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## Restrictive Covenants in New York

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*Conclusions.*

We have seen, then, that the First Amendment guarantees more than "mere absence from previous restraints", and that its aegis extends to any governmental action that tends to shackle a free press. We have observed that liberty of circulation is as essential as liberty of publishing to a press that is to be kept "free" in more than name alone; and that, in the past, our highest court has sometimes failed to detect invasions upon the freedom of circulation, especially in the cases dealing with distribution by mail.

However, we have marked that the Supreme Court, as evidenced by the *Grosjean* and *Lovell* cases, is no longer unaware of the dangerous trend of the past decisions. And that now, it would seem, the court is fully cognizant of the precarious paradox involved in guaranteeing a free press with one hand, and fettering the circulation of its fruits with the other. "And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficial source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness?"<sup>75</sup>

LAWRENCE JARETT.

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 RESTRICTIVE COVENANTS IN NEW YORK.

In the law of real property a restrictive covenant refers to an agreement whereby an owner of some interest in land has agreed not to use it in a particular way for the benefit of some other interest in the same or related land. Properly speaking, the term "restrictive covenant" should be limited to covenants running with the land,<sup>1</sup> but so many courts<sup>2</sup> and writers<sup>3</sup> have used the word "covenant" when

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<sup>75</sup> Report on the Virginia Resolutions (1799) 4 MADISON'S WORKS 544.

<sup>1</sup> At common law a covenant was said to be synonymous to a contract under seal. 2 TIFFANY, REAL PROPERTY (2d ed. 1920) § 388. Equitable restrictions, on the other hand, required no such formality, any simple agreement, whether or not in the language or form of a covenant being sufficient. Giddings, *Restrictions Upon the Use of Land* (1891) 5 HARV. L. REV. 274; Note (1928) 14 VA. L. REV. 647.

<sup>2</sup> *Trustees of Columbia College v. Lynch*, 70 N. Y. 440 (1877); *Korn v. Campbell*, 192 N. Y. 490, 85 N. E. 682 (1908); *Neponsit Property Owners' Association, Inc. v. Emigrant Industrial Savings Bank*, 278 N. Y. 248, 15 N. E. (2d) 793 (1938).

<sup>3</sup> 4 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) 3958 n.

referring to those restrictive agreements which are enforced in equity irrespective of whether or not they are real covenants, that today the term may be said to include both classifications. A great deal of confusion has resulted and it often becomes difficult to ascertain when the restriction is a covenant running with the land and when it is not. One distinction given is that covenants running with the land are enforceable both at law and equity, whereas the equitable restrictions (except as between the original parties) are enforced only in equity.<sup>4</sup> It is our purpose here to consider in turn those restrictions which may be said to be covenants running with the land and those which, for want of a better name, are called "equitable restrictions".

### *Covenants Running with the Land.*

Restrictions may be so created as to be covenants running with the land.<sup>5</sup> The covenant is said to run with the land "when either the liability to perform it, or the right to enforce it, passes to the assignee of the land."<sup>6</sup> In such a case recourse may be had either to an action at law or to a suit in equity, depending upon whether damages for a breach or an injunction restraining a threatened violation is sought.

In addition to the formal contract which creates the restriction there must be present: (1) an intention that the restriction shall run,<sup>7</sup> (2) that it touch and concern the land,<sup>8</sup> and (3) that there be privity of estate.<sup>9</sup> These elements have been found necessary in order to justify the running of the benefit or the burden, the contract

<sup>4</sup> Ames, *Specific Performance for and against Strangers to the Contract* (1904) 17 HARV. L. REV. 174, referring to negative agreements restricting the use of land, says at 177: "The first includes covenants that run at law with the land or the reversion, in which cases the equitable relief is concurrent with the legal remedy. The second included agreements, whether under seal or by parol, enforceable at law only by and against the immediate parties, in which cases, therefore, the jurisdiction of equity in favor of or against third persons is exclusive." See WALSH, EQUITY (1930) § 99.

<sup>5</sup> *Ibid.*; *Norman v. Wells*, 17 Wend. 136 (N. Y. 1837).

<sup>6</sup> *Kidder v. Port Henry Iron Ore Company of Lake Champlain*, 201 N. Y. 445, 448, 94 N. E. 1070, 1071 (1911).

<sup>7</sup> *Duryea v. Mayor, etc. of New York*, 62 N. Y. 592 (1875); *Clark v. N. Y. Life Ins. and Title Co.*, 64 N. Y. 33 (1876); *Kitching v. Brown*, 180 N. Y. 414, 73 N. E. 241 (1905).

<sup>8</sup> *Norman v. Wells*, 17 Wend. 136 (N. Y. 1837); *Rensselaer v. Smith*, 27 Barb. 104 (N. Y. 1858), *aff'd*, 19 N. Y. 68 (1859); *Neponsit Property Owners' Association, Inc. v. Emigrant Industrial Savings Bank*, 278 N. Y. 248, 15 N. E. (2d) 793 (1938); CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND (1929) 73-79.

