Notre Dame Law Review

Volume 3 | Issue 3 Article 2

1-1-1928

Restrictive Covenants in Deeds

James F. Kirby

RESTRICTIVE COVENANTS IN DEEDS

By JAMES F. KIRBY

No attempt is made in this article to analyze any considerable number of the many decisions upon this subject. Nor will it be possible to examine the many refinements of doctrine to which the courts have gone in applying the law of "Equitable Easements". I shall attempt merely to state a few of the rules applicable to this subject that are well defined and almost unanimously sustained by the adjudicated cases and to cite some of the cases, together with reference books where other authorities may be found, should a further examination of the subject seem profitable to the reader.

The doctrine of covenants, restraining the use of real property, is the child of equity. Equity charges the conscience of a grantee of land with an agreement relating to the land, although the agreement neither creates an easement nor constitutes a covenant running with the land; and it does this even though the covenant may not be binding in law, provided the grantee takes with notice.[1]

But the covenant must be reasonable, it must be certain and not vague, and the right to relief must not be doubtful. The covenant must relate to and concern the land, or its use or enjoyment. It cannot be in parole, at least as against subsequent grantees. While equity dislikes hard bargains, the fact that the defendant will suffer loss will not stay the hand of equity from enforcing such a covenant by injunction. The restrictions may be placed in a plat of a sub-division to a city.[2]

The leading case usually cited on this subject is *Tulk v. Moxhay,* 2 Phillips ch. 774, decided by Lord Cottonham in 1848, on a covenant entered into in 1808. This case has been the subject of some judicial controversy and judges have disagreed as to the reasons upon which the decision was made.

Sir George Jessel, master of the rolls, said of it: "The de-

1 Whitney v. Union Ry. Co. 11 Gray 359, 363.
2 Curtis v. Rubin (Ill.) 91 N. E. 84.

cision in that case, rightly understood, appears to be either an extension in equity of the doctrine of Spencer's Case, (1 Smith Leading Cases 145, 5 Coke 16a,) to another line of cases, or else of an extension in equity of the doctrine of negative easements."[3]

Lord Justice Cotton said: "As I understand *Tulk v. Moxhay*, the principle there laid down was that, if a man bought an underlease, although he was not bound in law by the restrictive covenants of the original lease, yet, if he purchased with notice of these covenants, the court of chancery could not allow him to use the land in contravention of the covenants. That is a sound principle. If a man buys land subject to a restrictive covenant, he regulates the price accordingly, and it would be contrary to equity to allow him to use the land in contravention of the restrictions."[4]

Chief Justice Beasley thought the principle governing this case to be as follows: "It will be found on examination that these decisions (*Tulk v. Moxhay* and others) proceed upon the principle of preventing a party having knowledge of the just rights of another from defeating such rights and not upon the idea that the engagement enforced created an easement, or is of a nature to run with the land."[5]

Lord Cottonham, in deciding *Tulk v. Moxhay*, explained it thus: "It is said that the covenant being one which does not run with the land, the court cannot enforce it; but the question is not whether the covenant runs with the land, but whether the party shall be permitted to use the land in a manner inconsistent with the contract entered into with 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."

Thus able lawyers have disagreed as to the reason for the doctrine by which a subsequent purchaser is restrained in the use of real estate by a covenant in a deed to which he was not a

3 Railway Co. v. Gomm 20 Ch. Div. 562, 563.
4 Hale v. Erwin 37 Ch. Div. 74.
5 Brewer v. Marshall, 19 N. J. Eq. 537, 543.

party and which need not run with the land. But when we consider what the courts actually do, it appears that the restriction is upon the use that may be made of the particular land rather than upon the particular owner who may desire to make that use of it, though the covenant may be said to be a personal one and not to run with the land. Let us say that A sues to prevent B from operating a smithy upon B's lot which is burdened with a restrictive covenant prohibiting the operation of a smithy thereon. B is not restrained from operating a smithy but only from operating it upon that particular land. The right enforced is the right in A to have this particular lot used, or rather not used, in a particular manner. That is to say it is a right or an interest vesting in A, in a particular piece of real estate, which is enforced by the decree, and this relief would be granted in favor of any owner of A's property against any owner of B's property attempting a like violation of the covenant. A and B are only incidental, the right, or interest, in the lot is essential.

