Negative Agreements Affecting Land

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NEGATIVE AGREEMENTS AFFECTING LAND

THESIS PRESENTED FOR THE DEGREE OF MASTER OF LAWS

BY

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In this thesis I have tried to investigate a field of Equitable Jurisdiction which seems to have been either neglected or treated in a very superficial manner by text books, and I have attempted, as far as my ability would allow, to arrange in a systematic manner the different phases of the subject of "Negative Agreements affecting Land". In Chapter one I have tried to deal with the nature and scope of these agreements, the way in which the Court of Equity takes cognizance of them, and the reason for its interference. In Chapter two, the subject of rights of action has been fully treated, and the effect that laches has upon such rights. I have been able to find little, if any, authority dealing with this branch of the question in text books, while, on the other hand, there are many cases which seem to tend to the conclusions I have reached and tried to clearly express.

The cases, however, do not seem to fully distinguish between the effect of covenants, restrictions, and easements; so I have taken as the title of my thesis "Negative Agreements affecting Land" with the object of embracing these different terms in a word so generic in its nature as "Agreement". This, however, does not mean that have used the words "Negative Agreements" throughout this treatise; for, although, the terms, "Covenants"; "Restrictions" Etc, can be broadly distinguished, it facilitated matters to use these terms synonymously, for so they seem to be employed in the leading cases on this
subject.

The following authorities furnished many useful suggestions, and shed much light on the task I have tried to perform: Beach, Modern Equity Jurisprudence; Bispham's Principles of Equity, Fifth Edition 1893; High on Injunction, Third Edition; and Pomeroy's Equity Jurisprudence, Second Edition, 1892.
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CHAPTER I

NATURE AND SCOPE OF NEGATIVE AGREEMENTS.

Definition. A concise definition of negative agreements may be given in the following statement: Negative agreements or restrictions are stipulations concerning the use of land by which the owner or any person possessing rights therein confines its use to certain purposes.

The Court will look upon these restrictions, in many cases, as easements, and therefore as such are for the benefit of the respective landowners, it is unnecessary to insert them in subsequent conveyances to bind the grantees who claim under such deeds. Barrow v Richard (a) is cited as the case establishing this rule in Birdsall v Tiemann (b). Justice Titchell says "The effect of such covenants was considered and settled in Barrow v Richard, and the Chancellor held that they created easements on the lands for the benefit of their respective landowners. In that case there was no allegation that the covenants were contained in the deed to the defendant; and if an easement was created, it was unnecessary to insert them in subsequent conveyances."

How these restrictions are created. A restriction on the use of land may be created by grant or by covenant by the owner that he shall refrain from using his premises in a particular manner. Reciprocal restrictions of this character may be created upon the

(a) 8 Paige (N.Y.) 351, (b) 12 How.Pr.551
division and conveyances in severalty to different grantees of an entire tract, and they may be created by a reservation in a conveyance, by a condition which is annexed to a grant, or by a covenant, and even a parol agreement of the grantees. (a)

Development of the law on this subject. Until late in this century it seems that the Court would only exercise its equitable jurisdiction where it was a covenant running with the land and the plaintiff depended on his contractual right, and the defendant was subject to a legal obligation which equity would enforce. If there were no contractual relations between the parties equity would not interpose a remedy. These opinions or dicta were, however, discredited in later cases, and we find the case of Whatman v Gibson (b), where a covenant against certain trades was enforced by an injunction against a purchaser of the land with notice of the covenant, in which the learned judge said "Whatever may be the form of the covenant, or whatever difficulty there may be in bringing an action on it, I think there is a plain agreement which the Court of Equity ought to enforce; and as the defendant admits he intends to carry on one of the prohibited businesses, he comes within the purview of the deed, and ought to be restrained from so doing by the injunction of the court".

Not necessary that the agreements should be in covenants running with the land. It is not necessary therefore, that the covenant whose enforcement is sought should run with the land so as to be

(a) Trustees v Lynch, 70 N.Y. 447. Carter v Ayrault, 47 N.Y. 73, Tallmadge v East River Bank, 26 N.Y. 105. (b) 9 Sim. 196.
binding upon the purchasers. A case illustrative of this point is Tulk v Moxhay(a) which held, that where there was a covenant that no buildings should be erected on the gardens, the purchaser with notice of the covenant that no buildings should be erected, was bound by it in Equity whether he was bound at law or not, and an injunction was granted to restrain him infringing the covenant. Lord Cottenham observed here "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."

It would appear therefore that where a subsequent purchaser buys with notice of the restriction, the Court treats the property as impressed with a trust. It is contended to be a case of constructive trusts, and the intent of the parties will be looked into as to whether they intended the contract to run with the land or not, and it would seem from the cases examined that the equity attaches in the same way as do trusts, and, like trusts funds, may be followed until it comes into the hands of a bona fide purchaser. As against the first purchaser the plaintiff would rely on his contract, and against the subsequent purchaser with notice of the restriction, the question would seem to be one of trusts.

**Nature of the agreement.** There has been much difficulty, however, to determine in the cases whether the agreement which the purchaser has entered into is such that it creates an easement, a covenant, or a restriction. The cases are conflicting, but the

(a) 11 Beav. 571.
weight of authority seems to point to the fact that these restrictions are regarded really as easements. They are equitable easements which, by nature of some defect in their creation or some other fact, are not enforceable in a court of law. They are defined as "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" (a) In other cases, however, they are regarded as merely coming under the doctrine of specific performance which the court will enforce on the ground of the contractual relations existing between the vendor and vendee, and against the subsequent purchaser on the ground that he had taken the land subject to the trust that was attached to it by the predecessor in title. Viewing the case, however, in this way would not give the Court ground to interfere on behalf of several purchasers of different parts of a tract of land with whom no contract was made, but the Court will often give relief to such persons. However it may still be upheld as an obligation on a purely equitable ground, and it is said that "the principle on which equity enforces the burden of the covenant against an alienee is that of preventing the party having acquired land with knowledge of the rights of another from defeating such rights, and not upon the idea that the engagements create easements which run with the land" (b).