<sup>9</sup> *Ibid.*; *Cole v. Hughes*, 54 N. Y. 444, 448 (1873): " \* \* \* the burden or liability will be confined to the original covenantor, unless the relation of privity of estate or tenure exists or is created between the covenantor and covenantee at the time when the covenant is made." *Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. 611 (1891).

*per se* being deemed insufficient to affect strangers to the original agreement.<sup>10</sup>

The necessity for the first element—intention—is self-evident. Obviously the courts are not going to regard the covenant as being other than collateral to the land when the parties themselves have indicated that the agreement was to be a personal one.<sup>11</sup> Where, however, nothing is said as to whether the restriction should follow the land, the surrounding circumstances must be examined to ascertain the intent of the parties.<sup>12</sup>

The question as to when the covenant touches and concerns the land is often difficult to determine. Since the land is the medium by which the benefit or burden passes, it is essential that the restriction be closely related to the ownership. This relation is often a question of degree, the problem really being whether the covenant *substantially* alters the rights of the parties.<sup>13</sup> In the recent New York case of *Neponsit Property Owners' Association, Inc. v. Emigrant Industrial Savings Bank*<sup>14</sup> the Court of Appeals, referring to when a covenant touches and concerns the land, said: "The test is based on the effect of the covenant rather than on technical distinctions. Does the covenant impose, on the one hand, a burden upon an interest in land, which on the other hand increases the value of a different interest in the same or related land?"<sup>15</sup> In that case the covenant was to pay a sum of money each year to sustain the costs of maintaining roads, beaches, parks, etc., in the building development in which the covenantor had purchased. It was further provided that the promise to pay would be a charge upon the land. The court held that the covenant touched and concerned the defendant's land, since the money paid by him would go towards maintaining the easements which would in turn benefit his and the other property owners' land.

The third element, privity of estate, has been defined as "mutual or successive relationships to the same rights of property."<sup>16</sup> Among the relationships in which this privity appears are those of landlord

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<sup>10</sup> *Mygatt v. Coe*, 142 N. Y. 78, 86, 36 N. E. 870, 872 (1894): "Originally the common law did not permit the assignment of the things in action, and it followed that a covenant, regarded from the direction of a contract, would not pass beyond the covenantee. But the old warranty \* \* \* so attached to that estate as to go with it when transmitted. It could not pass to assigns as an independent contract, but by its connection with an estate in land, became transmissible with it."

<sup>11</sup> *Clark v. Devoe*, 124 N. Y. 120, 26 N. E. 275 (1891). It should be noted that even if the parties expressly state that the covenant shall run, that, of itself, is insufficient if other elements are lacking. See notes 13, 16, *infra*.

<sup>12</sup> *Springsteen v. Samson*, 32 N. Y. 703 (1865); *Evansville National Bank v. Kaufman*, 93 N. Y. 273 (1883); *Smith v. Kerr*, 108 N. Y. 31, 15 N. E. 70 (1888).

<sup>13</sup> *Neponsit Property Owners' Association, Inc. v. Emigrant Industrial Savings Bank*, 278 N. Y. 248, 15 N. E. (2d) 793 (1938).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Id.* at 257, 15 N. E. (2d) at 796.

<sup>16</sup> *Mygatt v. Coe*, 124 N. Y. 212, 219, 26 N. E. 611, 613 (1891).

and tenant,<sup>17</sup> reversioner and life tenant,<sup>18</sup> grantor and grantee,<sup>19</sup> and tenancies in common.<sup>20</sup> While the authorities agree as to the definition, there is some disagreement as to whether the privity must exist between covenantor and covenantee, or only between one of the covenanting parties and the assignee of the land affected.<sup>21</sup> New York follows the former rule, holding that there must be privity of estate in an unbroken chain between the one seeking to enforce the covenant and the one against whom liability is sought to be predicated.<sup>22</sup>

The better view would seem to be that advanced by Professor Charles Clark<sup>23</sup> and Mr. Justice Holmes<sup>24</sup> to the effect that "succession to the interest of one of the parties to the covenant, not to both,"<sup>25</sup> is sufficient. It should be kept in mind that privity of estate was adopted as a sort of "connecting link"<sup>26</sup> to bridge the gap between remote parties to the agreement. As between the immediate parties, the necessary privity or connection is satisfied by the contract itself, rendering superfluous the added requirement of privity of estate.

The presence of privity of estate being an essential condition precedent to the maintenance of an action on the covenant, it would logically follow that anyone desirous of bringing such an action must have succeeded to the covenantee's estate. The *Neponsit* case presented an interesting problem in this connection, for the plaintiff was seeking to enforce a covenant running with the land without having received any land from the covenantee. The agreement entered into by defendant and plaintiff's assignor provided that among the assigns of the latter there might be a Property Owners' Association thereafter to be organized for the purpose of carrying out the improvements agreed upon for the benefit of all the property owners. As a result plaintiff corporation was formed and received an assignment of the rights under the covenant from the covenantee. No land, however, passed with the assignment. This obstacle to recovery was overcome by the court's insistence upon looking at the substance rather than the form of the agreement. Applying that test, the corporate entity<sup>27</sup> of the plaintiff was disregarded so as to find the real

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> 2 TIFFANY, *op. cit. supra* note 1, 1410 n.

