shown in the map, were to be set back eight feet from the street. In the English case, the plan was exhibited upon the treaty for a lease. The lease as executed, contained on the margin another plan which did not extend to include that part of the property on which the injunction, if granted, would operate. In the former case, the evidence established a parol contract collateral to the grant; in the latter, the affidavits presented tended to vary the extent and form of the plan as embodied in the lease, and, in that respect, to alter the terms of the written contract.

WHEN, IN FAVOR OF, AND AGAINST WHOM, AN EQUITABLE EASEMENT WILL BE ENFORCED.

The restriction on the use of the property must not amount to a general restraint of trade; for the law will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry or his capital, in any useful undertaking in the kingdom, would be void: *Homer* v. *Ashford* (1825), 3 Bing. 326; *Brewer* v. *Marshall* (1868), 4 C. E. Green (N. J.) 537.

The rule as to what will constitute an illegal contract, as laid down in the leading case of *Mitchell* v. *Reynolds* (1711), 1 P. Wms. 181, is that where the restraint is not general, but partial, and is founded on a valuable consideration, it cannot be said to be an unreasonable restraint; and a restraint preventing a person from carrying on trade within a certain limit of space, though unlimited as to time, may be good, and the limit of space may be according to the nature of the trade: *Catt* v. *Tourle* (1869), L. R. 4 Ch. App. 654; *Trustees, etc.*, v. *Lynch* (1877), 70 N. Y. 440; *Hodge* v. *Sloan* (1887), 107 Id. 244; *Wilson* v. *Hart* (1866), L. R. 1 Ch. App. 463; *Luker* v. *Dennis* (1877), L. R. 7 Ch. D. 227.

Change in Character of Property.—A court of equity will not enforce a covenant of the character under consideration, where the complainant has caused or permitted a material change in the property, for the benefit of which the scheme of restriction was adopted, nor where, by reason of the altered condition of the property, it would be oppressive to give effect to the covenant or agreement. This question arises in three classes of cases: *first*, where the complainant has himself altered the condition of the property with respect to which the scheme of improvement was devised; *second*, where he has permitted breaches by other covenantors; and, *third*, where the condition of things has been altered by changes referable to the acts of others. Thus, in *Duke of Bedford* v. *Trustees of the British Museum*, often cited as the British Museum case, (1822), 2 M. & K. 552, the Duke of Bedford, being the owner of all the property in the neighborhood of the British Museum, for the protection of a large part of that property, took a covenant

from the persons to whom he sold or let other parts of the property, restricting them from building otherwise than in a particular way. He afterwards himself built upon a large part of the property which was originally intended not to be built upon. In refusing his application for an injunction to restrain the defendant, being the grantee of the original covenantor, from building in violation of the covenant, the Court said—

"If this deed is permitted to be urged against what I must call, not the legal, but the actual intention of the parties, and if you have the means of obtaining any remedy, you may have recourse to your deed; but you cannot, under such circumstances, come into a court of equity for a remedy which the court never grants, except in cases where it would be strictly equitable to grant it. It is impossible to state as the doctrine of a court of equity, that the court will carry into execution a specific covenant, in all cases where the legal intention of the deed is found. * * * * The question is whether, from the altered state of the property, altered by the acts of the party himself, he has not thereby voluntarily waived and abandoned all that control which was applicable to the property in its former state."

To the same effect are *Sayres* v. *Collyer* (1883), L. R. 24 Ch. Div. 180; *Lattimer* v. *Livermore* (1878), 72 N. Y. 174.

Where the covenant is framed to provide uniformity in the mode of building, so that the enjoyment which springs from regularity in a series of dwelling may be preserved, he who seeks to enforce the covenant, must suffer no such breach of the stipulation by other grantees, as will frustrate all the benefit that would otherwise accrue to the other parties to the agreement. Thus, in *Roper* v. *Williams* (1822), 1 T. & R. 17, the defendant Williams had conveyed to the plaintiff a piece of ground, being part of a larger tract, covenanting for himself, his heirs, appointees and assigns, that all buildings to be erected on the adjoining land of the grantee should be built in a certain manner. The bill stated that Williams had contracted to sell, and was about to convey to the defendant, Burnand, part of the land belonging to him to the west of the plot conveyed to the plaintiff, without requiring any stipulation that Burnand should refrain from building houses in a manner not conformable to his covenant, and that Burnand had agreed to let the land for the erection of houses not in conformity with the covenant. It appeared by affidavits, that four years previously another grantee of part of the tract had been permitted to build in disregard of the restriction. Lord Chancellor ELDON said—