Distinction between covenants, restrictions and easements. The law

(a) Whitney v Union Ry Co. 11 Gray (Mass) 359
(b) Brewer v Marshall, 19 N.J. Equity 537.
is that a covenant must be under seal, but a restriction may be created by simple contract. Any kind of agreement, affirmative or negative is binding by way of a covenant, but enforceable restrictions are practically limited to negative agreements. Also the question whether the covenant runs with the land, at law, depends upon questions of privity of estate between the contracting parties, but Equity does not take cognizance of such questions. Notice is essential in the case of a restriction to a subsequent purchaser, but a covenant runs regardless of such notice. An easement is defined to be "a privilege, without profit, which the owner of one neighboring tenement has over another in respect of their several tenements, by prescription or by grant; by which the servient owner is obliged to suffer or not do something on his own land, for the advantage of the dominant owner" (a)

Whether we regard the agreement as a covenant, a restriction or an easement, it seems that the Court will nevertheless enforce it as between the grantor and the immediate grantee. Justice Bigelow says "Nor can there be any doubt that in whatever form such a restriction is placed on real estate by the terms of the grant, whether it is in the technical form of a condition or covenant, or for a reservation or exception in the deed, or by words which give to the acceptance of the deed by the grantee the force and effect of a parol agreement, it is binding as between the grantor, and the immediate grantee, and can be enforced against him by suitable process, both in law and equity" (b)

(a) Wolfe v Frost, 4 Sand. Ch. 72
(b) Whitney v Union Ry Co. (Supra)
Instances of breach of covenant and what constitutes such breach.

A great many cases are found which deal with the breach of covenants forbidding the grantee from building beyond a certain line, or prohibiting him from the erection of a dwelling which would be offensive to the grantor. In all these cases Equity will restrain the purchaser or his assigns with notice, from the violation of the covenants. In Seymour v McDonald (a) the defendant bought a lot from the plaintiff where it was understood that a family mansion would be placed on it. There were covenants by the plaintiff to the effect that he would not use the lot in any way which would be offensive to the occupant of the adjoining property, which would tend to deteriorate and lessen its value, and would not use it for a stone quarry. The defendant soon after used the lot as a quarry, and also placed a wharf on the river front. The Court held that the defendant had violated the covenant and could be restrained. The erection of a "switchback railway" has been held to come within a restrictive covenant entered into by the grantee to the effect that no operative machinery, hut or tent, shall be fixed or fastened on the land, inasmuch as such a railway is both operative machinery and a chattel within the meaning of the covenants. (b).

A case which seems to conflict with those examined is that of Warden v Southeastern R.Co (c) where the defendant erected

a building which exceeded the height stipulated by six feet. Here we see the Court exercised its discretion about granting the injunction, which would take the form of a mandatory one, and denied the prayer of the plaintiff on the ground that no irreparable injury was done by such excess, and in effect held that a small excess in height above that authorized will not constitute ground for an interlocutory injunction to prevent the use of the building so erected, as here there was plainly no damage done by the plaintiff.

Each case therefore will depend upon attending circumstances, and the jurisdiction of the Court of equity may be exercised for their enforcement or refused according to its discretion (Trustees v Thatcher)(a); but when the agreement is a just and honest one, its judgment should not be in favor of the wrongdoer.

Exception to the general rule. We have the dictum of Lord Chancellor Cottenham that "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"; yet an exception to this rule would seem to exist when we read the case of Austerberry v The Corporation of Oldham(c), where the court refused to grant the injunction on the ground that the statement of Lord Chancellor Cottenham is limited to restrictive covenants, and that it would not be extended so as to bind in Equity a purchaser who took with notice of a covenant to expend money on repairs or otherwise which does not run with the land at law, or,

(a) 87 N.Y.311. (b) Tulk v Moxhay 2 Phill. 774. (c) L.R.29 C.D. 750.
in other words, there is an exception made to the rule that the covenant need not run with the land in those cases in which the stipulation is for the performance of some positive act on the land by either covenantor or covenantee. Lord Justice Cotton here said "It is not a covenant which the Court of Equity will enforce; it will not enforce a covenant not running at law, when it is sought to enforce the 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". Thus Tulk v Moxhay can be distinguished from this case by the learned judge continuing "The covenantor must not use the property for a purpose inconsistent with the use for which it was originally granted, but in my opinion, a court of Equity does not and ought not 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" (a)

Effect of the Statute of Frauds. Are restrictions affected by the Statute of Frauds? It has been decided by some cases that such restrictions create an interest in lands, and if not in writing are void. The provisions of the Statute, however, can be complied with, as in other cases, when there is a part performance, but such performance must be founded upon and referable solely to the agreement. If the acts relied upon would have been done whether there were any agreement or not, or might be referable to

(a) See also: Moreland v Cook, 6 Eq. 252, Haywood v Brunswick Building Society, 8 Q. B.D. 403
some other agreement, they will not relieve the case from the operation of the Statute.

The majority of cases, however, dealing with this subject seem to hold that there may be a mere parol agreement and no covenant, and yet the Court will grant an injunction against the party who purchases the land with notice. This is on the ground that no one purchasing the land with notice can be in a different situation from that occupied by his grantor. The agreement can therefore be written or oral. (a) If, however, the vendors, previous to the conveyance, exhibit a plan of the property which purports to grant the plaintiff more rights than he actually has under the deed the plaintiff cannot secure an injunction against the vendor, for the plaintiff is bound by the written contract, and cannot therefore vary its terms. Hence the distinction between the American case of Tallmadge v East River Bank (b), and the English case of Squire v Campbell (c). In the former case, it was established by the evidence that there was a parol contract which was collateral to the grant; in the latter, the evidence adduced tended to vary the extent and form of the plan as described and embodied in the lease, and thus vary the terms of the written contract.