<sup>21</sup> CLARK, *op. cit. supra* note 8, at 91; Ames, *supra* note 4, at 177; *cf.* 2 TIFFANY, *op. cit. supra* note 1, § 391.

<sup>22</sup> Cole v. Hughes, Mygatt v. Coe, both *supra* note 10.

<sup>23</sup> CLARK, *op. cit. supra* note 8, at 95.

<sup>24</sup> Holmes, J., in *Norcross v. James*, 140 Mass. 188, 189, 2 N. E. 946, 947 (1885): "The privity of estate which is thus required is privity of estate with the original covenantee, not with the original covenantor; and this is the only privity of which there is anything said in the ancient books."

<sup>25</sup> See note 23, *supra*.

<sup>26</sup> *Ibid.*

<sup>27</sup> For a discussion of the corporate entity theory see PRASHKER, CASES AND MATERIALS ON PRIVATE CORPORATIONS (1937) c. I, pp. 6-92; Note (1937) 11 ST. JOHN'S L. REV. 294.

parties in interest, who in this case were the various property owners who had purchased land from the covenantee. Looking at it in this light, privity of estate was found to be present. The decision is indicative of the desire of the courts to carry out the intentions of the parties in spite of the limited applicability of covenants running with the land. It was for this reason that courts of equity shortly before the middle of the nineteenth century<sup>28</sup> began to seek ways whereby a more equitable balance could be struck in regard to rights and liabilities under restrictive agreements. This brings us to a consideration of those restrictions which while not achieving the status of real covenants, are nevertheless recognized as valid in equity.

### *Equitable Servitudes or Easements.*

Although the courts were not inclined to favor restrictions upon the use of land,<sup>29</sup> it was nevertheless recognized that there was a certain amount of injustice in permitting individuals who had succeeded to the ownership of land with notice of a restriction pertaining thereto, to deprive the covenantee of the benefits gained by his contract merely because one or more of the elements constituting a covenant running with the land were missing.<sup>30</sup> The famous decision of *Tulk v. Moxhay*<sup>31</sup> was, therefore, a logical consequence. In that case plaintiff was the owner of a certain vacant piece of ground known as Leicester Square. He conveyed it to one Elms, the latter covenanting to maintain the land as it then stood. The defendant, who had succeeded to the title, knew about the covenant, but nevertheless sought to build upon the land. In an action brought to restrain him the usual defense that the covenant did not run with the land was interposed. The court granted the injunction, saying: "It is said that, the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased."<sup>32</sup>

*Tulk v. Moxhay*<sup>33</sup> was the first case in which the courts, by definite language, showed that equity would not be bound by the limitations of the common law courts, but would administer these restric-

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<sup>28</sup> See notes 30, 31, *infra*.

<sup>29</sup> 2 TIFFANY, *op. cit. supra* note 1, § 394. Courts favor the free and unrestricted use of land and construe the restrictions against those seeking to enforce them. *Kitching v. Brown*, 180 N. Y. 414, 73 N. E. 241 (1905).

<sup>30</sup> *Whatman v. Gibson*, 9 Sim. 196, 208 (1838): " \* \* \* whatever may be the form of the covenant, or whatever difficulty there may be in bringing an action on it, I think that there is a plain agreement which a Court of Equity ought to enforce."

<sup>31</sup> 2 Phil. 774 (1848).

<sup>32</sup> *Id.* at 776.

<sup>33</sup> 2 Phil. 774 (1848).

tive agreements so as to give full relief, predicated on the equitable doctrine that one who takes land with notice of a restriction upon it will not in equity and good conscience be permitted to act in violation of the terms of the restriction. Other courts, however, had arrived at the same conclusion even before this, but had not clearly drawn the distinction.<sup>34</sup> Thus, the existence of an equitable restriction as distinguished from a covenant running with the land was recognized in New York even before *Tulk v. Moxhay*.<sup>35</sup> In *Barrow v. Richard*<sup>36</sup> the parties had purchased lots subject to a uniform plan of restriction placed thereon by their common grantor. It was held that although the plaintiff might not be able to maintain a suit at law upon the covenant, "this court can give full effect to the covenant, by a suit in the name of the party for whose benefit and protection the covenant was intended."<sup>37</sup> This decision assumes added importance when it is considered that it gave a right, in equity at least, to anyone who could show that the restriction was made for his benefit, irrespective of privity of contract or estate.<sup>38</sup> This rule was reaffirmed in *Equitable Life Assurance Society v. Brennan*<sup>39</sup> where the court said, "\* \* \* there must be found somewhere the clear intent to establish the restriction for the benefit of the party suing or his grantor, of which right the defendant must have either actual or constructive notice."<sup>40</sup>