"Every relaxation which the plaintiff has permitted, in allowing houses to be built in violation of the covenant, amounts *pro tanto* to a dispensation of the obligation intended to be contracted by it. Very little, in cases of this nature, is sufficient to show acquiescence; and courts of equity will not interfere unless the most active diligence has been exerted throughout the whole proceeding. * * * * In every case of this sort, the party injured is bound to make immediate application to the court in the first instance; and cannot permit money to be expended by a person, even though he has notice of the covenant, and then apply for an injunction. Taking all the circumstances together, the permission to build contrary to the covenant, and the laying by, four or five months, before filing the bill, this is not a case in which a court of equity ought to interfere by injunction, but the plaintiff must be left to his remedy at law."

So, also, *Peek* v. *Matthews* (1867), L. R. 3 Eq. 515; *Gaskin* v. *Balls* (1879), L. R. 13 Ch. Div. 324; *Eastwood* v. *Lever* (1863), 4 DeG. J. & S. 114; *Child* v. *Douglass* (1854), 5 DeG. M. & G. 739.

The waiver relied upon, must be in respect of a material violation of the covenant. In *German* v. *Chapman* (1877), L. R. 7 Ch. Div. 271, the law is recognized to be, as stated in *Roper* v. *Williams*, that—

"If there is a general scheme for the benefit of a great number of persons, and then, either by permission or acquiescence, or by a long chain of things, the property has been either entirely, or so substantially changed, as that the whole character of the place or neighborhood has been altered, so that the whole object for which the covenant was originally entered into, must be considered to be at an end, then the covenantee is not allowed to come into the court for the purpose merely of harassing and annoying some particular man, where the court could see he was not doing it *bona fide*, for the purpose of effecting the object for which the covenant was originally entered into."

The Court (in *German* v. *Chapman*) then proceeded—

"That is very different from the case we have before us, where the plaintiff says that in one particular spot, far away from this place, and not interfering at all with the general scheme, he has, under particular circumstances, allowed a waiver of the covenant. I think it would be a monstrous thing to say that nobody could do an act of kindness, or that any vendor of an estate, who had taken covenants of this kind from several persons, could not do an act of kindness, or from any motive whatever, relax in any single instance any of these covenants, without destroying the whole effect of the stipulations which other people had entered into with him. For instance, in this very case, application was made to the plaintiff for a waiver. It would be monstrous to suppose, if he had acceded to that application, that therefore he was, by the mere act of kindness to the defendants themselves, destroying the whole benefit of the covenants as to all the rest of the estate."

The same ruling in *Western* v. *Macdermott* (1866), L. R. 1 Eq. 499, s. c. affirmed on appeal (1866), L. R. 2 Ch. App. 72; *Kent* v. *Sober* (1851), 1 Sim. N. S. 517.

Where a contingency has happened, not within the contemplation of the parties, which imposes upon the property a condition frustrating the scheme devised by them, and defeating the object of the covenant, thus rendering its enforcement oppressive and inequitable, a court of equity will not decree such enforcement. In *Trustees of Columbia College* v. *Thatcher* (1881), 87 N. Y. 311, the covenant was not to erect, establish or carry on in any manner, on any part of the said lands, any stable, school-house, engine house, tenement or community house, or any kind of manufactory, trade or business whatsoever, or erect or build, or commence to erect or build, any building or edifice with intent to use the same, or any part thereof, for any of the purposes aforesaid. The breaches relied on by the plaintiff were that the defendant permitted the use of the several rooms in the houses upon the premises by his tenants, for the business of a tailor, milliner, insurance agent, newspaper dealer, tobacconist and two express carriers. It also appeared that the general current of business had reached and passed the premises, and that during the pendency of the action, an elevated railroad was built with a station in front of such premises, which the trial court found affected them injuriously, and rendered them less profitable for the purpose of a dwelling house, but did not render their use for business purposes indispensable. The evidence also disclosed that the station covered a portion of the street, its platform occupied half the width of the sidewalk in front of defendant's premises, and from it persons could look directly into the windows, and that this, with the noise of the trains, rendered privacy and quiet impossible, so that large depreciations in rents and frequent vacations followed the construction of the road. Mr. Justice DANFORTH, speaking for the Court, said:

"It is now claimed by the appellant that there has been such an entire change in the character of the neighborhood of the premises, as to defeat the object and purpose of the agreement, and that it would be inequitable to deprive the defendant of the privileges of conforming his property to that character, so that he could use it to his greater advantage, and in no respect to the detriment of the plaintiff. The agreement before us recites, that the object which the parties to the covenant had in view was 'to provide for the better improvement of the lands, and to secure their permanent value.' It certainly is not the doctrine of courts of equity to enforce, by its peculiar mandate, every contract, in all cases, even where specific

execution is found to be its legal intention and effect. It gives or withholds such decree, according to its discretion, in view of the circumstances of the case, and the plaintiff's prayer for relief is not answered, where, under those circumstances, the relief he seeks would be inequitable. * * * * If for any reasons, therefore, not referable to the defendant, an enforcement of the covenant would defeat either of the ends contemplated by the parties, a court of equity might well refuse to interfere; or if in fact the condition of the property by which the premises are surrounded, has been so altered 'that the terms and restrictions' of the covenant are no longer applicable to the existing state of things. * * * * And so, though the contract was fair and just when made, the interference of the court should be denied, if subsequent events have made performance by the defendant so onerous, that its enforcement would impose great hardship upon him and cause little or no benefit to the plaintiff. * * * * In the case before us, the plaintiffs rely upon no circumstance of equity, but put their claim to relief upon the covenant and the violation of its conditions by the defendant. They have established, by their complaint and proof, a clear legal cause of action. If damages have been sustained, they must, in any proper action, be allowed. But, on the other hand, the defendant has exhibited such change in the condition of the adjacent property, and its character for use, as leaves no ground for equitable interference, if the discretion of the court is to be governed by the principles I have stated, or the cases which those principles have controlled."

See also the *dictum* above quoted (page 85) from *Roper* v. *Williams* (1822), 1 T. & R. 17.

Object of Restriction.—It must also appear, either from the terms of the agreement, from the circumstances in which it originated, or the situation and condition of the property, that the restriction was intended to benefit that property, and not merely for the personal advantage of the original covenantee: *Keates* v. *Lyon* (1869), L. R. 4 Ch. App. 218; *Parker* v. *Nightingale* (1863), 6 Allen (Mass.) 341; *Peck* v. *Conway* (1876), 119 Mass. 546; *Sharp* v. *Ropes* (1872), 110 Id. 381; *Clark* v. *Martin* (1865), 49 Pa. 289; *Tod-Heatly* v. *Benham* (1888), L. R. 40 Ch. Div. 80. In *Nottingham Patent Brick and Tile Company* v. *Butler* (1886), 16 Q. B. D. 778, LINDLEY, L. J., stated the law to be as decided in *Harrison* v. *Good* (1871), L. R. 11 Eq. 338, "that it is an inference of fact in each case, whether the purchasers are bound *inter se* by such covenants, and that the mere fact that the vendor does not bind himself expressly to enforce the covenants which he takes for the benefit of the purchasers, is not material." It is the community of interest in the beneficial restriction which necessarily requires and imports reciprocity of obligation. This in *Renals* v. *Cowlishaw*