(b) Supra
(c) 1 M. & C. 458.
Effect of the Rule against Perpetuities. "The Rule against Perpetuities, which governs limitations over to third persons, has never been held applicable to conditions, the right of entry for the breach of which is reserved to the grantor or devisor and his heirs, and may be released by him or them at any time." (a) Justice Bigelow in Whitney v Union Railway Co (b) says:

"Every owner of real property has the right so to deal with it as to restrain its use by his grantees within such limits as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the land which he retains. The only restriction on this right is, that it shall be exercised reasonably, with a due regard to public policy, and without creating any unlawful restraint of trade." And again at page 366 he says "They do not restrict the alienation of land. The owner of the fee can convey it at his pleasure. They do not tend to perpetuity. The person who is entitled to the rights or privileges created or secured by the restrictions can, at any time, release them. They do not impair the enjoyment of the property. This remains in the respective parties according to their legal rights under the contract and grant, in the same manner as in the case of a right of way, where one person owns the land, which he may use and occupy, subject only to the enjoyment of the easement by him who has the right of way over it.

Construction of these Covenants. It is a rule that restrictive covenants are to be construed very narrowly, and the Court will not enjoin an alleged threatened breach without seeing that such breach will come plainly within the provisions of the covenant, and construes the restriction so as to be as little burdensome to the covenantor as possible, and the restriction is held to be a personal right of the covenantee, unless the contrary intention clearly appears. (a) In the case where there is a general plan of land which is divided up into lots, there is a presumption that the restriction was intended to be appurtenant to that land. (b)

Rights of a grantee holding land subject to a restrictive covenant. The owner of an estate in fee may use it for any purposes at his own pleasure, and he may alter it in any way. If there is another person who has an easement in it, the owner has still the beneficial use in it which he can exercise consistently with the others enjoyment of the easement. (c)

Penalty and Liquidated Damages. There are many cases in which a fixed sum of money is mentioned in the instrument as payment for the breach of a covenant. In such cases the courts are

(a) Keats v Lyon 4 Ch.App. 218.
(b) Tobey v Moore, 130 Mass 450
called on to find out whether this was meant as liquidated damages or as a penalty. In case it is a penalty the Court will not be deprived in the exercise of its equitable jurisdiction, but will exercise it as in their discretion it seems fit. (a) It does not follow that because a penalty is fixed on the breach of a restriction that this authorizes the party to do the act. However, if it is clearly shown that the parties intended to regard the amount in question as liquidated damages, the Court will not grant the injunction, but leave the parties to their remedy at law. It does not follow that because the parties used in the instrument the term "penalty" or "liquidated damages" that the court will always construe the contract to mean that in using the word "penalty" that it was intended to secure the faithful performance of the covenant, or that in using the words "liquidated damages" the contract was to be interpreted to mean that it was to be paid as a equivalent for doing the act forbidden. (b)

Form of Remedy. Whenever there is a threatened breach of covenant, the form of remedy should be a prohibitory injunction. Where the breach is already made, the injunction assumes a

(a) Bird v Lake, 1 Hem. & M. 111

(b) Phoenix Ins. Co. v Continental Ins. Co. 87 N.Y. 400.
mandatory form, and in all cases where a purchaser erects buildings beyond a line fixed by the covenants, it is proper to grant an injunction in such form (a).

The breach of a negative covenant will sometimes be inferred from circumstances (b), thus following the dictum of Lord St Leonards - in the nature of a digression - in the famous case of Lumley v Wagner, with regard to the service of an actress, "I am of opinion, that if she had attempted even in the absence of any negative stipulation to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered." This statement of the law, as far as personal services are concerned, has, however, been disapproved of in the case of Whitwood Chemical Co. v Hardman, upon the merits of which we need not now enter. (d)

When an Injunction will be granted. When the Court of Equity sees that it ought to exercise this jurisdiction of granting an injunction, it will not regard the way it will affect the parties to the contract, but it only looks on the terms of the contract. (c) A case illustrative of this point

(a) Lord Manners v Johnson, 1 C.D. 673. Rankin v Huskisson, 4 Sim. 13.
(b) Newman v Nellis, 97 N.Y. 285
(c) 1 DeG. M. & G. 604.
(d) 1891, 2 Ch. 415.
is found in Tipping v Eckersley (a), where the defendant entered into a covenant not to interfere with the use of the water of a stream which was used by plaintiff for his mill. The damage was shown to amount to very little, yet Vice-Chancellor Wood intimated that such a fact would not have weight with the Court in the exercise of their right to grant an injunction. His views may be briefly stated in the following abstract: “If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstances of the breach affords sufficient ground for the court to interfere by injunction. And I apprehend the Court may so interfere whether the defendant has or has not actually committed the breach in respect of which the interference of the Court is sought. For in the case of contract, it is enough if the defendant claims and insists on a right to do the act, although he has not already done it mod et forma as alleged. In such a case I should have no difficulty in granting the injunction.” Provided the restriction is of some substantial value, any breach will be enjoined unless so trivial as to come within the principle de minimis (b) Qualification to above statement. There must however be a qualification to what has been said in the preceding paragraph. The Court, as later cases show, will only exercise this absolute jurisdiction when the covenants on which they base the decree are clear and free from doubt, and their contemplated or actual violation is established, and there is 

(a) 2 Kay & J.264. (b) Attorney Genl v Algonquin, 153 Mass.
likely to ensue irreparable injury. If this does not exist the Court will be governed by the effect the injunction will have on the parties. In Wilkinson v Rogers (a) there was a lease of a house which contained a covenant by the lessee to use it as a private dwelling house only, with a proviso that if any of the adjoining premises belonging to the lessor, were converted into a shop, the lessee should be at liberty to convert his premises to a similar use. The plaintiff used, or allowed to be used, the adjoining premises as a place for selling photographs. Lord Justice Turner said "I agree that if the covenant is clear and distinct, and irreparable injury is likely to accrue from it, it is the duty of the Court to interfere by injunction before the hearing. On the other hand, if the covenants are not clearly expressed, or if it is doubtful whether a breach has actually been committed, or if no irreparable injury is likely to be occasioned either to one side or to the other, then, I think, that according to the whole course of this Court, it becomes a question of comparative injury - on which side would greater injury be caused?".

