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THE ASSIGNABILITY OF EASEMENTS, PROFITS AND EQUITABLE RESTRICTIONS*

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I

THE ASSIGNABILITY OF EASEMENTS AND PROFITS

The concept of an interest "running" with particular realty is employed in connection with assignments of easements and profits to develop rules which are reasonably clear and free from dispute in most situations. The *burden* on the servient land passes with such land to all takers thereof. In theory this end of the easement or profit runs with the servient tenement itself, rather than merely with an estate therein, and hence is binding upon even adverse possessors of the freehold.¹ The *benefit* of an easement appurtenant to some dominant tenement passes freely therewith even without separate mention.² The benefit of a profit appurtenant passes in similar fashion. The only limitation is that the servient land must not be "surcharged," or unduly burdened, by certain transfers as described below.³ The benefit of a profit in gross is freely assignable from one person to another, subject only to the rule that where assigned to more than one the new takers must "work together with one

* This article will form part of a book on Real Covenants and Other Interests that Run with the Land to be published by Callaghan & Co., Chicago, Ill.

¹ See discussion in HOLMES, *THE COMMON LAW* (1881) 382-386; Clark, *The Doctrine of Privity of Estate in Connection with Real Covenants* (1922) 32 *YALE L. J.* 123.

² See cases cited in 2 TIFFANY, *REAL PROPERTY* (2d ed. 1920) 1227, 1228, nn. 6, 7, and in 19 C.J. 935, 936. Division of the dominant estate is freely permitted. *Infra* note 33.

³ See next paragraph.

stock" that is, in common as one person.⁴ But when we come to easements in gross, a serious difference of opinion exists on the question whether or not they are transferable. A large portion of this essay will be devoted to a consideration of this particular problem.

SURCHARGING A PROFIT APPURTENANT

The rules against surcharging an appurtenant profit, while somewhat technical in form, have a common sense basis. A profit involves, in addition to other legal relations, a power of appropriation of some part or product of the servient estate.⁵ Unless created as an exclusive profit, the servient owner is also entitled to make a similar appropriation.⁶ The possibilities of such appropriation, particularly in the old cases of commons of pasturage where the rules were developed, are in the nature of things strictly limited by the amount of the available product. The rules against surcharging operate to prevent the unfair exploitation by the dominant owner of the servient estate beyond what was originally contemplated in the creation of the profit. Such unfair use may occur when one having a profit not "admeasurable" or divisible releases part of the servient estate, thus claiming the entire profit in the remainder.⁷ The same result would follow when he attempts to transfer only a part of the dominant estate⁸ or when the title to a part of the servient estate becomes united with, and thus extinguished by, the title of the dominant estate.⁹ Where such surcharging occurs the penalty is the extinguishment of the easement.¹⁰ It should be noted that this can occur only by a conveyance of the kind indicated, and does not arise from mere exercise of

⁴ Mountjoy's Case, 1 And. 307 (1583); Grubb v. Bayard, Fed. Cas. No. 5849 (C. C. E. D. Pa. 1851); Stanton v. Herbert, 141 Tenn. 440, 211 S. W. 353 (1918) (stating, however, that the profit is extinguished); Harlow v. Lake Superior Iron Co., 36 Mich. 105 (1877); cases cited 19 C.J. 870, n. 25; 2 TIFFANY, *op. cit. supra* note 2, at 1398. But where the profit is *exclusive*, no such limitation appears to be made. New Haven v. Hotchkiss, 77 Conn. 168, 58 Atl. 753 (1904); Baker v. Kenney, 145 Iowa 638, 124 N. W. 901 (1910); Chandler v. Hart, 161 Cal. 405, 119 Pac. 516 (1911), Ann. Cas. 1913B 1094.

⁵ Comment (1923) 32 YALE L. J. 813, 817.

⁶ Mountjoy's Case; Grubb v. Bayard; Stanton v. Herbert, all *supra* note 4.

⁷ Rotherham v. Green, Cro. Eliz. 593 (1597).

⁸ Van Rensselaer v. Radcliff, 10 Wend. 639 (N. Y. 1833); Livingston v. Ketcham, 1 Barb. 592 (N. Y. 1847); Leyman v. Abeel, 16 Johns. 30 (N. Y. 1819).

⁹ Tyrringham's Case, 4 Co. 36b (1584); Klimpton v. Wood, 1 And. 159 (1586); Bell v. Ohio & P. R. R., 25 Pa. 161 (1855); Hall v. Lawrence, 2 R. I. 218 (1852) (giving a resumé of the rules); TIFFANY, *op. cit. supra* note 2, at 1398-1400; see Comment (1923) 32 YALE L. J. 813, 817.