(1878), L. R. 9 Ch. D. 125, the former owners in fee of a residential estate and adjoining lands, sold part of the adjoining lands to the defendant's predecessors in title, who entered into a covenant to build upon the land thereby conveyed, within a certain distance from a particular road; that the garden walls or palisades to be set up along the sides of the said road should stand back a certain distance from the centre of the road; that any house to be built upon the land adjoining the road, should be of a certain value, and of an elevation at least equal to that of the houses on a particular road; and that no trade or business should be carried on in any of such houses or buildings, but that the same should be used as private dwelling houses only. The conveyance did not state that this covenant was for the protection of the residential property, or in reference to the adjoining pieces of land, or make any statement or reference thereto. Other pieces of the adjoining lands were subsequently sold, and the conveyance to the purchaser in each case contained restrictive covenants similar to that above mentioned. The same vendors afterwards sold the residential estate to the plaintiffs' predecessors in title. The conveyances contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers of the residential estate were to have the benefit of them; there was, moreover, in the conveyance to the plaintiffs, a covenant not to build a public house or carry on offensive trades upon a particular portion of the property conveyed, thus limiting their use of the purchased property, but not coextensively with those covenants first given. Vice Chancellor HALL dismissed a bill to restrain the defendants from building in contravention of the first mentioned covenants. In his judgment he said:

"From the cases * * * it may, I think, be considered as determined, that any one who has acquired land, being one of several lots laid out for sale as building plots, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by, and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that the right, that is, the benefit of the covenant, enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but where a mutual contract can be sufficiently estab-

lished. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase. In considering this, the expressed or otherwise apparent purpose or object of the covenant, in reference to its being intended to be annexed to other property, or to its being only obtained to enable the covenantee more advantageously to deal with his property, is important to be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into, is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained, and if he has done so, whether or not he has so sold subject to a similar covenant; whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important."

The Vice Chancellor, being satisfied that the restrictive covenant was not inserted for the benefit of the particular property, but to enable the vendors to make the most of the property they retained, refused to order an injunction. This decision was affirmed by the Court of Appeals in (1879), L. R. 11 Ch. Div. 866, and cited with emphatic approval in *Spicer* v. *Martin* (1888), L. R. 14 App. Cas. 12; *Master* v. *Hansard* (1876), L. R. 4 Ch. Div. 718; *Badger* v. *Boardman* (1860), 16 Gray (Mass.) 559; *Tobey* v. *Moore* (1881), 130 Mass. 448; *Thurston* v. *Minke* (1870), 32 Md. 487. And where the restrictions are made for the benefit of the property, and enure in favor of the persons who become the respective owners of it, the original covenantee cannot by release discharge any part of it except such as he still retains: *Raynor* v. *Lyon* (1887), 46 Hun. (N. Y.) 227.

Title to land within the tract, for the common benefit of which the easement is created, is the only other requisite to support a prayer for an injunction to restrain a violation of the covenant by any proprietor. As restrictions of this nature are intended for the mutual protection of all the proprietors, neither privity of contract nor privity of estate is essential, and a prior may have a remedy against a subsequent purchaser of part of the same tract, even when a parol representation of a uniform building plan is the sole evidence of the contract: *Tobey* v. *Moore* (1881), 130 Mass. 448; *Talmadge* v. *The East River Bank* (1862) 26 N. Y. 105; *Gibert* v. *Peteler* (1868), 38 Id. 165; *Green* v. *Creighton* (1861), 7 R. I. 1.

It is necessary that the defendant purchase with full notice of the agreement. It is binding upon him, not because he stands as assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform: *Whitney* v. *Union Ry. Co.* (1858), 11 Gray (Mass.) 359; *Phœnix Ins. Co.* v. *Continental Ins. Co.* (1882), 87 N. Y. 400. And slight circumstances will be construed as equivalent to notice of the existence of the equity. Thus, in *Tallmadge* v. *The East River Bank*, cited above, the uniformity in the position of houses erected in the immediate neighborhood, in conformity with a general building plan, was held to be sufficient to put the purchaser on inquiry and charge him with notice. Similarly, *Salisbury* v. *Andrews* (1880), 128 Mass. 336; *Morland* v. *Cook* (1868), L. R. 6 Eq. 252.

EQUITABLE REMEDIES.