It therefore appears that equitable easements, servient and dominant equitable estates, are not inept terms to apply to the benefits and burdens, rights and restrictions, arising out of covenants in deeds restricting the free use of land by owners who acquire title subsequent to the making of such covenants by which its use is limited.[6]

Equity will grant relief against a person violating a covenant restricting the free use of land only when he purchases with notice of the covenant. An innocent purchaser for value and without notice takes free from the burden of such covenants. But this notice need not be actual notice; it may be constructive, as by record, contained in the chain of title, or even by knowledge of the general observance of certain rules of building in the neighborhood.[7]

In the past at least the rule has been, that restrictions on the free use of land are repugnant to the recognized policy of this country; that they are not favored by the law, and that they will be strictly construed against the party seeking to enforce them.

---

6 C. J. Deeds sec. 463; Pomeroy's Eq. Jur. 4 ed. sec. 1693; R. C. L. Deeds sec. 178, Covenants sec. 39; Covenants, 21, 84, 91, 103; Injunctions, Key Nos. 58, 62; Sprague v. Kimball 213 Mass. 380, 100 N. E. 622; Whitney v. Union Ry. Co. 11 Gray 359, 363.

7 Pomeroy's Eq. Jur. sec. 1704; Covenants, Key No. 84; C. J. Deeds sec. 462; Dedication, Key No. 48; Whitney v. Union Ry. Co. 11 Gray 359; Curtis v. Rubin (Ill.) 91 N. E. 84.

All doubts must be resolved in favor of the free use of the property by the owner.[8]

To such an extent has this doctrine of strict construction been carried that where a lot was a corner lot and it was doubtful whether or not the restriction applied to a cross street, an injunction restraining the erection of an offending building on the cross street was refused.[9]

And where a covenant was originally made as to several city blocks embracing a number of streets, the right to enforce it was limited to persons owning property on the street where the offending building was being erected.[10]

It has been said that restrictive covenants will be enforced regardless of the amount of damage suffered by the complaining party.[11] Still there is a doctrine of substantial compliance, especially where the restrictions are a part of a general building scheme. The majority rule seems to be that equity will not enforce mere technical or immaterial violations of such covenants.[12]

When the damages resulting from the violation of the covenant are slight, equity will sometimes refuse specific performance by injunction.[13] A substantial compliance so as to accomplish the purpose intended is all that equity will require.[14]

Equity will inquire to ascertain what is a substantial compliance under all the conditions existing at the time the action is brought and will inquire into the relation of the parties as to their rights in the land, and will use its discretion as to granting relief.[15]

---

8 18 C. J. 385, Notes 93, 94, 95 & Page 387 Notes 19, 20; Test Oil Co. v. La Tourette, 19 Okla. 214; 91 P. 1025; Eckhart v. Irons, 128 Ill. 568, 20 N. E. 687; Voorhees v. Blum, 274 Ill. 319, 113 N. E. 593; Melson v. Ormsby, 169 Ia. 522, 151 N. W. 817; Casterton v. Plotkin, 188 Mich. 333, 154 N. W. 151; Covenants, Key Nos. 20, 21, 49; Deeds, Key No. 170.

9 Howland v. Andrus, 81 N. J. Eq. 175; 86 A. 391; C. J. Deeds sec. 451, Page 390 n. 45; Injunction, Key Nos. 58. 62.

10 Loomis v. Collins (Ill.) 111 N. E. 999; Dedication, Key No. 47.

11 Miller v. Klein, 177 Mo. A. 557, 160 S. W. 562.

12 18 C. J. Page 399 n. 82.

A variation of a few inches in elevation of the lower floor of a house was held immaterial. Melson v. Ormsby 169 Ia. 522, 151 N. W. 817.

Overhanging of eaves two feet and two inches twenty-four feet from the ground was said to be immaterial. Smith v. Spencer (N. J.) 87 A. 158.

Round towers, bays or projections and piazzas with slender columns on the second story of a house projecting a few feet beyond the line are immaterial. Morrow v. Hasselman, 69 N. J. Eq. 612, 61 A. 369.

A bay window which would obstruct plaintiff's view of the Hudson River was said to be a substantial violation of the covenant, but some projecting eaves and cornices were said to be immaterial. Meaney v. Stork (N. J.) 83 A. 492.