Therefore the objects sought to be secured by the restrictive covenants must be certain and clearly expressed in their provisions. This is a rule fixed by the Court of Equity in (a) 12 W.R. 284.
order to protect the defendant from injunctions in cases where the restrictions are vague in their prohibition, and where the effect would be to leave the defendant in doubt as to what was the real order of the Court, and in what circumstances he would be liable to imprisonment for disobeying the order of the Court. Where an injunction is ambiguous and indefinite and gives no clear rule of conduct, it becomes a snare to the defendant which, if he violates, renders him liable to imprisonment. The Court will, therefore, in granting an injunction take care that the language of its order will be such that it is quite plain what it permits and what it prohibits. Equity will interfere where the breach is intended, but in such a case the intention must be clear and manifest.

Reason for the interference of courts of Equity. The remedy by injunction is given by the Courts—which really has the effect of decreeing the specific performance of the agreements—where it would seem that the plaintiff had a remedy at law in damages. In such cases, however, the interference of the Court is based on the ground that there would be a multiplicity of suits were the plaintiff denied the injunction. An illustration of this is Stewart v Winters (a), where it was a bill by a lessor to restrain his lessee from using the premises demised as an auction store, the lease containing a covenant.

(a) 4 Sandf. Ch. 587.
that the store should be only occupied for a certain purpose which impliedly excluded that of auctioneering. Vice-Chancellor Sandford referring to the legal remedy said "In the first place it is manifest that at law a new cause of action might arise every day that the defendants sell at auction. If the lessor avail himself of his full rights at law he will sue daily for the damages. This would lead to a multiplicity of suits, harrassing to both parties and highly obnoxious to the censure of a court of Equity." He further observes that it would be hardly possible to estimate the actual damages. There would be the opinions of the jury which might vary greatly as to the amount of the injury, to the property as the damages would be very conjectural, for some might think it enhanced its value, while others might consider the damages so great as to render their ascertainment a matter of the greatest difficulty.
CHAPTER II

RIGHTS OF ACTION.

A. Who may exercise such, and
B. How they may be lost.

The question now arises as to who is entitled to the relief in Equity for breach of these negative agreements. So far we have seen the grantor and grantee have enforced their respective rights on breach of covenants by reason of the privity of contract existing between them (a), and it is fitting now to ask whether the Court will also protect those who claim under the grantees who have not entered into any contract with the grantor. The most important point to be settled, however, is whether lot owners who claim from a common grantor can enforce negative covenants against one or more of their number on a threatened or actual breach, when there are no reciprocal covenants existing as between themselves. The rule that the Court will grant an injunction on the threatened or actual breach of a covenant as against the original parties to the agreement and their assigns is so well settled (b), that the greater part of this chapter will investigate the question

(a) Duke of Bedford v Trustees of British Museum, 2 H & K 513
(b) Clements v Welles, L.R.1 Eq.199.
Trustees of Columbia College v Lynch, 70 N.Y. 440
Spencer's Case, 3 Coke 16
whether an injunction will be granted against parties who are not bound by privity of contract, and between whom there is no contractual relationship.

The rule of law seems to be settled that where the action is brought by the original covenantee against a subsequent purchaser from the covenantor for breach of covenant that the Court will enforce the covenant against such subsequent purchaser with notice. When however the question arises as to the right of a grantee of one part of the land to enforce a restrictive covenant made by his grantor upon the sale of another part, a different problem is presented. In this case it might be that the grantor made the restrictive covenant in order to secure a personal benefit or to enhance the value of a particular piece of land. If the restriction is not in the nature of a legal right, then the question which influences the Court of Equity is whether, on entering into this restrictive covenant, it was intended that this restriction should enure to the benefit of this particular grantee.

**General Plan Theory.** The case of Whatman v Gibson (b) gives us grounds for saying that when, from the facts surrounding the conveyances to different grantees, it can be inferred that the different conveyances were part of a general plan for the improvement of the whole tract of land, then each of the

(a) Keates v Lyon, L.R. 4 Ch. App. 218.
Master v Hansard, 4 Ch. D. 718.
(b) 9 Sim. 196.
grantees of smaller divisions has such an interest in preserving the property according to the intent of the restrictions, that the Court will grant an injunction to prevent the violation of the covenants. The plan or general scheme is sufficient notice to subsequent purchasers of the object of the restriction, and they take subject to an obligation to observe these stipulations imposed for the purpose of carrying the plan into effect for the common benefit. Consequently, these contracts need not be express, but may be implied from the transaction of the sale and purchase (a), and although the agreement in a deed may be regarded as a contract merely binding on the original parties, the Court will construe it so as to carry out the intention of the parties, and regard it as being in the nature of an incorporeal hereditament or easement remaining and attached to the land in question. Where it appears, therefore, from a fair interpretation of the instrument that it was the intention to reserve a right in the nature of an easement in the property granted, for the benefit of other land owned by the grantor, such a restriction will be deemed to be appurtenant to the land, and this will be binding on all subsequent purchasers of the same lot of land (b).

Obligations on Grantees. Each grantee of a part of the land is bound to observe whatever restrictions may be imposed on

(a) Renals v Cowlishaw, 9 Ch.D. 125.
Spicer v Martin, 14 App. Cas. 12.
(b) Whitney v Union Ry. (Supra)
his lot for the benefit of the others, and can claim the same right against the other grantees. And it matters not whether such a party would maintain an action at law to enforce such a covenant. The Court will exercise its jurisdiction in favor of such a party when the restrictions were intended for his benefit and protection. (a)

Reason for apparent burden on Purchasers. The rule appears to be that a covenant entered into with the grantor not only binds the original grantee, but, where the land is sold in lots, each purchaser, under certain circumstances, may claim the benefit of the restriction against the other purchasers. This seems somewhat anomalous, but on examining the authorities carefully the justice of the rule appears, for many times persons will be induced to purchase land which they know can only be used for purposes of residence, as also is the case with regard to the neighboring land, where, were there no restrictions, they would never think of purchasing. It is very important for the grantor or vendor of the lots to see that the sale of one or more should not impair the value and prejudice the sale of the rest; therefore they take care to lay the purchasers under restrictions as to the use they may make of the lot, and in this way they encourage the erection of residences and enhance the value of the land, that might otherwise be depreciated were they to allow all sorts of buildings to be erected that might become a source of annoyance. Since, in many cases, the original vendor parts will all the lots, it follows that he has