¹⁰ *Supra* notes 7-9.

the profit. Conveyances where no surcharging occurs are valid. And where the profit is, by its nature, admeasurable, or capable of exact division and apportionment according to the area of the dominant estate, it is not extinguished but apportioned so that the servient owner is not harmed.¹¹

No similar rule applies to profits in gross. Here there is not the possibility of surcharging in the manner and form specified, and protection to the servient owner is afforded by the rule that new owners may exercise such profit only together as "one stock."¹²

NON-ASSIGNABILITY OF EASEMENTS IN GROSS

As to easements in gross, there is a considerable body of law holding them unassignable. The usual form of statement is not free from ambiguity since it does not distinguish between benefit and burden. The English cases deny assignability to the benefit.¹³ Further it is asserted that they refuse to recognize such easements at all. This is not strictly accurate for they do hold that an enforceable privilege is created.¹⁴ What is meant is that the burden is not allowed to pass. The relations created by the easement are held to involve the original parties to it alone.¹⁵

In this country, in spite of some objection by writers,¹⁶ the burden is quite generally held to pass with the servient land.¹⁷

¹¹ *Cole v. Foxman*, Noy 30 (1618); *Drury v. Kent*, Cro. Jac. 14 (1603); *Daniel v. Hanslip*, 2 Lev. 67 (1672); *Wild's Case*, 8 Co. 78b (1609); cases cited *supra* notes 7-9.

¹² Cases cited *supra* note 4.

¹³ *Ackroyd v. Smith*, 10 C. B. 164 (1850), is a leading case. See also authorities cited *infra* notes 14, 15.

¹⁴ See discussion in TIFFANY, *op. cit. supra* note 2, at 1223, 1224, and Comment (1923) 32 YALE L. J. 814, 815, citing Lord Cairns in *Rangleley v. Midland Ry.*, L. R. 3 Eq. 306, 310 (1868); GODDARD, EASEMENTS (8th ed. 1921) 10; GALE, EASEMENTS (9th ed. 1910) 11, 12.

¹⁵ *King v. Allen*, [1916] 2 A. C. 54, *aff'g* [1915] 2 Ir. R. 448 (advertising privilege held personal); see Clark, *Licenses in Real Property Law* (1921) 21 COL. L. REV. 757; *infra* notes 16, 17; DIGBY, HISTORY OF THE LAW OF REAL PROPERTY (5th ed. 1897) 182, n. 1; cf. Sweet, *The True Nature of an Easement* (1908) 24 L. Q. REV. 260. In *Hill v. Tupper*, 2 H. & C. 121 (1863), an exclusive boating privilege was not protected as against third persons. The privilege here might well be deemed appurtenant and not in gross. But see Hohfeld, *Faulty Analysis in Easement and License Cases* (1917) 27 YALE L. J. 66, 94, n. 54; Comment (1923) 32 YALE L. J. 813, 814. English cases upholding privileges in gross as against the original parties are cited *ibid.* 815.

¹⁶ (1911) 11 COL. L. REV. 689, criticising *Borough Bill Posting Co. v. Levy*, 144 App. Div. 784, 129 N. Y. Supp. 740 (2d Dept. 1911), where an injunction to protect an advertising privilege was granted against a subsequent taker of the land.

¹⁷ *Cusack Co. v. Myers*, 189 Iowa 190, 178 N. W. 401 (1920), 10 A. L. R. 1104 (1921); *Levy v. Louisville Gunning System*, 121 Ky. 510, 89 S. W. 523

Much may be said for this result. It is true that thereby an encumbrance is placed upon the title and the transfer of the servient estate is to that extent hindered. But, if the benefit is not assignable, that burden is definite and certain in favor of a specific individual and limited in point of time to the life of the dominant owner. The difficulties noted hereafter as to the assignability of the benefit do not apply. Moreover, circuitry of action is avoided by allowing a direct action against the one who has done the acts of obstruction.¹⁸ The desirability of such direct burdens, considered in the light of the servitudes and restrictions now freely allowed, seem greater than their disadvantages as clogs upon land titles.

It is in connection with the benefit of easements in gross that the chief question arises in this country. The more usual view is represented by the following quotation of the Michigan Supreme Court, taken from an article in *Ruling Case Law*:

"The great weight of the authorities supports the doctrine that easements in gross, properly so-called because of their personal character, are not assignable or inheritable, nor can they be made so by any terms of the grant."¹⁹

But this view is strongly assailed in several cases and by many leading text writers.²⁰ It seems to these critics a strange anomaly that easements in gross should be non-assignable while as to other similar interests, notably profits in gross, the directly contrary rule applies.

BASIS OF THE RULE OF NON-ASSIGNABILITY

It is not unusual in our property law to discover rules more or less arbitrary which say to the realty owner, "Thou shalt

(1905), 1 L. R. A. (N. S.) 359 (1906); *Willoughby v. Lawrence*, 116 Ill. 11, 4 N. E. 356 (1886); *cf. Smith v. Dennedy*, 224 Mich. 378, 194 N. W. 998 (1923); also *supra* note 16.

¹⁸ *Cf. cases supra* notes 16, 17 with *Hill v. Tupper*, *supra* note 15; see also the discussion as to covenants in gross in *Clark*, *op. cit. supra* note 1, at 128.