13 Injunction Key No. 62.

14 Covenants Key No. 103.

15 Melson v. Ormsby 169 Ia. 522, 151 N. W. 817; Specific Performance, Key No. 8; Covenants, Key No. 91, 103.

Not only will equity stop at a substantial performance of the covenant, but, if it appears that it is being used as a means of oppression and annoyance, it will cancel it. These covenants at times may become so burdensome as to practically destroy the value of property to the owners, and in such case equity should grant relief by cancellation after a proper showing. This is well illustrated by the following case.

Restrictive covenants like all other obligations may be destroyed by release; but to have this effect the release must be by all persons whose lands are entitled to the benefit of the covenant. Thus an owner of a sub-division, who sells the lots subject to restrictions, cannot afterward release one of the lots. What right he might have to sell it free from restrictions, if he had declared a forfeiture of title for violation of the covenant providing for forfeiture, was not determined; but he could not sell his right of forfeiture to a stranger who could then release the restrictions to the owner, who was violating the covenant and thus merge the forfeiture, the restrictions, and the right to release and thus defeat the rights of other owners.[17]

The right to insist on compliance with such covenants may be waived, or lost by laches, as where one party, with full knowledge of all the facts, allows the other to expend large sums in valuable improvements, or where the owner of one tract, in a general building scheme, himself violates the covenant. This statement is qualified by exceptions which must be examined in each particular case.[18]

But where plaintiff permitted obstructions to the west of his property, in which direction the prospect was negligible, he was held not to have waived his right to insist on the observance of the restrictions by property owners to the east of him which obstructed his view of a great avenue and the Hudson river.[19]

When plaintiff permitted a stable to be maintained on lot by covenantor for some years, she could not have his grantee en-

---

16 St. Stephen's Church v. Church of the Transfiguration (N. Y.) 130 App. Div. 166 C. J. Deeds Page 399 n. 74.

17 Hopkins v. Smith, 162 Mass. 444, 38 N. E. 1122; Kimball et al v. Com Ave St. Ry. Co., 173 Mass., 152, 53 N. E. 274; Beetem v. Garrison, 129 Md. 664, 99A, 897; Covenants, Key No. 72, 79 (3). Cent. Cov. 73-76; C. J. Deeds Sec. 469.

18 C. J. Deeds Sec. 468; Duncan v. Central Pass. R. Co. 85 Ky. 225, 4 S. W. 228; Witherspoon v. Hurst, 88 S. C. 561, 71 S. E. 232; Loomis v. Collins (Ill.) 111 N. E. 999.

19 Meaney v. Stork, (N. J.) 83 A. 492.

joined from maintaining it. But the grantee could not enlarge it or make other objectionable use of the lot. Plaintiff must act seasonably to assert this right before money has been expended or liability incurred or he will be barred by laches.[20]

Restrictive covenants may terminate by expiration, by abandonment, and by operation of statute. If the restriction is for a limited term of years it will, of course, terminate at the end of the term. If no time limit is named, these covenants are presumed to continue for the duration of the estate created by the instrument.[21]

If there is a statute by which the time is limited during which the title or use of real estate may be restricted, this, of course, will govern; and the restrictive covenant, though unlimited as to duration in the instrument creating it, will terminate by force of such statute in the time prescribed by the statute.[22] If, however, the statute is only declaratory of the rule against perpetuities it probably does not have this effect.[23] The opposite rule has been announced in England.[24]

The violation of the covenant by the complaining party may constitute an abandonment and so a defense as to him. A general abandonment may terminate or destroy the covenant. If terminated by abandonment each owner may thereafter use his property for any proper purpose. The following cases illustrate the results of abandonment and the particular facts that have been held to establish it. Extending a sun-room or porch over the building line is not an abandonment of a general building plan nor of the restrictive covenants establishing it.[25]

As a general rule equity will not enforce a restrictive covenant, where, on account of change in the condition of the neighborhood, the violation becomes immaterial and the enforcement

---

20 Whitney v. Union Ry. Co. 11 Gray (Mass.) 359, 367.

21 Gifford v. Syracuse etc. 56 Barb. (N. Y.) 114; Landell v. Hamilton, 175 Pa. 327, 34 A. 663.

22 Revised Laws of Mass. 1902 Chapter 134 Sec. 20; Riverbank, etc., Co. v. Bancroft et al 209 Mass. 217, 95 N. E. 216; Deeds, Key Nos. 170, 17-.