(a) Hills v Miller, 3 Paige 256
Watertown v Cowen, 4 Paige 510
Barrow v Richard (Supra)
no more interest in the use of the land, nor can the aggrieved purchasers force him to bring an action against the person who has broken the covenants, and hence the remedy is given at the suit of any of the purchasers. (a)

Eastwood v Lever. (b) An instructive case, and one which deals with the questions already raised in this thesis, is that of Eastwood v Lever. The defendant in this case, a grantee, erected a building contrary to a covenant entered into with the grantor. The plaintiff, a grantee from the same grantor, sought to enforce this restrictive covenant although it had not been entered into with him. The Court determined that the plaintiff had an equity against the defendant, and in effect held that when land is sold in building lots, the conveyance containing certain restrictive covenants, each purchaser has an equity against the other to compel the faithful observance of the conditions.

Rights as between Lessee and Lessor. A good authority for adopting the rule that the Court should interfere to restrain the breach of a negative covenant where there is a common scheme is found in the case of Hudson v Cripps (c), where an injunction was granted to restrain the conversion into a club of a large part of a building, adapted for the occupation of tenants, at the instance of a tenant who held under an agreement in a common form, binding the lessees to rules suitable to buildings erected as residences. Justice North here says

"(a) Barrow v Richard, 8 Paige 351.
(b) 33 L.J. Ch.
(c) '96 1 Ch.265."
"No one can read these provisions without seeing that there was a scheme for the general management of this building, composed of several flats, in such a way as to be suitable to the convenience of all the persons who should be tenants of the respective flats. Where the landlord enters into such an arrangement with each tenant, it is obviously intended to be and is, as a matter of fact, for the benefit of all the tenants. Whether this house was built originally with any such scheme in view I do not know, and it seems to me entirely unimportant. There were, at any rate, existing a collection of flats, each occupied in a similar manner, under a common management, by different tenants." The learned judge based his decision on the cases of Renals v Cowlishaw and Spicer v Martin(a)

Rights as between grantee and grantor. The rights of a grantee against the grantor are established in the late case of Birmingham & District Land Co. v Allday (b), where a land company directed to be sold by auction a property which was divided into lots, and described as "a small freehold estate divided into twenty-two convenient lots of sound building sites!" There was a plan which showed how the whole piece of land was to be laid out, and the position and boundaries of the lots. The purchaser covenanted that he would build none but dwelling houses on the lot, and that it would not cost him less than two hundred and fifty pounds, and that he should follow the plan as enforced on the other lands of the vendor.

(a) 9 C.D.125, 14 App.Cas.12, (b) '93 1 Ch.342.
The part which was put up for sale only formed a portion of the estate of the vendors, and at the auction only a small number of the lots were sold. One lot was purchased by Allday who refused to complete the purchase on learning that the vendors were going to sell the remainder of the lots free from the restrictive conditions, and the action was brought to determine the validity of the claims of the vendors and the rights of the vendee.

Justice Stirling cited with approval Martin v Spicer (a) and The Nottingham Patent Brick Co. v Butler (b), and upheld the General Plan theory. It was held that Allday, the vendee, was entitled to the benefit of the contract by the vendors implied in the conditions of sale, that they would, as to the lots unsold at auction, observe stipulations similar to those which the purchasers of those lots, had they been sold, would have been bound by covenant to observe; and that the conveyance to him ought to contain an expression of such an obligation on the part of the vendors. The learned Justice says "It seems to me, therefore, that these particulars and conditions constituted (in the language of Lord MacNaghten in Spicer v Martin) an invitation to the public to come in and purchase on the footing that the whole property offered for sale was to be bound by one general law affecting the character of the

(a) L.R. 14 App. Cas. 12
(b) The Nottingham Patent Brick & Tile Co. v Butler, 16 Q.B.D. 784
buildings to be erected thereon; and that the vendors ought not to be considered at liberty to destroy the value of that which was sold, by authorizing the use of a part of the property for a purpose inconsistent with the law by which they imported to bind the whole.'

**Rights as between grantees and purchasers.** The rights of a purchaser of one residential lot against another who implicitly buys with notice of a general scheme, although there was no deed of mutual covenants to be executed by each purchaser and no restrictive covenant except that contained in the general plan, are discussed and settled in the late case of Tindall v Castle (a). Here the defendant was restrained at the suit of purchasers of some of the other residential lots from building cottages on a piece of land marked "lodge" which by a building scheme or plan could only be used for that purpose. Justice North held that the defendant bought with notice of the general plan or scheme which was intended to represent to purchasers that this particular piece of land was to be used only for a lodge, and therefore he should be restrained from building these cottages or using the land for any purpose inconsistent with the scheme disclosed by the plan.

**Meaning of the term "Assigns".** The question was raised in a recent English case (b), whether when a large building estate has been offered for sale in plots, under an agreement that the purchaser would not alter the buildings on the plot he purchased "without the consent in writing of the vendor, his

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(a) (1893) 62 L.J.Ch.555  
(b) '92 3 Ch.148, Everett v Remington
heirs or assigns", but there is no general building scheme governing the whole estate, and the purchaser of the plot, although he has entered into a covenant in the terms provided by the form of agreement, is not bound to obtain the consent of the purchaser of another plot which has been subsequently sold and conveyed, before he can alter the buildings on his own plot. In the case above cited, the facts briefly stated were: the estate, in question, was being sold in lots at different times for building purposes, and certain restrictive covenants were entered into. Remington, the defendant, purchased the house and garden in which he carried on a school. The defendant had covenanted with Durrant the vendor "his heirs and assigns" that such covenant should run with the land, and that he, the defendant, would not "without the consent of Durrant his heirs or assigns" alter the buildings &c, or suffer anything to be done which might be a nuisance to Durrant his heirs or assigns or his or their tenants in the neighborhood. Subsequently an adjoining house and garden were conveyed to Everett, the plaintiff, by a previous purchaser from Durrant, which were subject to similar restrictive covenants. Remington erected a school-room, and Everett brought action, claiming an injunction for the nuisance caused by the school, and also because the new building was erected without his consent as an "Assign" of Durrant. The Court would not grant relief on the ground that Everett was not an "Assign", 
and had no ground for seeking a remedy in a court of Equity.