The above quotation embodies the two basic elements in the enforcement of equitable restrictions, for once the plaintiff has shown that the restriction was made for his benefit, or to be more accurate, to benefit his ownership of land, and that the defendant, when he purchased, had notice, then he has a right of action in equity.<sup>41</sup> We say that he must show that the restriction was intended to benefit land owned by him because there is strong *dicta* in several New York cases that one seeking to enforce a restriction must own the land benefited.<sup>42</sup>

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<sup>34</sup> *Hills v. Miller*, 3 Paige 254 (N. Y. 1832); *Trustees of Watertown v. Cowen*, 4 Paige 516 (N. Y. 1834); *Barrow v. Richard*, 8 Paige 351 (N. Y. 1840) (building scheme); *Whatman v. Gibson*, 9 Sim. 196 (1838). See Jones, *Equitable Restrictions on the Use of Real Property and Their Relation to Covenants Running with the Land* (1934) 13 CHI-KENT REV. 33.

<sup>35</sup> 2 Phil. 774 (1848).

<sup>36</sup> 8 Paige 251 (N. Y. 1840).

<sup>37</sup> *Id.* at 260.

<sup>38</sup> "The violation, therefore, of the restrictive covenant may be restrained at the suit of one who owns property, or for whose benefit the restriction was established, irrespective whether there were privity of estate or of contract between the parties, or whether an action at law were maintainable." *Chesebro v. Moers*, 233 N. Y. 75, 80, 134 N. E. 842, 843 (1922).

<sup>39</sup> 148 N. Y. 661, 43 N. E. 173 (1896).

<sup>40</sup> *Id.* at 671, 43 N. E. at 176.

<sup>41</sup> *Chesebro v. Moers*, 233 N. Y. 75, 134 N. E. 842 (1896).

<sup>42</sup> *Trustees of Columbia College v. Lynch*, 70 N. Y. 440, 451 (1877): "Should it appear that the plaintiffs had parted with their title, it might be questionable whether they could maintain the action." *Graves v. Deterling*, 120 N. Y. 447, 458, 24 N. E. 665, 667 (1890): "As they have title neither to the park nor to any land for the benefit of which the park was created, they have no foundation upon which to base an action." *Richter v. Distelhurst*, 116 App. Div. 269, 101 N. Y. Supp. 634 (1st Dept. 1906); *St. Stephen's Church v.*

The language used in the *Equitable Life* case has led many to believe that this is an extension of the third party beneficiary doctrine of *Lawrence v. Fox*.<sup>43</sup> Such a theory might explain the decision reached in *Vogeler v. Alwyn Imp. Corp.*<sup>44</sup> In that case the covenantee conveyed a lot to the defendant and later conveyed an adjoining lot to plaintiff's predecessor, exacting from the latter a restrictive covenant for the benefit of the lot previously conveyed. Plaintiff sought a declaratory judgment declaring the restriction unenforceable by the defendant, on the grounds that the covenantee could only exact a restriction for the benefit of lands retained by himself. The court found for the defendant, holding that he had a right to enforce the restriction because the covenant expressly provided that it was for his benefit. It is to be noted that the right of action given here was to a prior grantee. In restrictive agreements involving building schemes the right of a prior grantee to sue a subsequent grantee might be explained on the grounds that the grantor impliedly covenanted that the land retained by him would be sold subject to the same restrictions,<sup>45</sup> thereby binding subsequent purchasers who took with notice of the building restrictions. This would not explain the prior grantee's right in the *Vogeler* case, however, for there was no building scheme nor evidence that the grantor impliedly covenanted to restrict land retained by him. The only explanation, therefore, would be that he was a beneficiary under the contract.<sup>46</sup> Needless to say, this extension if it can be called such, of *Lawrence v. Fox*,<sup>47</sup> to restrictive agreements has come in for considerable criticism.<sup>48</sup> In defense of the real property side of the argument it should be pointed out that *Barrow v. Richard*<sup>49</sup> had set the stage for *Vogeler v. Alwyn Imp. Corp.*,<sup>50</sup> at least nineteen years before the *Lawrence* case was decided.

In discussing the *Vogeler* case we saw that while the covenantee did not own the land benefited, nevertheless an enforceable restrictive agreement was created in favor of the prior grantee. A somewhat opposite situation was presented in *Lewis v. Gollner*.<sup>51</sup> There the

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Church of Transfiguration, 130 App. Div. 166, 114 N. Y. Supp. 623 (1st Dept. 1909); *McArdle v. Hurley*, 103 Misc. 540, 172 N. Y. Supp. 57 (1918). But *cf.* *Borough Bill Posting Co. v. Levy*, 144 App. Div. 784, 129 N. Y. Supp. 740 (2d Dept. 1911).

<sup>43</sup> 20 N. Y. 268 (1859).

<sup>44</sup> 247 N. Y. 131, 159 N. E. 886 (1928).

<sup>45</sup> Note (1928) 13 CORN. L. Q. 619.

<sup>46</sup> *Ibid.*

<sup>47</sup> 20 N. Y. 268 (1859).