23 Palmer et al v. President et al (R. I.) 24 A. 109; Proprietors of Ch. in Brattle Sq. v. Grant 3 Gray 142; Phillips et al v. Harrow et al (Ia.) 61 N. W. 434; Whitney v. Union Ry. Co. 11 Gray 359, 366; 30 Cyc Page 1479 N. 68.

24 30 Cyc Page 1478 N. 67.

25 Godley v. Weisman (Minn.) 157 N. W. 711, 712; Bangs v. Potter, 135 Mass. 245; Smith v. Price, 214 Mass. 298, 101 N. E. 370; Chelsea Land etc., Co. v. Adams, 71 N. J. Eq. 771, 66 A. 180; Thorburn v. Morris (N. J.) 75 A. 757; Thompson v. Langan, 172 Mo. A. 64, 154 S. W. 808; Covenants, Key No. 103; Loomis v. Collins, (Ill.) 111 N. E. 999; Injunction Key No. 62.

would not materially benefit the complaining party and would only work inconvenience, hardship, and loss to the party complained against.[26]

Covenants are found relating not only to land, building restrictions and business permitted to be carried on, but even to restraints upon the use of personal property. And restraints upon the use of personal property have been enforced in equity.[27]

Just what covenants will be enforced as legal on the one hand or refused enforcement on the other as against public policy, in restraint of trade, or as incapable of enforcement on account of inherent difficulties, varies much in the several states.[28]

In the following cases the agreements were held to be against public policy as in restraint of trade and relief was denied.[29]

The means used by courts of equity to enforce these covenants restraining the free use of land is the injunction, except where the covenant provides for a forfeiture of title in case of breach or a reversion to the original grantor.[30]

If the owner, in violation of a restrictive covenant, knowingly, and against the protest of plaintiff proceeds to build, a mandatory injunction will be granted to compel the removal of the building or the offending portions thereof. And in some cases this form of relief has been granted even where the violation was slight.[31]

The right to enforce these restrictive covenants rests upon

---

26 Ewertsen v. Gerstenberg, 186 Ill. 344, 57 N. E. 1051, 51 L. R. A. 310; Jackson v. Stevenson 156 Mass. 496, 31 N. E. 691; 18 C. J. Page 400 N. 85.

27 Pomeroy's Eq. Jur. Sec. 1706.

28 In New York a covenant not to sell sand was enforced. Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335.

In Massachusetts enforcement of a covenant not to open a quarry was refused. Norcross v. James, 140 Mass. 188 2 N. E. 946.

In Pennsylvania a railroad company which had expended large sums to help develop ore lands in consideration of the exclusive right to haul freight was granted relief as against a mortgage after foreclosure. Bald Eagle Valley R. Co. v. Nittany etc. 171 Pa. St. 284, 33 A. 239.

While in Minnesota an agreement to give a railroad the exclusive right to haul the products of certain land was held not to concern the land and enforcement was refused. Kettle River R. Co. v. Eastern R. Co. 41 Minn. 461, 43 N. W. 469.

29 West Virginia Trans. Co. v. Ohio River Pipe Line Co. 22 W. Va. 626, 46 Am. R. 527; Brewer v. Marshall, 19 N. J. Eq. 537.

30 Pomeroy's Eq. Jur. Sections 1693 to 1705; Injunctions, Key Nos. 58, 62; C. J. Injunctions Sections 316-334.

31 Pomeroy's Eq. Jur. Sec. 1705; Attorney General v. Algonquin Club, 153 Mass. 447, 27 N. E. 2, 11 L. R. A. 500; Turney v. Shriver, 269 Ill. 164, 109 N. E. 708; Supplee v. Cohen, 80 N. J. Eq. 83, 83 A. 373; Gatzmer v. German R. C. Asylum, 147 Pa. St. 313, 23 A. 452.

the principle that every owner of real property has the right to deal with it so as to restrain its use by his grantees within such limits as will prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the land which he retains. Provided always that this right shall be exercised reasonably with due regard to public policy and without creating an unlawful restraint of trade.[32]

These rights, resting as they do on agreement, the principle in equity that that which is agreed to be done shall be considered as performed applies, and a purchaser of land with notice of a right, or interest in it, subsisting in another, is liable to the same extent and in the same manner, and is bound to do that which his vendor had agreed to do. And therefore a covenant merely personal in its nature, and not purporting to bind assignees, will be enforced against them unless they have a higher and better equity as bona fide purchasers without notice.[33]