¹⁹ See *Stockdale v. Yerden*, 220 Mich. 444, 448, 190 N. W. 225, 226 (1922), quoting 9 R. C. L. 739; *cf. also Thomas v. Brooks*, 188 Ky. 253, 221 S. W. 542 (1920); (1920) 30 YALE L. J. 94; *Atlantic Mills v. New York Cent. R. R.*, 221 App. Div. 386, 223 N. Y. Supp. 206 (3d Dept. 1927); *Waller v. Hildebrecht*, 295 Ill. 116, 122, 128 N. E. 807, 809 (1920); *Tide-water Pipe Co. v. Bell*, 280 Pa. 104, 124 Atl. 351 (1924), 40 A. L. R. 1516 (1926); *Cndwalader v. Bailey*, 17 R. I. 495, 23 Atl. 20 (1891), 14 L. R. A. 300 (1892); 19 C. J. 867; *JONES, EASEMENTS* (1898) § 39; *Comment* (1919) 29 YALE L. J. 218.

²⁰ 2 TIFFANY, *op. cit. supra* note 2, at 1227; *Comment* (1923) 32 YALE L. J. 813; *Simes, The Assignability of Easements in Gross in American Law* (1924) 22 MICH. L. REV. 521. Among cases taking this point of view are *Goodrich v. Burbank*, 12 Allen 459 (Mass. 1866); *Standard Oil Co. v.*

not." Building line and zoning ordinances are modern developments and among traditional restrictions may be noted the rule against perpetuities, the rules as to restraints on alienation and the rule that an easement or profit may be "abandoned" by act of the owner without a written transfer.²¹ Much objection has from time to time been voiced against Lord Brougham's famous dictum that "incidents of a novel kind cannot be devised, and attached to property, at the fancy or caprice of the owner" as a fantastic expression of British conservatism.²² It is true that this view may easily be carried to absurd extremes.²³ But as a counsel of caution it has its uses. It expresses an ingrained view of our law that land interests should be made freely available for commercial development, that "encumbrances upon title" should be generally frowned upon, and that the long tying up of realty and consequent removal of it from the market should be prevented.²⁴ The general background of arbitrary restrictive rules is clear. The test in each case must be as to the desirability of the particular restriction and resort to generalities in favor of the freedom of will of owners or vendors of property is of little aid.²⁵

Buchi, 72 N. J. Eq. 492, 66 Atl. 427 (1907); and other cases cited in Comment (1923) 32 YALE L. J. 813, 816, n. 28.

²¹ For able criticisms of the rule of abandonment see Note (1911) 11 COL. L. REV. 777; see also (1925) 38 HARV. L. REV. 523; (1925) 34 YALE L. J. 910.

²² See *Keppell v. Bailey*, 2 Myl. & K. 517, 535 (1834); Comment (1923) 32 YALE L. J. 813, 814; 2 TIFFANY, *op. cit. supra* note 2, at 1256, 1257.

²³ But the English courts have not refused to recognize new property interests. Thus Lord Shaw of Dunfermline in *Attorney-General of S. Nigeria v. Holt*, [1915] A. C. 599, 617, quotes Lord St. Leonards in *Dyce v. Hay*, 1 Macq. 305 (1852), as follows: "The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind."

²⁴ This view seems now generally assumed, and no extensive discussion is had. See cases *supra* notes 13-15, 19, 22; also cases frowning upon covenants cited in Clark, *op. cit. supra* note 1. *Boatman v. Lasley*, 23 Ohio St. 614 (1873), discusses the point of devolution of title. See Sims, *A Study of Rights Incident to Realty; The Growth of Limitations upon Property Rights* (1922) 8 VA. L. REV. 317. The doctrine that titles must be kept unencumbered and freely marketable was carried far in the English Settled Land Act, 45 & 46 Vict. c. 38 (1882), giving the life tenant of settled land power to alien the fee, the proceeds being held on the settlement; and it was carried still further in the recent property reform where such life tenant is made the "estate owner" of the fee. 15 Geo. V, c. 18, §§ 4 (2), 5, 6, 7; c. 20, § 1 (4), (7) (1925); see Bordwell, *English Property Reform and its American Aspects* (1927) 37 YALE L. J. 1, 2; Bordwell, *Property Reform in England* (1925) 11 IOWA L. BULL. 1, 5; UNDERHILL, *A CONCISE EXPLANATION OF LORD BIRKENHEAD'S ACT* (1922) 29, 32. In fact, a main purpose of the reform was to render titles more freely marketable. Warren, *Law of Property Act, 1922* (1923) 21 MICH. L. REV. 245, 251.