<sup>48</sup> In *Bristol v. Woodward*, 251 N. Y. 275, 288, 167 N. E. 441, 446 (1929) Cardozo, J., said: "If we regard the restriction from the point of view of contract, there is trouble in understanding how the purchaser of lot A can gain a right to enforce the restriction against the later purchaser of lot B without an extraordinary extension of *Lawrence v. Fox*. Perhaps it is enough to say that the extension of the doctrine, even if illogical, has been made too often to permit withdrawal or retreat." See CLARK, *op. cit. supra* note 8, at 151.

<sup>49</sup> 8 Paige 251 (N. Y. 1840).

<sup>50</sup> 247 N. Y. 131, 159 N. E. 886 (1928).

<sup>51</sup> 129 N. Y. 222, 29 N. E. 81 (1891).

covenantor, at the time of making the covenant, owned no land which could be burdened by the restriction. Although the true reason for deciding for the plaintiff-covenantee was the fraud of the defendant, the court said that the restriction would attach to any land thereafter acquired by the covenantor and be binding upon him and those who succeeded to the ownership of the land with notice of the contract.

These two cases present an interesting comparison of the scope and flexibility of restrictive agreements administered upon equitable principles and the restraints placed on such agreements by the narrow confines of common law formalism in dealing with covenants running with the land. There was no privity of estate in either of the decisions, yet relief was given. Before *Tulk v. Moxhay*<sup>52</sup> such agreements would have been tested by the principles relating to real covenants and if privity of estate were lacking no recovery could be had even though the action was in chancery.<sup>53</sup> Similarly, restrictive agreements will be enforced regardless of whether or not an action at law can be maintained, and whether or not plaintiff can prove actual damage,<sup>54</sup> in cases involving building scheme developments;<sup>55</sup>

<sup>52</sup> 2 Phil. 774 (1848).

<sup>53</sup> G. L. Clark, *Equitable Servitudes* (1917) 16 MICH. L. REV. 906; Note (1915) 15 COL. L. REV. 55.

The extent to which the old rule has been disregarded is illustrated by the case of *Trustees of Columbia College v. Lynch*, 70 N. Y. 440 (1877), wherein Allen, J., said at 450:

"It would be unreasonable and unconscientious to hold the grantees absolved from the covenant in equity for the technical reason assigned, that it did not run with the land, so as to give an action at law. A distinguished judge answered a like objection in a similar case by saying, in substance, that, if an action at law could not be maintained, that was an additional reason for entertaining jurisdiction in equity and preventing injustice. The action can be maintained for the establishment and enforcement of a negative easement created by the deed of the original proprietor, affecting the use of the premises now owned and occupied by the defendants, of which they had notice, and subject to which they took title. There is no equity or reason for making a servitude of the character of that claimed by the plaintiffs in the lands of the defendant, and exception to the general rule which charges lands in the hands of a purchaser with notice with all existing equities, easements, and servitudes. The rule and its application does not depend upon the character or classification of the equities claimed, but upon the position and equitable obligation of the purchaser. The language of courts and of judges has been very uniform and very decided upon this subject, and all agree that whoever purchases lands upon which the owner has imposed an easement of any kind, or created a charge which would be enforced in equity against him, takes the title subject to all easements, equities and charges, however created, of which he has notice."

<sup>54</sup> G. L. Clark, *loc. cit. supra* note 53.

<sup>55</sup> *Barrow v. Richard*, 8 Paige 251 (N. Y. 1840); *Tallmadge v. East River Savings Bank*, 26 N. Y. 105 (1862); *Korn v. Campbell*, 192 N. Y. 490, 85 N. E. 687 (1908).

Where land is sold under a common scheme of development it must appear that the restrictions are for the mutual benefit of the lots sold. Where no such intent is shown the restrictions may be enforced only by the common grantor.

mutual restrictive covenants between adjoining land owners;<sup>56</sup> and covenants exacted by a grantor who retains contiguous or adjoining lands.<sup>57</sup> In all these situations the general rule is that the restriction is enforceable in equity by way of a mandatory or prohibitory injunction.<sup>58</sup> On occasion, however, relief will be denied on grounds of public policy,<sup>59</sup> or where the character of the neighborhood has so changed as to substantially defeat the purpose of the restrictive covenant.<sup>60</sup>

### *Nature of Equitable Restrictions.*

The decisions in New York all agree that the restriction should be enforced against one with notice, but as to the theory upon which liability is predicated there is a singular lack of unanimity.<sup>61</sup> The difficulty seems to be whether these restrictive agreements are to be regarded as being merely contractual rights pertaining to land, or as creating interests in the land somewhat in the nature of easements. The confusion engendered by this controversy is shown by the variety of names used to describe the restrictions. They have been referred to as "restrictive covenants",<sup>62</sup> "negative easements",<sup>63</sup> "equitable negative easements",<sup>64</sup> "equitable servitudes",<sup>65</sup> and "equitable easements".<sup>66</sup>

The proponents of the contract theory draw the analogy to the equitable doctrine of specific performance of contracts.<sup>67</sup> As between

*Equitable Life Assurance Society v. Brennan*, 148 N. Y. 661, 43 N. E. 173 (1896). For an excellent discussion of the English rule see Strachan, *Restrictive Covenants Affecting Land* (1930) 46 L. Q. Rev. 159.