Therefore if the covenant is full, clear, and explicit as to the parties by and against whom enforcement may be had and as to the land to be burdened, and the land to be benefited, there is no difficulty, so long as the agreement does not violate any principle of law. For instance, if the covenant expressly states that it is for the personal benefit of the covenantee and specifically negatives the idea that it is for the benefit of any other person or for the benefit of any other particular land, then it is clear that no one but the grantor can enforce it. It follows that if the covenant states that it is for the benefit of A and his grantees of a certain lot or lots and is to burden B and his grantees of a certain lot or lots, there can be no question of interpretation and the covenant will be enforced, subject always to the rule among others that the relief is not a matter of strict right and the court will exercise its discretion. But this discretion is a judicial discretion, is not arbitrary, and, where the right is clear and there are no intervening equities, the relief will be granted.

The remote grantees of the original covenantee receive the same protection in equity as he does. His additional right to proceed at law need not be taken up here. But in most cases where the plaintiff seeks to enforce a restrictive covenant he must

---

32 Vendor and Purchaser, Key No. 79.
3 Whitney v. Union Ry Co. 11 Gray 359, 364, 365.

show a privity of estate with the covenantee. Privity with the covenantor is not material. Thus if A is the owner of several lots and conveys them to different purchasers by deeds containing restrictive covenants that may be enforced against vendees of the other lots conveyed, B who asks that C be restrained from violating his covenant must show privity of estate with A and not with X, who purchased of A and sold to C, nor with C. And of course Y who claims through a chain of title superior to and adverse to A, can in no event claim the benefit of the covenant.[34] The limits of this article will not permit a discussion of the cases where privity is necessary and where it is not.

Where the covenant merely places a restraint upon the use of the land conveyed without more, or it is uncertain or doubtful as to the parties by and against whom enforcement may be had or the land to be benefited or burdened, the courts must resort to construction to ascertain the intention of the parties; and that, once clearly ascertained, will control. In order to arrive at the intention of the parties, the situation and the surrounding circumstances in connection with the terms of the grant may be taken into consideration.[35]

For our purpose we may divide the cases in which relief may be granted into five classes:

I. The covenant is personal to the covenantee and does not purport to apply to any land except the land conveyed by the deed creating the covenant. In such case the covenant cannot usually be enforced by anyone after the original covenantee has disposed of all his holdings in the vicinity except in certain cases of which forfeitures and reversions are the most conspicuous examples.[36]

II. The second class of cases is where A the owner of a certain tract of land or a number of lots, let us say of three lots, numbered 1, 2 and 3, sells lots 2 and 3 to B and C and in each deed he inserts a restrictive covenant. Then B and C sell to D and E who take with notice. Let us further suppose that in this case there is no general building scheme. If these restrictive covenants are for the benefit of A to protect his property

---

34 18 C. J. Page 394 Sec. 458; Norcross v. James 140 Mass. 188, 189.
35 Beals v. Case, 138 Mass. 138; Melson v. Ormsby, (Ia.) 151 N. W. 817; Pomeroy's Eq. Jur. Sec. 1696; Firth v. Marovich, (Cal.) 116 P. 729.
36 Firth v. Marovich (Cal.) 116 P. 729; Doerr v. Cobbs (Mo. A.) 123 S. W. 547; C. J. Deeds Sec. 460; Peck v. Conway 119 Mass. 546.

against injury by the use of a neighboring tract without more, neither B nor C nor their grantees can enforce the covenants between themselves, but A and his grantees can enforce them as against B. C, D and E and their grantees with notice.[37]

But if the covenants were for the benefit of other land at the time of the conveyance or formerly belonging to A the subsequent grantees of such other land, lot, or parcel may enforce the covenant under the following conditions:

A. If B purchased lot 2 first and C purchased lot 3 second, C may enforce the covenant against B under certain circumstances.
   1. If C is an express assignee of the covenant as distinct from an assignee of the land; or
   2. If the restrictive covenant is expressed to be for the benefit of lot 3. In this case the benefit of the covenant passes to C whether he knows of it or not. It is in the nature of an easement attached to C's property as the dominant estate.[38]
      This is the English rule at present under such facts, but the better rule and the American rule seems to be that the intention of the parties to make C's land the dominant estate may be ascertained otherwise than from the covenant and the assignment thereof.[39]