²⁵ The same view is advanced in considering covenants and equitable re-

Now the objections to assignable easements in gross as most unfortunate encumbrances on title are obvious. Such easements, usually of small value, and easily forgotten by the holder thereof, often are discovered many years later just at a time when they may hold up or prevent an advantageous sale of the servient estate. Thus, suppose a personal way is granted by A to his neighbor, B. B as he moves out of the neighborhood is not likely to think enough about the situation to give a formal release; and his own death, followed by various marriages, deaths or changes of residence of his heirs, may put the title, if transferable, in such a shape that no release now is practically possible. True the rules of abandonment or of adverse possession may make it possible for A to clear up his title by means of a bill in equity to quiet title. But even if the necessary defendants to such a bill are discovered and properly served, the difficulties of proof, especially if meanwhile the way has been kept open by the servient owner, are heavy. Meanwhile the prospective purchaser has gone elsewhere. Contrast this situation with that of an easement appurtenant to some dominant land. The latter is an interest hardly to be overlooked either upon death or removal elsewhere of the owner. Consequently it and the appurtenant easement will pass to some definitely ascertainable person. The encumbrance is therefore easily traced to some one capable of giving a release, or against whom abandonment or adverse possession may more easily be proven.

One may still ask with much force why a distinction should be made between easements in gross and profits in gross. The answer seems to be purely practical and pragmatic. The more important the interest the more necessary it is that it should be subject to sale and transfer. Historically profits, particularly commons of pasturage, were of much importance. The protection afforded by the rules against surcharging indicates the value of pasturage rights.²⁶ And today profits, usually such privileges as those of mining ore or other minerals or of taking oil and gas, are even more valuable. Hence a profit in gross will normally be held by an individual definitely ascertainable. Unlike the easement in gross the desirability of the attribute of assignability here outweighs the objection to the clog on title on the servient interest. True the dividing line may at times appear as an arbitrary and capricious standard. Some profits are not worth saving. Some easements may be. But the necessity for some fairly easily applied rule with predictable consequences makes this arbitrary line desirable unless some other test equally clear may be formulated.

strictions. Clark, *op. cit. supra* note 1; Clark, *Party Wall Agreements as Real Covenants* (1924) 37 HARV. L. REV. 301.

²⁶ See cases cited *supra* notes 7-11.

ARGUMENTS FOR ASSIGNABILITY—"SURCHARGING" AN EASEMENT

Recently two notable articles by learned and experienced property teachers have covered this ground very thoroughly from points of view different from that here stated. The first was by Professor Vance²⁷ who most ably and forcefully presents a view designed to reconcile the cases and to afford a clearer standard of division between assignable and non-assignable interests. His idea, based on an analogy borrowed from the law of the surcharging of profits, is that certain easements may be thought of as surcharging the servient easement and should therefore be non-assignable, while others which are admeasurable may be freely transferred. The second article was by Professor Simes of Ohio State.²⁸ Professor Simes criticises Professor Vance's conclusions, arguing that easements in gross should be generally assignable.

Though I appreciate Professor Vance's search for a more apt line of division between assignable and non-assignable interests, and gladly acknowledge the stimulus of his original idea, I am inclined to feel that the doubts raised by Professor Simes are substantial. The analogy to the surcharging of profits is not close and pointed. That rule applies to profits *appurtenant* not to profits *in gross*; it deals with surcharging by *deeds of conveyance*, while the rule as to easements is thought of in terms of *excessive user* of the servient estate; it is designed to secure a fair division of the natural products of the soil, not to prevent use of the servient estate; and the result of surcharging is to extinguish the profit, not to prevent its assignment.²⁹ Surcharging seems misleading as applied to easements. As Professor Simes suggests, the rule contended for is in effect that *unlimited* easements in gross are not assignable; limited easements are. And the reason behind the rule is to prevent excessive user of the servient estate.

To the rule thus stated I believe there are two serious objections. The first is that the real objection to assignable easements in gross is not met. Here I must disagree also with Professor Simes whose argument is based on his conclusion that the objection of excessive user is the one actually relied upon in the cases.³⁰ The objection he successfully answers. It does not seem

²⁷ Comment (1923) 32 YALE L. J. 813.

²⁸ Simes, *op. cit. supra* note 20. I am indebted to both these learned articles for many valuable citations.

²⁹ Cases cited *supra* notes 7-11.

³⁰ See Simes, *op. cit. supra* note 20, at 531: "The question then is: are there any such reasons of policy (against alienability) in the case of easements in gross? The principal one advanced is that of the danger of surcharging the servient estate. That has already been dealt with. So far as the writer knows, no other reasons of policy have been advanced by American courts."

to me, however, that this issue is emphasized in the decisions.³¹ The other objection, that of the clog on title, runs through not merely the cases dealing with easements in gross but the property cases in general.³² Easements are rarely drawn where the use, as distinguished from the extent of the servient estate subject thereto, is limited. Thus the number of times per day a way may be used is not ordinarily specified, although its width on the servient estate often is. And while a way may be stated to be a foot way and not a carriage way, it is the more limited burden on the servient estate from the standpoint of the title which makes the limitation of importance. Rarely will it matter whether a way is used three times a day or six times if it must be kept open, or whether water is drawn through a pipe continuously or only on alternate days, if the pipe must be allowed to remain where it is. This is shown by another rule, the one applied in the situation most nearly analogous to the surcharged profit, that of the easement appurtenant. According to the well settled rule, upon division of the dominant tenement, the easement passes as appurtenant to each part of such tenement, even though the number of users is thereby vastly increased.³³ It thus appears that in the cases "surcharging" the servient estate by use is not considered an objectionable thing.