<sup>56</sup> *Trustees of Columbia College v. Lynch*, 70 N. Y. 440 (1877).

<sup>57</sup> *Post v. Weil*, 115 N. Y. 361, 22 N. E. 145 (1889); *Korn v. Campbell*, 192 N. Y. 490, 85 N. E. 687 (1908).

<sup>58</sup> 2 TIFFANY, *op. cit. supra* note 1, § 394.

<sup>59</sup> *Norcross v. James*, 140 Mass. 188, 2 N. E. 946 (1885), where a promise not to compete was held void as against public policy. In a case involving a similar set of facts in New York such a promise was held valid. *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335 (1887).

<sup>60</sup> *Trustees of Columbia College v. Thacher*, 87 N. Y. 311 (1882); *McClure v. Leaycraft*, 183 N. Y. 36, 75 N. E. 961 (1905); *Batchelor v. Hinkle*, 210 N. Y. 243, 104 N. E. 629 (1914); *Bull v. Burton*, 227 N. Y. 101, 125 N. E. 111 (1919).

<sup>61</sup> *Bristol v. Woodward*, 251 N. Y. 275, 167 N. E. 441 (1929); CLARK, *op. cit. supra* note 8, at 149-156; Pound, *Progress of the Law* (1920) 33 HARV. L. REV. 813.

<sup>62</sup> *Chesebro v. Moers*, 233 N. Y. 75, 134 N. E. 842 (1922).

<sup>63</sup> *Trustees of Columbia College v. Lynch*, 70 N. Y. 440 (1877).

<sup>64</sup> *Equitable Life Assurance Society v. Brennan*, 148 N. Y. 661, 43 N. E. 173 (1896).

<sup>65</sup> G. L. Clark, *loc. cit. supra* note 47; Pound, *loc. cit. supra* note 61.

<sup>66</sup> *Ibid.*

<sup>67</sup> 2 TIFFANY, *op. cit. supra* note 1, § 396; Giddings, *loc. cit. supra* note 1; Stone, *The Equitable Rights and Liabilities of Strangers to a Contract* (1918) 18 COL. L. REV. 291.

the original parties this is the obvious explanation. When, however, one or both of the parties to the action are strangers to the original agreement complications arise. Additional explanation of what takes place becomes necessary. Where the plaintiff is the remote party, the third party beneficiary doctrine is given as the reason for his right to sue.<sup>68</sup> Where the defendant is the remote party, analogy is drawn to the right of a vendee in a contract for the sale of land, to enforce it against subsequent holders of the land with notice of the vendee's contract.<sup>69</sup> Continuing the analogy it is said that relief is given in both situations because the purpose of the contract might otherwise be defeated by a collusive transfer to a third party, thus depriving the promisee of the benefits to be obtained by his contract.<sup>70</sup> The cases of *Lewis v. Gollner*<sup>71</sup> and *Vogeler v. Alwyn Imp. Corp.*<sup>72</sup> are notable illustrations of the application of the contract theory in New York.

Leading authorities, including Dean Pound<sup>73</sup> and Professor Charles Clark,<sup>74</sup> favor the easement theory. According to Dean Pound servitudes at common law are created by way of easements, profits *a prendre* and covenants running with the land. Equity added the equitable easement to this list. That the doctrine has found its way into the courts of New York is shown in several of the leading cases on the subject of restrictive agreements. In *Trustees of Columbia College v. Lynch*,<sup>75</sup> the court, referring to the restriction, called it "a negative easement, as distinguished from that class of easements which compels the owner to suffer something to be done upon his property by another." Other cases use similar language.<sup>76</sup> In *Flynn v. New York, Westchester and Boston Ry. Co.*<sup>77</sup> the restriction was held to create a proprietary interest in the land burdened. Judge Pound, speaking for the court, said, "These restrictive covenants create a property right and make direct and compensational the damages which otherwise would be consequential and non-compensational."<sup>78</sup>

The unfortunate consequences resulting from New York's al-

<sup>68</sup> *Bristol v. Woodward*, 251 N. Y. 275, 167 N. E. 441 (1929); CLARK, *op. cit. supra* note 8, at 150.

<sup>69</sup> 2 TIFFANY, *loc. cit. supra* note 61; Giddings, *loc. cit. supra* note 1. He explains the nature of the action by saying that as between the original parties it is a question of specific performance; as between third parties the principle involved is one of constructive trusts. See Stone, *loc. cit. supra* note 67.

<sup>70</sup> *Ibid.*

<sup>71</sup> 129 N. Y. 222, 29 N. E. 81 (1891).

<sup>72</sup> 247 N. Y. 131, 159 N. E. 886 (1928).

<sup>73</sup> Pound, *supra* note 61, at 821.

<sup>74</sup> CLARK, *op. cit. supra* note 8, at 153.

<sup>75</sup> 70 N. Y. 440, 447 (1877).