B. But B, having purchased lot 2 before C purchased lot 3, B cannot ordinarily enforce the restrictive covenant against C unless he can show that, at the time he purchased lot 2, A entered into a binding agreement with him (B) to the effect that he (A) would insert the restriction in the deed to lot 3, whenever he (A) should sell it. In that case lot 3 becomes bound in favor of B and lot 2 from the time of the conveyance of lot 2 from A to B.[40]

III. The third class of cases arises where there is what is called, a general building scheme. This occurs when the owner of a tract of land sub-divides it with the intention of selling the

---

37 Korn v. Campbell (N. Y.) 85 N. E. 687, 689.
38 Reid v. Bickerstaff, 2 Ch. 305, 320.
39 Pomeroy's Eq. Jur. 4th ed. Sec. 1696 N. 17 and Sec. 1697 N. 19; Beals v. Case, 138 Mass. 138.
40 Pomeroy's Eq. Jur. Sec. 1697 N. 19; Sprague v. Kimball, 213 Mass. 380, 100 N. E. 622; Deeds Key No. 173.

lots all subject to general building or other restrictions so as to preserve to the neighborhood a special character such as a high class residential district.

In this case if A, B, C to X, Y, Z purchase lots in such subdivision at various times, but all subject to the restrictions, they can each enforce the restrictions against any and all of the other purchasers and their grantees with notice regardless of the order of their purchases from the original vendor, or subsequently. Thus if A purchased his lot before Y purchased his, A may still enforce the covenant against Y and his grantees with notice. And of course Y and his grantees have the same right as against A and his grantees. It is not necessary, where there is a general building scheme, that the covenants in the various deeds conform to absolute uniformity. Under certain circumstances the covenant may be absent from some of the deeds without destroying the general building scheme.[41]

And it has been held that where the party who originally makes the sub-division acquires additional land and sub-divides it, the restrictions in the deeds conveying the lots in the original sub-division will apply to the additional lots if they were within the content of the original plan.[42] To constitute a general building scheme, the owner need not have a multitude of lots. He may have such a plan for two lots as well as for two hundred.[43]

A building restriction in the original deed of the whole land which is also put in all subsequent deeds to purchasers of individual lots has been held sufficient evidence of a general plan for improvement and benefit of all the land.[44]

But with reference to the evidence necessary to establish a general building scheme, when the covenant is not explicit as to the land to be benefited, the land to be burdened, and the parties by and against whom it may be enforced, Justice Parker says: "It must be proved (1) that both the plaintiffs and defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are

---

41 Allen v. Barnett, (Mass.) 99 N. E. 575; Velie v. Richardson (Minn.) 148 N. W. 286; Sanford v. Keer 83 A. 225; Hooper v. Lottman (Tex) 171 S. W. 270.

42 C. J. Deeds Sec. 459; Pomeroy's Eq. Jur. Sec. 1697; Kneip v. Schroeder, 225 Ill. 621, 99 N. E. 617; Highland Realty v. Groves, 130 Ky. 374, 113 S. W. 420 A. N. S.; Allen v. Detroit, 167 Mich. 464, 133 N. W. 317.

43 Godley v. Weisman (Minn.) 157 N. W. 711.

44 Godley v. Weisman (Minn.) 157 N. W. 711; Tobey v. Moore, 130 Mass. 448, 451; St. Andrews Church's Appeal 67 Pa. 512.

respectively entitled, the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were intended to be and were for the benefit of other land retained by the vendor; and (4) that both the plaintiffs and the defendants or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to inure for the benefit of the other lots included in the general scheme, whether or not they were also to inure for the benefit of other lands retained by the vendor. If these four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor irrespective of the dates of the respective purchases. I may observe, with respect to the third point, that the vendor's object in imposing the restrictions must in general be gathered from all the circumstances of the case, including in particular the nature of the restrictions. If a general observance of the restrictions is in fact calculated to enhance the value of the several lots offered for sale, it is an easy inference that the vendor intended the restrictions to be for the benefit of all the lots, even though he might retain other land the value of which might be similarly enhanced, for the vendor may naturally be expected to aim at obtaining the highest possible price for his land. Further, if the first thre points be established, the fourth point may readily be inferred, provided the purchasers have notice of the facts involved in the three first points; but if the purchaser purchases in ignorance of any material part of those facts, it would be difficult, if not impossible, to establish the fourth point."[45]