The other objection is that the proposed rule does not furnish a workable standard. "Admeasurable easements," from various examples given, seem to be those in any way limited, as an inch and a quarter pipe, a right of way ten feet wide for pipes, a right (privilege, etc.) to take out all the timber on a tract of land, railway, telegraph and telephone lines, the right to divert a certain amount of water, to lay and maintain a sewer, to display advertisements on certain walls and roofs, or to build and maintain a logging boom in a stream upon the grantor's land.³⁴

³¹ The only reference looking in this direction I have discovered is one in *Boatman v. Lasley*, *supra* note 24, at 618, which I read as being more directed to the difficulties as to the title than any question of excessive user. See also cases cited *infra* note 33.

³² *Supra* note 24.

³³ *Siedler v. Waln*, 266 Pa. 361, 109 Atl. 643, 8 A. L. R. 1363 (1920); *Phoenix Nat. Bank v. U. S. Security Co.*, 100 Conn. 622, 124 Atl. 540 (1924); *Newcomen v. Coulson*, 5 Ch. D. 133 (1877); 2 TIFFANY, *op. cit. supra* note 2, at 1346. The rule seems undisputed.

³⁴ Comment (1923) 32 YALE L. J. 813, 818. The rule is suggested as one not announced in the cases but actually reconciling the decisions. But easements thus limited seem generally to have been held personal without question in jurisdiction following the rule of nonassignability. *Garrison v. Rudd*, 19 Ill. 558 (1858) (an alley 25 feet wide); *Kershaw v. Burns*, 91 S. C. 129, 74 S. E. 378 (1912) (limited to 10 or 11 feet); *Field v. Morris*, 88 Ark. 148, 114 S. W. 206 (1908); *Wooldridge v. Smith*, 243 Mo. 190, 147 S. W. 1019 (1912); *infra* note 43; *Ackroyd v. Smith*, *supra* note 13 (a way in a described road).

This is a very extensive list. In view of it one may question whether any easements in gross may properly be considered not admeasurable. It is suggested that the unlimited way is not admeasurable.³⁵ But a way becomes fixed on the servient estate either by designation or by usage without express designation, and thereafter cannot be changed except by agreement.³⁶ By virtue of this rule an unlimited way is in effect just as limited as one specified to be a certain number of feet, or a reasonable width. Moreover, though "unlimited" in the sense that it may be used by horses, wagons and automobiles, it would surely be limited in some sense, as from use by airplanes for landing.³⁷ As a practical matter, it would seem that under this rule essentially every easement in gross should be held assignable.

This, as stated above, is Professor Simes' view.³⁸ He sets forth a cogent and powerful argument in favor of assignability, based in general upon the assignability of similar interests. But in answering the arguments against "surcharging" the servient estate, he does not give full weight to the practical difficulties of the easement in gross as a clog on title.³⁹ These practical difficulties afford much basis for the traditional view of non-assignability.

I am disposed therefore to conclude that the traditional attitude of the courts towards easements in gross is on the whole a more desirable one than that advocated by either learned author. But whether their ultimate conclusions are fully accepted or not, the profession is indebted to both gentlemen for their thorough-going analyses of a rather difficult problem.

TYPES OF EASEMENTS IN GROSS AND DECISIONS UPON ASSIGNABILITY

Both learned authors suggest that the rule of non-assignability is not as extensively followed as the cases would seem to indi-

³⁵ *Ibid.* 186.

³⁶ *Dudgeon v. Bronson*, 159 Ind. 562, 64 N. E. 910 (1902); 2 *TIFFANY*, *op. cit. supra* note 2, at 1335; see *Ballard v. Titus*, 157 Cal. 673, 683, 110 Pac. 116, 122 (1910).

³⁷ Compare the remarks in *Parks v. Bishop*, 120 Mass. 340 (1876); *cf.* also *Ballard v. Dyson*, 1 Taunt. 279 (1808); *Shaughnessey v. Leary*, 162 Mass. 108, 38 N. E. 197 (1894).

³⁸ *Simes, op. cit. supra* note 20.

³⁹ He does, however, advance arguments on this point, based chiefly on the doctrine of constructive notice from the recording of land titles. "For the existence of such encumbrances is now easily ascertainable from the records." It is true their existence is thus ascertained; but how to get rid of them long after their purpose is fulfilled is not shown. In this connection Professor Simes cites my article on real covenants [*Clark, op. cit. supra* note 1, at 144], as pointing out the tendency towards increased use of various restrictions on land. I would urge, however, as suggested above, that in each case the desirability of the particular restriction must be

cate. But this conclusion is reached in part at least by including certain interests which it is believed are not analogous. These are railroad rights of way, and pew and burial rights. Railroad rights of way are often termed easements. They are, however, more extensive interests carrying possession of the premises. Cases which are called upon to analyze the interest with care term them determinable or base fees.⁴⁰ Moreover they are not freely assignable. Unless used for railroad purposes the interest where obtained by condemnation will cease; where obtained by purchase usually the fee is obtained outright. A railroad or other utility cannot transfer its business to another company without consent of the state.⁴¹ The railroad right of way is therefore a special peculiar interest subject to its own rules. A similar statement may be made concerning pew⁴² or burial rights.⁴³ These depend so much on the rules laid down by the governing association or body and agreed to by holders of such rights that generalizations concerning them are dangerous. Without attempting to determine just the nature of the interest involved, it would seem that where a church or a burial association and its members all agree to a plan involving the transferability of rights there is no occasion for the law to interfere. Obviously the title difficulties which render the ordinary ease-

balanced against the loss through a possible lessened marketability of the land. See *supra* note 25.