It must be noted that the case did not decide that a neighboring purchaser cannot enforce his rights when there has been a breach of covenants, against another, but assumed that even if the plaintiff in such a case was entitled to enforce the restrictive covenant, there was no breach, and because the consent required was that of the original vendor, and the words "consent of George Durrant, his heirs and assigns," meant the consent of the owner for the time being of the estate in its broad and popular sense, and not of every subsequent lessee or purchaser of a plot. .

Limitation to the right of action of grantees. It would seem therefore to be established from cases cited, and the absence of dissenting opinions, that the right of grantees who have bought property from a common grantor to enforce against each other covenants entered into by each of them with the grantor, is restricted to cases where it is established that there is a general plan for the improvement of the property, and the covenant has been entered into by all the purchasers, and for the benefit of each of them, and the party has bought the property with notice of such plan. (a)

qualification to general plan theory. A limitation to the general plan theory is that where there is a sale of building

As to meaning of term "adjoining" see Harrison v Good, 11 Eq. Cas. 336.
(a) Mulligan v Jordan, 80 N.J. Eq. 363
Fielden v Slater, L.R. 7 Eq. 523.
estate in plots, where the vendor shows a plan that contains the proposed sites of lots and the situations of the houses which should occupy them, and a printed form of the agreement for the purchase, which has spaces for alterations, the purchaser is not entitled, in the absence of further representations to assume that the whole estate is governed by a building scheme or plan which follows wholly that laid down in the plan.

This is not at all in conflict with cases already discussed, as it is expressly laid down by Justice Romer in the case which is authority for the above statement of the law (a) that the plaintiffs would be entitled to judgment if they could also show that such a scheme, if there was one, was communicated to them, or that they were led to believe in the existence of such a scheme, and that the intention was that each one of the several purchasers of the different lots should be bound and also have the benefit of the covenants which were entered and by each of the other purchasers. (b)

What constitutes notice to subsequent purchasers. It may well be asked now: What is sufficient to constitute notice to a subsequent purchaser? It has been held that constructive notice is sufficient, and if a defendant claims derivative-ly under a grant, if a deed is duly registered, the defendant is deemed to have notice of its stipulations, and is bound to

(a) Tucker v Vowles, 19 Ch. 195
(b) Davies v Leicester, 94 2 Ch. 208.
De Gray v Monmouth Beach Club House, 24 Atl. Rep. 388
Graham v Hite (1893) 20 S.W. (Ken) 506.
observe the restrictions which are imposed on the enjoyment of the land (a) Again it has been held (b), that where houses were all erected according to a general plan and uniformly, that this uniformity was sufficient to put the defendant upon inquiry, and that he should be charged with notice.

Intention a governing principle. A party seeking relief in the Court for breach of covenant, where no privity of contract exists between the parties to the action, must be able to show that the restriction was intended to benefit his property and not merely that of the original covenantee (c) Lord Escher is authority for the dictum "x x when an estate is put up for sale in lots, subject to a condition that restrictive covenants are to be entered into by each of the purchasers with the vendor, and the vendor is intending at that sale to sell the whole of the property, the question, whether it is intended that each of the purchasers shall be liable in respect of those restrictive covenants to each of the other purchasers, is a question of fact, to be determined by the intention of the vendor, and not of the purchasers, and that question must be determined on the same rules of evidence as every other question.

(a) Whitney v Union Ry Co. 11 Gray 366.
(b) Tallmadge v East River Bank, 26 N.Y. 105
   See also Mooreland v Cook, L.R. 6 Eq. 252, Kna
   Knapp v Hall (1893) N.Y. Supp. 42
(c) Parker v Nightingale, 6 Allen, 341.
   Tod-Heatly v Barham, L.R. 4 C.D. 80
(d) Nottingham Patent Brick & Tile Co v Butler, 16 Q.B.D. 770.
of intention. And if it was found that it was the intention that the purchasers should be bound by covenants inter se, the Court of Equity will, in favor of any one of the purchasers, insist upon the performance of the covenants by any other of them and will do so without introducing the vendor into the matter"

From the above dictum one would be led to infer that the sale of the whole property must be consummated at one time to establish conclusively that the intention of the vendor was that all the purchasers should be benefited by the restrictions, as such a disposition of the property would clearly prove that the vendors did not impose the restrictions for his own benefit. The learned judge however says "it is impossible, in my opinion, to say that the mere fact that the lots were not all sold on one day can make any difference. Lapse of time is not of itself a bar to the liability of the purchasers inter se; it is a matter to be taken into consideration, but it is not a bar."

**Inferences to be drawn from the cases.** As is seen by the preceding paragraph intention seems to be a governing principle in helping the Court to construe the object of a restriction. As a consequence there may be two separate and distinct kind of cases. The first may be found where there has been a sale of part of the property, when the vendor has no intention of selling the rest, but he afterwards determines to sell the remaining block. In this case you cannot hold the restrictions binding on the first sale as also fixed
on the second conveyance, and you can only look at the conditions relating to the second sale. The second class of cases is where the entire property is put up for sale in lots subject to restrictions. Here it is purely a question of fact whether it was or was not intended that the restrictive covenants should be entered into for the benefit of each of the purchasers against the others, and here, as was said before, it is very material whether the vendor reserves any property for himself, and if he does not reserve any part that is almost conclusive evidence that the covenants which he takes from the purchasers are intended for the benefit of each purchaser which may be enforced against the others.