<sup>76</sup> *Hills v. Miller*, 3 Paige 254 (N. Y. 1832); *Tallmadge v. East River Savings Bank*, 26 N. Y. 105 (1862); *Gilbert v. Peteler*, 38 N. Y. 165 (1868); *Equitable Life Assurance Society v. Brennan*, 148 N. Y. 661, 43 N. E. 173 (1896); *Smith v. Graham*, 161 App. Div. 803, 147 N. Y. Supp. 773 (4th Dept. 1914); *Hart v. Little*, 103 Misc. 620, 171 N. Y. Supp. 6 (1918).

<sup>77</sup> 218 N. Y. 140, 112 N. E. 913 (1916).

<sup>78</sup> *Id.* at 146, 112 N. E. at 914.

legiance to both schools of thought is graphically illustrated by the decision in *Bull v. Burton*.<sup>79</sup> In that case the question was one of marketability of title as affected by restrictions upon the land. The court held that although the character of the neighborhood had so changed as to preclude equitable relief being given, nevertheless the covenantee would have a right of action at law for damages and this was sufficient to constitute an encumbrance. The court seemed to follow the lead of earlier cases such as *McClure v. Leaycraft*<sup>80</sup> in holding that the point involved was the right of a court of equity to refuse specific performance of a contract where performance would result in inequity. Looking at the problem from the proprietary side, this would in effect be permitting equity, at its discretion, to deprive plaintiff of his property.<sup>81</sup> The courts in these cases seem to recognize the inconsistency and seek to palliate the effects of the decisions by suggesting that damages might be recovered. Two objections may be raised to such a course.<sup>82</sup> If the damages are to be recovered in an action at law, as suggested in *McClure v. Leaycraft*<sup>83</sup> and *Bull v. Burton*,<sup>84</sup> the plaintiff must be in privity of contract or estate with the defendant. There are occasions, however, when neither privity will be present. In such case it would seem difficult to spell out an action for breach of contract. On the other hand, if equity awards damages as a substitute for the equitable relief of injunction, as was done in *Amerman v. Deane*,<sup>85</sup> it might be said that this is a condemnation of private property for a private use without legislative sanction. These decisions have come in for considerable criticism, one writer saying that when the purpose of the restriction can no longer be carried out the restriction should come to an end.<sup>86</sup> This would seem to be the proper solution since one cannot imagine the covenanting parties as wanting the restrictions to endure when they can no longer produce the intended benefits.

The Court of Appeals had an opportunity to settle the whole question and also the concomitant problem of whether oral promises to restrict come within the Statute of Frauds in the case of *Bristol v. Woodward*,<sup>87</sup> but avoided the issue. It was intimated, however, that if the parol representations created merely contractual rights the Statute of Frauds would not be applicable; if, however, an interest in

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<sup>79</sup> 227 N. Y. 101, 125 N. E. 111 (1919).

<sup>80</sup> 183 N. Y. 36, 75 N. E. 961 (1905); Trustees of Columbia College v. Thacher, 87 N. Y. 311 (1882); *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. 741 (1892).

<sup>81</sup> Note (1918) 31 HARV. L. REV. 876.

<sup>82</sup> *Ibid.*; Pound, *loc. cit. supra* note 61.

<sup>83</sup> 183 N. Y. 36, 75 N. E. 961 (1905).

<sup>84</sup> 227 N. Y. 101, 125 N. E. 111 (1919).

<sup>85</sup> 132 N. Y. 355, 30 N. E. 741 (1892).

<sup>86</sup> Pound, *supra* note 61, at 821.

<sup>87</sup> 251 N. Y. 275, 167 N. E. 441 (1929). The grantees contended that the grantor had made parol representations that the land retained would be restricted. It was held that there was no evidence of such representations.

land was created by the parol promises, then the latter would be within Section 242 of the Real Property Law.<sup>88</sup> Admitting for the sake of argument that no interest in land is created and that therefore the real property statute would not be relevant, and adopting the alternative of contract, it would appear that a writing would still be required because the contract is not one which by its terms may be performed within a year or completed before a lifetime.<sup>89</sup> Although the question of restrictive agreements was not involved, it was held in *Young v. Dake*<sup>90</sup> that this phase of the Statute of Frauds did not apply to contracts concerning land.

The Court of Appeals has never directly passed on the real property Statute of Frauds although in *Tallmadge v. East River Savings Bank*<sup>91</sup> and *Lewis v. Gollner*<sup>92</sup> parol representations were held to be valid. In both cases, however, the Statute was not raised as an issue. Among the lower courts there is a conflict of decision, but for the most part it has been held the restrictive agreements must be in writing.<sup>93</sup>

### Conclusion.

It would seem that Dean Pound's theory that the restrictive agreement creates an equitable easement comes nearest to being the true answer to the dispute. Much confusion might be avoided if the courts would recognize that they are dealing with something which is *sui generis*, combining many of the features of easement and contract without being entirely the one or the other. From the law of real property is drawn the doctrine that there must be a dominant estate and that the owner of said estate need prove no damages in order to restrain interference with the right appurtenant thereto; from the law of contracts we find that any informal written or perhaps even verbal agreement is sufficient to create the restriction. Similarly we get the concept of a purchaser with notice. Upon final analysis one feels that

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<sup>88</sup> N. Y. REAL PROP. LAW § 242: "An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner related thereto, can not be created, granted, assigned, surrendered or declared, unless by act or operation of law or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent, thereunto authorized in writing."