⁴⁰ See *Western U. Tel. Co. v. Penn. R. R.*, 195 U. S. 540, 570, 25 Sup. Ct. 133, 141 (1904); *cf.* also *Fitch v. N. Y., Prov. & B. R. R.*, 59 Conn. 414 (1890); *Pittsburgh, Ft. W. & C. Ry. v. Peet*, 152 Pa. 488, 25 Atl. 612 (1893); *Abercrombie v. Simmons*, 71 Kan. 538, 81 Pac. 208 (1905), 1 L. R. A. (N. S.) 806 (1906); *Citizens Electric Co. v. Susquehanna Boom Co.*, 270 Pa. 517, 113 Atl. 559 (1921); *Smith v. Hall*, 103 Iowa 95, 72 N. W. 427 (1897); 1 NICHOLS, *EMINENT DOMAIN* (2d Ed. 1917) §§ 150, 192; Note (1922) 8 VA. L. REV. 383; (1925) 20 ILL. L. REV. 183; (1926) 24 MICH. L. REV. 512; see also Sweet, *op. cit. infra* note 60, at 79-82; *Midland Valley R. R. v. Sutter*, 28 F. (2d) 163 (C. C. A. 8th, 1928); *cf.* also Conn. Pub. Acts 1927, c. 167, cited *infra* note 53.

⁴¹ *Cumberland Tel. & Tel. Co. v. City of Evansville*, 127 Fed. 187 (C. C. D. Ind. 1903); *Abbott v. Johnstown, G. & K. H. R. R.*, 80 N. Y. 27 (1880); *Plummer v. Ches. & O. Ry.*, 143 Ky. 102, 136 S. W. 162 (1911); see *Thomas v. Railroad Co.*, 101 U. S. 71, 83 (1879); Notes (1893) 20 L. R. A. 737; (1911) 31 L. R. A. (N. S.) 636; L. R. A. 1918 A 266.

⁴² ZOLLMAN, *AMERICAN CIVIL CHURCH LAW* (1917) 421, 424; Zollman, *Pew Rights in American Law* (1916) 25 YALE L. J. 467; 2 TIFFANY, *op. cit. supra* note 2, at 1250-1254; (1894) 22 L. R. A. 206; *Zernosky v. Kluchinsky*, 278 Pa. 99, 122 Atl. 262 (1923); Note (1924) 22 MICH. L. REV. 463 (pointing out that pew rights have often been called personal property and considering them a "nondescript type of property").

⁴³ See Simes, *op. cit. supra* note 20, at 538; 2 TIFFANY, *op. cit. supra* note 2, at 1252-1254. In *Wooldridge v. Smith*, *op. cit. supra* note 34, a privilege of burial in a lot 10 feet by 36 was held only a personal easement in gross.

See also ZOLLMAN, *AMERICAN CIVIL CHURCH LAW* (1917) 441-443; Zollman, *Church Cemeteries in the American Law* (1916) 14 MICH. L. REV. 391.

ment in gross objectionable are not present here, as they are not in the railroad right of way cases. All these interests seem of a special type throwing little light upon the question as it relates to easements in gross.

The most usual type of such easements are ways. Here the authorities seem fairly strong against assignability,⁴⁴—a desirable result if the objections stated earlier in this essay are valid. But admitting this result to be desirable it may be urged that all other easements in gross should be assignable. Yet a glance at the kinds of easements in gross listed by Professor Simes in his rather complete review of the authorities would indicate how many forms of easements in gross are very similar and probably subject to the same consideration as rights of way. Thus rights, (privileges, etc.) of wharfage, right to maintain a boom, right to use log sluice, ditch rights, and rights of way to remove timber would, it seems, fall in this class.⁴⁵ A somewhat different result is suggested for rights to lay pipe lines, but the application of another rule, namely, that an easement once laid out should be considered limited to that location, suggests a doubt as to some of the cases holding in favor of assignability.⁴⁶ In fact the important *Pipe Line Case* in New Jersey,⁴⁷ relied on as a strong authority for assignability seems a harsh decision violating this latter rule. The decision permits another and in fact an indefinite number of additional pipe lines to be laid 25 years after the original grant and 13 years after the second of two pipe lines was laid.⁴⁸

This leaves as a case about which there may be the most question the easement to take water. From the practical standpoint, this has many similarities to the profit, and in fact several cases have considered the interest as a profit.⁴⁹ The objection to such

⁴⁴ This is admitted by Simes, *op. cit. supra* note 20, at 539, citing cases. See also cases *supra* note 19.