B. How rights of action may be lost.

Effect of Acquiescence and Change in Locality. A person who has a right to enforce a covenant prohibiting the carrying on of a trade or business upon certain lands, may lose that right by acquiescing in the regular breaches of the covenant, or by changes in the character of the building estate. If, however, there is a part of the building estate remote from the plaintiffs property on which business has been carried on in breach of the covenant, this is not proof of acquiescence by him unless it was know what was being done. The change in the character of the property must be so complete as to make the object for which the covenant was imposed impossible of
attainment to deprive the plaintiff of his right. The rule in Equity regarding the time of bringing action to compel a compliance with covenants, is, that it must be commenced promptly and before the persons in possession of the land have expended money or incurred liabilities in erecting buildings on the land. It would be unequitable to allow a party to lie by and see acts done which would involve expense to others, and then to permit him to enforce his rights, and injure, very materially, persons acting in good faith.

Duke of Bedford v Trustees of British Museum. The early and historical case in which the question as to the validity and force of these restrictions are questioned is that of the Duke of Bedford v Trustees of the British Museum (d). Here there was a conveyance in fee made of certain lands in the city of London, and the feoffee covenanted not to use the land in a particular manner with a view to the more ample enjoyment of the adjoining lands, by the feoffor; and, afterwards, by the voluntary acts of the feoffor and those claiming under him, the character and condition of the adjoining land had been so greatly altered that the contemplated benefits were entirely gone. The court refused to interfere to compel a specific performance by injunction, and left the party to his remedy.

(a) Knight v Simmonds, 1896 2 Ch. 294.
Jackson v Stevenson, (1892) 156 Mass 496.

(b) Whitney v Union Ry Co. 11 Gray 367.

(d) 2 M & K 563.
at law on the covenant. Lord Eldon, in giving the judgment of the court said "If this deed is permitted to be urged against what I must call, not the legal, but actual intention, and if you have the means of obtaining any remedy, you may have recourse to that 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 the 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."

What will constitute waiver of covenants. A great many instances arise where a grantee has covenanted not to carry on a certain trade or business upon the premises leased, or to use them to the annoyance or injury of any of the houses on the estate. The case which deals with this phase of the question is Kemp v Sober(a), which, on a cursory examination, would seem to conflict with the British Museum case. In Kemp v Sober the owner of an estate covered it with houses and sold some of them subject to a covenant not to carry on any trade or allow them to be used to the annoyance or injury of any of the houses on the estate. It was held that the carrying on of a girls school, in one of the houses was a breach of the covenant, and that the covenantee had not waived the benefit of the

1 Sim. N.S. 520
covenant, though he had permitted other houses held under like covenants to be used as schools. The distinction, however, was drawn between this and the British Museum case, as in the latter there was a permanent change in the estate, and the purposes for which the covenant was originally entered into were gone by reason of the British Museum having been built on the site, but in Kemp v Sober, although the covenantor had allowed some of the houses to be used as schools, they would become private houses again as soon as they ceased to be used as schools.

Where an injunction will be refused. An illustration of a case where an injunction would be refused is given in the dictum of Lord Chancellor Eldon in Barret v Blagrave, where he says "May not a very different question be made: whether if you have permitted this to go on for eleven years, you must not take your chance at law? I have not the least doubt that what is stated in the affidavits is within the term of the covenant; but the question is whether you can have a specific performance under such circumstances, the parties having from the execution of the lease, eleven years ago, permitted that covenant to stand an ineffective part of the lease. I rather doubt whether, so far from the Court's interfering at your instance, a bill might not be filed to prevent your suing at law upon that covenant. If there are equitable circumstances to prevent your taking your legal remedy, surely they will prevent your having a specific performance!"

(a) 6 Vesey, 104
Sayers v Collyer. A case somewhat similar to that of the Duke of Bedford v Trustees of the British Museum is Sayers v Collyer (a). Here a building estate was sold in lots and the vendee covenanted with the vendors and the owners of the adjoining lots that he would not build a shop on his land or carry on any trade there. The purchaser of one of the lots brought an action against the defendant who was using his house as a beer shop, to restrain him from breaking his covenant. The plaintiff had known that the defendant had carried on this business for three years previous to bringing action, and there was also evidence that buildings contiguous thereto had been for some time used as shops notwithstanding the covenant. The lot, when it was bought by the defendant had on it what appeared to be a beer shop, which the defendant undertook to use as such. The defendant did not dispute either that the restrictive covenants bound him or that the plaintiff could enforce them, but the defence was set up on the special circumstances which existed. It was said that the covenants had lost their use by lapse of time and change of circumstances; that the preserving of the estate as a residential property had become impossible, and that the plaintiff had so far acquiesced in the change as to buy his own beer at the defendant's shop for a long time before he commenced the action. Therefore it was urged that the plaintiff should be denied the injunction asked for.

(a) 24 C.D. 180.
Justice Pearson founds his judgment in this case entirely on the authority of the British Museum adjudication, and in effect laid down that the character of the property had so changed, that the original purpose—that of keeping the property as a residential one—had failed, and that owing to these changes it would be inequitable to enforce the specific performance of the covenant. He thought the action was not bought bona fide, and therefore dismissed it with costs.

**Criticism of Sayers v Collyer.** The precise grounds on which Justice Pearson arrived at his conclusion are not very clear. He said that the British Museum case was ample authority for his decision. This case of Sayers v Collyer differs, however, from the British Museum case, in that the breaking of the covenants which had made the original object and purpose of them impossible had been brought about by the covenantee himself, the then plaintiff or his predecessors in title; whereas, in the present case, the plaintiff had not taken any part in the erection of the beershop on defendant's lot. The case however seems to have been decided on the ground that it would be impossible to raise the property out of the state into which it had been allowed to lapse, and to restore it to the condition contemplated by the covenants, irrespective of whether the plaintiff had any hand in bringing the property to its present condition. Some stress was also laid on the acquiescence of the plaintiff in the breach of the covenants.
which was shown by his having bought his own beer at defendants's shop, and by his having seen other shops opened close at hand by various persons without taking any proceedings against them.