It remains only to consider what will amount to a violation of an equitable easement, and the remedy which a court of equity will apply. The owner of the servient tenement can do no act on his land which interferes substantially with the easement, or with those rights which are requisite to the full enjoyment of its benefits; but the utmost extent of the duty which rests on the owner of the servient tenement, is not to alter its condition so as to interfere with the enjoyment of the easement: Gal. & What. on Ease't. 7, 339; *Kirkpatrick* v. *Peshine* (1873), 9 C. E. Green (N. J.) 206; *Johnston* v. *Hyde* (1881), 6 Stew. Eq. (N. J.) 632. The extent to which the owner of the servient tenement is interdicted from the exercise of acts of ownership on his lands, will depend on the nature and qualities of the easement: *Atkins* v. *Bordman* (1841), 2 Metc. (Mass.) 457. Where a penalty or forfeiture is annexed to the doing of the act prohibited, this penalty does not authorize the party to do the act, and before the act is done, the Court will restrain him by injunction, unless it appears from a fair construction of the instrument that it was intended to make the stipulated sum the price of non-performance; but if the act is done the penalty must be paid, and the amount is unimportant: *French* v. *Macale* (1842), 2 Dru. & War. 269;

Coles v. *Sims* (1854), 5 DeG. M. & G. 1; *The Phœnix Ins. Co.* v. *The Continental Ins. Co.* (1882), 87 N. Y. 400; *The Diamond Match Co.* v. *Roeber* (1887), 106 Id. 473; *National Provincial Bank of England* v. *Marshall* (1888), L. R. 40 Ch. D. 112. Nor is it necessary to show that any damage has been done. A covenantee has the right to have the actual enjoyment of the property, *modo et forma*, as stipulated for by him. The mere fact that a breach of the covenant is intended, is a sufficient ground for the interference of the court by injunction: *Kirkpatrick* v. *Peshine* (1873), 9 C. E. Green (N. J.) 206.

The usual and proper equitable remedy for a breach of a negative covenant or agreement, is an injunction. This will be awarded as of course, upon proof of the complainant's right and its violation by the defendant. In some cases, the court will import a negative quality into the covenant, and enforce the right by injunction: Kerr's Injunctions in Equity, 521; *Newman* v. *Nellis* (1884), 97 N. Y. 285. Thus, in the English brewers' leases, covenants are usually inserted stipulating for the purchase from the lessor of all the beer consumed at the public house demised. Such rights will be protected by injunction, against assignees with notice, even where they extend to other public houses held by the same lessees under other landlords: *Luker* v. *Dennis* (1877), L. R. 7 Ch. Div. 227; *Catt* v. *Tourle* (1869), L. R. 4 Ch. App. 654. The ground of decision is, that the grant of an exclusive right of this description, contained in a covenant, is equivalent to a negative covenant, and the cases are thus brought under the operation of the rule in *Lumley* v. *Wagner* (1852), 1 D. M. & G. 604, that wherever a court of equity has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, so far as they can be bound, to a true and literal performance of their agreements, and will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. By thus importing a negative quality into an affirmative covenant, the courts have assumed to enforce agreements of which specific performance could not be decreed: *Cooke* v. *Chilcott* (1876), L. R. 3 Ch. Div. 694. The propriety

and extent of this exercise of jurisdiction it is not within the scope of the present article to examine.

Where interference with the easement is merely threatened, the preventative remedy by injunction is always adequate to the exigencies of the case; but if there has been an actual interference, a mandatory injunction may become necessary to supplement the usual remedy. The power of the court to grant such relief, though once questioned, is now admitted beyond doubt. In *Rankin* v. *Huskisson* (1830), 4 Sim. 13, the agreement was that no buildings should be erected on the plot of ground, south of the demised premises. The complainants built thereon, and afterwards the defendants began to erect stables on the adjoining land. Vice-Chancellor SHADWELL awarded an injunction restraining the defendants, not only from continuing the projected buildings, or commencing any other buildings whatever, on the plot of ground described in the pleadings, or any part thereof, but also from permitting such part of said building as had been already erected to remain thereon. See note (1) to *Rankin* v. *Huskisson;* Kerr on Injunc., 231. The extreme limit of this jurisdiction, however, is the restoration of the property to its condition at the time the wrongful act or neglect began.

As has been said, specific performance of a proper covenant to perform positive acts, will be decreed, if the covenant is one which runs with the land, or if the bill is filed against the original covenantor. What are proper covenants under this head of equitable jurisdiction is a question to be determined solely under the rules regulating the granting of that kind of relief. It is unnecessary to discuss its limitations here.

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