⁴⁵ Simes, *op. cit. supra* note 20, at 537 *et seq.* Some of these interests were held assignable on various grounds, but query whether substantially all are not subject to the objections to easements in gross in general.

⁴⁶ Winslow v. City of Vallejo, 148 Cal. 723, 84 Pac. 191 (1906), 5 L. R. A. (N. S.) 851 (1907); see also Sked v. Pennington Spring Water Co., 72 N. J. Eq. 599, 65 Atl. 713 (1907); Moorhead v. Snyder, 31 Pa. 514 (1853); and cases cited *supra* note 36.

⁴⁷ Standard Oil Co. v. Buchi, *op. cit. supra* note 20; *cf.* Note (1907) 7 COL. L. REV. 536.

⁴⁸ The nominal consideration paid (\$5 down and a promise of \$20 more) would tend to indicate that the parties hardly contemplated such a drastic interest rendering the servient estate practically useless to the servient owner. *Cf.* Tidewater Pipe Co. v. Bell, *supra* note 19, where the decision was properly put, as to pipes already laid, upon the ground of open and notorious possession.

⁴⁹ Columbia Water Power Co. v. Columbia Electric Co., 43 S. C. 154, 20 S. E. 1002 (1895); Clement v. Rutland Country Club, 94 Vt. 62, 103 Atl. 343 (1920); (1920) 30 YALE L. J. 99; Hall v. Ionia, 38 Mich. 493 (1873);

a conclusion rests upon a somewhat technical difficulty of the common law. Under that law, no ownership of water in streams or percolating water is recognized until it has been ponded or placed in containers where it is considered personal property. Hence the easement to take water was, in the eyes of the law, little more than an easement of way to get to the place where it was proper to take the water.⁵⁰ Whether such interests should now be held alienable is fairly disputable. Obviously in many cases the interest is sufficiently important, and such expenditures have been made in contemplation of its assignability, that it seems harsh to hold it merely personal. It would seem not out of the way, should a court feel so disposed, to consider it now more nearly analogous to the profit than to the usual easement in gross and to permit its alienability.⁵¹

These general conclusions in substance support the common law view of non-assignability.⁵² Unless a more desirable scheme is developed by way of statute this, it is believed, is on the whole the better view. The common law rule may at times lead to anomalous results, but it is preferable to a rule which in no way limits the transferability of these interests. Should a statute be passed affecting the future creation of such interests it might well provide for a limited assignability within a certain period of time. Thus the Massachusetts statute controlling equitable servitudes might perhaps serve as model. By this it is provided that such servitudes shall last only for 30 years unless renewed by a new grant.⁵³

Saratoga State Waters Corp. v. Pratt, 227 N. Y. 429, 125 N. E. 834 (1920); (1920) 29 YALE L. J. 696; (1920) 18 MICH. L. REV. 549; see cases cited in Simes, *op. cit. supra* note 20, at 537; *cf.* Fudickar v. East Riverside Irrigation Dist., 109 Cal. 29, 41 Pac. 1024 (1895); Myers v. Berven, 166 Cal. 484, 137 Pac. 260 (1913).

⁵⁰ Race v. Ward, 4 El. & Bl. 702 (1855); *cf.* Note (1913) 13 COL. L. REV. 251; (1917) 30 HARV. L. REV. 297; 2 TIFFANY, *op. cit. supra* note 2, at 1236, 1390. The privilege of taking ice has been treated as a profit. Mitchell v. D'Olier, 68 N. J. L. 375, 53 Atl. 467 (1902); Huntington v. Asher, 96 N. Y. 604 (1884).

⁵¹ In Talbot v. Joseph, 79 Ore. 308, 155 Pac. 184 (1916), a distinction is drawn between easements in gross and water rights. *Cf.* (1920) 18 MICH. L. REV. 549.

⁵² See to the same effect Sims, *op. cit. supra* note 24, at 322-329. An excellent example of the desirable results of this rule is afforded by Thomas v. Brooks, *supra* note 19. See (1920) 30 YALE L. J. 100.

⁵³ MASS. GEN. LAWS (1921) c. 184, § 23 applying to "conditions or restrictions, unlimited as to time;" Flynn v. Caplan, 234 Mass. 516, 126 N. E. 776 (1920). The statutes of some states provide for the creation of certain easements in gross, and elsewhere provide that all property interests shall be alienable except as otherwise specifically provided. See CAL. CIV. CODE (Deering, 1923) § 802; Simes, *op. cit. supra* note 20, at 540. These statutes have been referred to as justifying holdings in favor of the assignability of water privileges, but apparently the courts do not feel justified

CHANGING EASEMENTS APPURTENANT TO EASEMENTS IN GROSS

The discussion above has indicated how the benefit of easements in gross differs in effect from the benefit of easements appurtenant. This explains the rule that where the easement is appurtenant, it cannot thereafter be reserved in gross by agreement between the dominant owner and his grantee.⁵⁴ It is obvious that the burden on the servient owner is materially altered, a circumstance which should not be permitted without his consent. A similar rule applies to profits.⁵⁵ There are dicta to the effect that attempts thus to change the form of interest result in its extinguishment.⁵⁶ This results in a free gift to the servient owner and seems unnecessary. There is much to be said for the view that in spite of the reservation in the transfer the easement passes as appurtenant to the dominant estate.⁵⁷ Such reservation might, however, be material upon the issue whether the grantee might be considered to have abandoned his easement.