The New Jersey court states the rule thus:

"The action is held not to be maintainable between pur-

[45] Elliston v. Reacher, 2 Ch. 374, 384 (1908).

chasers not parties to the original covenant, in cases in which— (1) It does not appear that the covenant was entered into to carry out some general scheme or plan for the improvement or development of the property which the act of defendant disregards in some particular. (2) It does not appear that the covenant was entered into for the benefit of the land of which complainant has become the owner. (3) It appears that the covenant was not entered into for the benefit of subsequent purchasers, but only for the benefit of the original covenantee and his next of kin. (4) It appears that the covenant has not entered into the consideration of the complainant's purchase. (5) It appears that the original plan has been abandoned without dissent, or the character of the neighborhood has so changed as to defeat the purpose of the covenant, and to thus render its enforcement unreasonable."[46]

The first statement in the above case applies only to a general building scheme. The last four apply equally well to the other four divisions of the cases herein set out.[47]

IV. The fourth class, which is really the application of the principles of the second and third classes of cases to different facts, arises where A, let us say, owns block X and three lots 1, 2, and 3 just across the street from block X in block Y. He sells lot 3 to B with a restrictive covenant. Shortly thereafter be subdivides block X under a general building scheme, into lots 1 to 12, and sells the said lots 1 to 12 to vendees M1 to M12, conveying by deeds all containing the same covenant as contained in B's deed. He then sells lot 2 in block Y to C with a like restrictive covenant. The purchasers of the lots in block X, as between themselves, are governed entirely by the rules of class three. Of

---

46 DeGray v. Monmouth Beach Club House Co. 50 N. J. Eq. 329, 24 A. 388.

47 a In the following cases a general building scheme was found to exist: Fisk v. Ley (Conn.) 56 A. 559; Curtis v. Rubin (Ill.) 91 N. E. 84; Weigman v. Kusel (Ill.) 110 N. E. 384; Loomis v. Collins (Ill.) 111 N. E. 999; Hartt v. Rueter (Mass.) 111 N. E. 1045; Godley v. Weisman (Minn.) 157 N. W. 711.

b In the following cases no general building scheme was found: Mulligan v. Jordan (N. J.) 24 A. 543; Judd v. Robinson (Colo.) 92 P. 724; Webber v. Landrigan (Mass.) 102 N. E. 460; Zinn v. Sadler (Mo.) 137 S. W. 1172; Sailer v. Podolski (N. J.) 88 A. 967.

c The following cases contain some of the latest pronouncements of the courts on restrictive covenants, wherein their use has been attempted for the purpose of promoting general building schemes: Shuler v. Independent Sand & Gravel Co. (Ia.) 209 N. W. 731; Kramer v. Nelson (Wis.) 208 N. W. 252; Schneider v. Eckhoff (Wis.) 206 N. W. 838; Bailey v. Jackson (N. C.) 131 S. E. 567; Grusi v. Eighth Church etc. (Oregon) 241 P. 66; Sowers v. Vestry etc. (Md.) 131 A. 785; Storey v. Brush, (Mass.) 152 N. E. 225; Rochester etc. v. Rochester etc. (N. Y.) 126 Misc. 309; Covenants, Key No. 79 (3), also No. 84.

course B and C, as between themselves, are governed by the rules of class two. And the rights of B, against the owners of the lots in block X and their rights against him and the rights of C against them and the rights of such owners against C are also governed by the rules of class two unless in the case of B and C their lots are brought within the general building scheme. If A's remaining lot 1 in block Y is not included within the general building scheme embracing block X his right to have the covenants observed by the purchasers of lots in block X in favor of his lot in block Y will be governed by the rules of class two.

V. The fifth class is that in which the several owners of lots in a neighborhood enter into covenants between themselves restricting the use to which the land of each party may be devoted. In that case each party and his assigns can enforce the covenants in equity against each of the other parties and his assigns, who take with notice.[48]

---

48 Korn v. Campbell 192 N. Y. 490, 85 N. E. 687; Trustees of Columbia College v. Lynch, 70 N. Y. 440, 26 Am. R. 615; Brown v. Huber, 80 Oh. St. 183; Erichsen v. Tapert, 172 Mich. 457, 138 N. W. 330.