In most of the cases examined so far, however, such a degree of acquiescence would not have barred the plaintiff from his equitable relief. Here the acquiescence is something less than three years. It did not induce the other side to spend money or place himself in an altered position, which would not as a rule constitute a sufficient ground for refusing relief to which the plaintiff would otherwise be entitled. However, the learned judge seemed to think that there was mala fides existing in the prosecution of the action: "I come therefore to the conclusion that the action is not brought bona fide for the purpose of stopping the use of the defendant's house as a beershop, because it is no injury either to the plaintiff or to the persons living in his immediate neighborhood in the same block, but there is some other reason which I do not know, which has induced the plaintiff in the year 1882 to complain of that of which he did not complain three years before." It might be urged that the learned judge was not explicit enough in his reasons, but that the motives ought not only to be known but it should also be shown to have actuated the plaintiff's conduct.

Summary of the Cases on Acquiescence and Change Locality. From a critical study of the cases bearing on the effect of acquiescence on the part of the grantor, in breaches of covenants, or
or changes due to the locality and surrounding property the conclusion may be arrived at that an injunction to enforce a covenant will not be granted where the grantor has made or permitted material changes to be made in the property, and by which the purposes of the original covenant were nullified, and it would be very oppressive for the Court to enforce the covenant or agreement. This question may arise in different ways:

1. Where the grantor has himself made material changes in the property,

2. Where he has allowed other covenantors to break their agreement

3. Where there is a material change in the condition of the locality.

1. Where the grantor has himself made material changes in the property, the British Museum case may be cited as an example, where the grantor built on a large part of the property which by the original intention was not meant as a place for the erection of buildings. The learned judge here said that recourse should be had, if any, to law and "the question is whether from the altered state of the property, altered by the act 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". (a)

See also Lattimer v Livermore, 72 N.Y.174
Stephens v Hockmeyer (1892) 19 N.Y.Sup. 666
Green v Richmond, (1893) 29 N.E. 770, and cases ante.
2. Where the grantor has allowed other covenantors to break their agreement. Here it is found that the question of acquiescence will have much weight with the Court, and if such is shown to be the case, in any great degree, an injunction will not be granted to restrain the breach. This is put on the ground that no breach should be permitted which would destroy all the benefit that would otherwise be enjoyed by the parties to the agreement. In Roper v Williams (a) an injunction was refused to restrain the breach of a covenant that buildings should be erected according to a general plan, as the covenantee had previously acquiesced in a change in the property not contemplated by the original covenants, and to restrain the breach of which he had not made an immediate application to the Court. It also establishes the rule that a landlord who relaxes in favor of some of his tenants a covenant entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing the covenant. Lord Chancellor Eldon said "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,

(a) 1 T.& R.18
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" (a)

If the defendant relies on a waiver of the covenants he must be prepared and able to show to the satisfaction of the Court that this was a material violation of the covenant. Justice James in German v Chapman (b) after reviewing the authorities, commented on the British Museum case to the effect "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 entirely or so substantially changed as that the whole character of the place or neighborhood has been so altered 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 of merely 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". Then the learned judge turned to the case before him, which was for the breach of a covenant, in erecting a girls' school, that "No house or other building to be erected or built upon the land shall be used or occupied otherwise than

(a) See also Eastwood v Lever, 4 DeG. J & S 114
    Peek v Matthews, 2 Eq. 515.

(b) 7 C.D. 271.
as and for a private residence only, and not for any purpose of trade", and 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 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. It appears to me it is impossible to apply the principle of Roper v Williams and Peek v Matthews to such a case as this; therefore I think that there is no answer to the case which the plaintiff has made out, that the intended use of the property would be a violation of the express covenant entered into, and the plaintiff is therefore entitled to the injunction asked."

3. Where there is a material change in the condition of the locality. Here we find as a leading case that of
Trustees of Columbia College v Thatcher (a). The Court said that although it had jurisdiction to enforce the observance of the covenants made by the owner of lands in a city with an adjoining owner, in consideration of similar reciprocal covenants on the part of the latter, restricting the use of lands to the purposes of private residences, the exercise of this authority is within its discretion, and where there had been so great a change in the neighborhood as to defeat the object and purposes of the agreement, such relief would not be granted. Justice Danforth said "Now having before us a covenant binding the defendant and his breach of it, if there is nothing more, the usual result must follow, viz: an injunction to keep within the terms of the agreement; for the case would come under the rule laid down in Tipping v Eckersley (2 K & J 264, 270), thus, that if the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of covenant affords sufficient ground for the court to interfere by injunction'. . . . It was then, however, suggested that another trial might disclose objections not before us. . . . It is now claimed by the appellant, that there has been such an entire change in the character of the neighborhood and of the premises, as to defeat the objects and purpose of the agreement, and that it would be inequitable to deprive the defendant of the privilege 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 . . . . If for any reason, 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 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!

CONCLUSION. "The result of an examination of the cases bearing upon the subject of this chapter, seems to lead us to the conclusion that the action to enforce the restriction cannot be maintained by parties who were not such to the original covenant. First, where it appears to the Court that the covenant was not entered into for the benefit of the land purchased by the complainant (a). Second, where it does not appear that the covenant was entered

(a) Renals v Cowlishaw, 11 C.D. 866
Sharp v Ropes, 110 Mass. 381, and cases ante."
into in view of some general scheme for the improvement of the property which the defendant fails to perform (a)

Third, where it does not appear that the covenant was entered into for the benefit of subsequent purchasers, and it was only meant for the benefit of the covenantee and his assigns (b)

Fourth, where the original plan has been abandoned or the character of the neighborhood has so changed as to defeat the purpose of the covenant, and thus render its enforcement unreasonable (c)

(a) Dana v Wentworth, 111 Mass 291
    Beals v Case, 138 Mass 140
    Badger v Boardman 15 Gray, 559.
    Parker v Nightingale, 6 Allen 341, and cases supra.

(b) Renals v Cowlishaw, 9 C.D.125, and cases supra.

(c) Trustees v Thatcher, 87 N.Y. 311
    Ammerman v Dean, 30 N.E. 741
    Peek v Matthews, L.R.3 Eq.515.
    Duke of Bedford v Trustees, 2 M.&K. 552.
    Sayers v Collyer, 28 C.D.103.