<sup>89</sup> N. Y. PERS. PROP. LAW § 31, subd. 1.

<sup>90</sup> 5 N. Y. 463 (1851).

<sup>91</sup> 26 N. Y. 105 (1862).

<sup>92</sup> 129 N. Y. 222, 29 N. E. 81 (1891).

<sup>93</sup> The following cases have held that easements were created by the restrictions and that the Statute of Frauds applies: *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y. 1846); *Norton v. McKain*, 121 App. Div. 497, 106 N. Y. Supp. 129 (2d Dept. 1907); *Pitkin v. Long Island R. R.*, 2 Barb. Ch. 221 (N. Y. 1847). *Contra*: *Hayward Homestead Tract Association v. Miller*, 6 Misc. 254, 26 N. Y. Supp. 1091 (1893). For a discussion of the Statute of Frauds and its connection with restrictive agreements, see Note (1925) 38 HARV. L. REV. 967.

something more than a mere contractual right concerning land has been created, for it is difficult to see how a subsequent purchaser of the land can be held liable on a contract to which he was not a party and the obligations of which he has not assumed, unless it may be said that in buying the land he impliedly assumes the contract. It would seem, however, in the latter event that the more logical explanation is that an interest in the land itself has actually been created, and that the purchaser with notice takes subject to such interest.

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#### THE EXTENT OF A HUSBAND'S OBLIGATION TO SUPPORT HIS WIFE.

As a necessary incident to the marital relation there is imposed on the husband the duty to support and maintain his wife and family in conformity with his condition and station in life.<sup>1</sup> This duty does not rest on any contractual rights but is based on considerations of public policy<sup>2</sup> which demand that the husband, as the legal head of the family,<sup>3</sup> fulfill his obligation to those who are naturally dependent upon him for support and protection. Today, most of the states have strengthened this common law obligation by statute,<sup>4</sup> imposing both

<sup>1</sup> *Keller v. Phillips*, 39 N. Y. 351, 354 (1868); *De Brauwere v. De Brauwere*, 203 N. Y. 460, 96 N. E. 722 (1911); *Rodgers v. Rodgers*, 229 N. Y. 255, 128 N. E. 117 (1920); *Shebley v. Peters*, 53 Cal. 288, 200 Pac. 364 (1921); *Bauer v. Abrahams*, 73 Colo. 509, 216 Pac. 259 (1923); *State v. Kelly*, 100 Conn. 727, 125 Atl. 95 (1924); *Thompson v. Thompson*, 86 Fla. 515, 98 So. 589 (1923); *Forrester v. Forrester*, 155 Ga. 722, 118 S. E. 373 (1923); *Lyons v. Schanbacher*, 316 Ill. 569, 147 N. E. 440 (1914); *Davis v. Davis*, 208 Ky. 605, 271 S. W. 659 (1925); *Fisher v. Drew*, 247 Mass. 178, 141 N. E. 875 (1923); *In re Wood's Estate*, 288 Mo. 588, 232 S. W. 671 (1921); *Knecht v. Knecht*, 261 Pa. 410, 104 Atl. 676 (1918); *State v. Bagwell*, 125 S. C. 401, 118 S. E. 767 (1923); *Clifton v. Clifton*, 83 W. Va. 149, 98 S. E. 72 (1919); *Garment Co. v. Schultz*, 182 Wis. 506, 196 N. W. 783 (1924); (1924) 24 HARV. L. REV. 306.

<sup>2</sup> *In re Ryan's Estate*, 134 Wis. 431, 114 N. W. 820 (1907); *In re Simonson's Estate*, 164 Wis. 590, 160 N. W. 1040 (1916).

<sup>3</sup> *Coleman v. Burr*, 93 N. Y. 17 (1883); *Blaeschenska v. Howard Mission*, 130 N. Y. 497, 29 N. E. 755 (1892).

<sup>4</sup> VERNIER, AMERICAN FAMILY LAWS (1935) 48: "The statutes of the *District of Columbia*, *Hawaii*, *Kentucky*, *Maryland*, and *Minnesota* merely state that the husband shall be liable for necessaries furnished the wife or contracted by the wife. By implication *South Carolina* and *Texas* reach the same result by providing that the husband shall not be liable for the debts of the wife, except those contracted for her necessary support. *California*, *Ohio*, *Oklahoma*, *Montana*, *New Mexico*, *Nevada*, *North Dakota*, and *South Dakota* all provide that if the husband does not make adequate support for the wife a third person in good faith may supply her with necessaries and recover the reasonable value thereof from the husband. \* \* \* Fifty-one jurisdictions now impose by means of abandonment, desertion, and non-support statutes a criminal or quasi-criminal liability upon the husband who under certain circumstances breaches such duty."