EASEMENTS AND PROFITS DISTINGUISHED FROM POSSESSORY INTERESTS

A final question arises as to how easements may be distinguished from other interests freely assignable. The question is discussed in the *Pipe Line Case* referred to above,⁵⁸ where it is suggested that the pipe line privilege is more than an easement and is in effect a possessory estate. A similar question often arises in connection with leases or profits in mineral and oil lands.⁵⁹ The distinguishing feature in each case seems to be

in relying solely on these statutes and also emphasize the unique character of such privileges. *Cf.* *Fudickar v. East Riverside Irrigation Dist.*; *Myers v. Berven*, both *supra* note 49. By Conn. Pub. Acts 1927, c. 167, "easements" for railroad and electric energy distribution purposes are made assignable when so intended.

⁵⁴ *Cadwalader v. Bailey*, *supra* note 19; *Blood v. Millard*, 172 Mass. 65, 51 N. E. 527 (1898); *Reise v. Enos*, 76 Wis. 634, 45 N. W. 414, 3 L. R. A. 617 (1890); *Wood v. Woodley*, 160 N. C. 17, 75 S. E. 719 (1912), 41 L. R. A. (N. S.) 1107 (1913); 2 *TIFFANY*, *op. cit. supra* note 2, at 1223.

⁵⁵ *Drury v. Kent*, *supra* note 11; *Daniel v. Hanslip*, *supra* note 11; *Baker v. Kenney*, *supra* note 4; *Hall v. Lawrence*, 2 R. I. 218 (1852).

⁵⁶ *Cadwalader v. Bailey*, *supra* note 19.

⁵⁷ *McKenna v. Brooklyn Union Elev. R. R.*, 184 N. Y. 391, 77 N. E. 615 (1906) (stating that there will be a resulting trust for the grantor of moneys received for the invasion or destruction of such easements; but query); *McCullough v. Broad Exchange Co.*, 101 App. Div. 566, 92 N. Y. Supp. 533 (1st Dept. 1905), *aff'd*, 184 N. Y. 592, 77 N. E. 1191 (1906); Note (1905) 18 HARV. L. REV. 608. See excellent discussion in (1906) 20 HARV. L. REV. 136; *cf.* 2 *TIFFANY*, *op. cit. supra* note 2, at 1223.

⁵⁸ *Standard Oil Co. v. Buchi*, *supra* note 20; *cf.* also *Tidewater Pipe Co. v. Bell*, *supra* note 19.

⁵⁹ Compare *Grubb v. Bayard*, *supra* note 4; *Caldwell v. Fulton*, 31 Pa. 475 (1858); *Saltsburg Colliery Co. v. Trucks Coal Co.*, 278 Pa. 447, 123

whether possession is granted or not. In both easements and profits traditionally neither seisin nor possession of the servient estate is given the dominant owner.⁶⁰ But if the question turns upon possession, narrow issues may arise. Is one in possession where he has built a concrete driveway for his way over his neighbor's land? Or where he has a pipe line an inch and a quarter in diameter? Historically it would seem clear that the seisin of the servient estate would not pass in such situation. This appears to be as satisfactory an answer as is possible since the line must be drawn some where. Either servient or dominant owner is in possession; they are not considered to share equally or to exercise the general rights of ownership together. Unless the servient owner is definitely excluded from possession of the servient estate, the interest should therefore be considered only an easement or profit. The exclusion should be from a substantial portion of the servient estate. On this basis the pipe line privilege would seem more properly considered an easement than a possessory estate.⁶¹

II

THE ASSIGNABILITY OF EQUITABLE RESTRICTIONS

One of the best examples of the expansion of modern property law to accommodate the demands of the realty market appears in the development of the law of equitable servitudes, or restrictions upon the use of real property. The law of covenants has been confused and restricted.⁶² This is undoubtedly due in considerable measure to the fact that only certain classes of covenants, those in leases and those concerning party walls in particular, have been continuously of great importance to property owners. On the other hand with the growth of cities and the more crowded conditions of modern life, the desire of home owners to secure desirable home surroundings has led to a demand for land limited entirely to development for residence purposes. This natural desire of householders has quite naturally been exploited by realtors and land companies so that the restricted resi-

Atl. 409 (1924); *Heywood v. Fulmer*, 158 Ind. 658, 32 N. E. 574 (1892), 18 L. R. A. 491 (1893); *Scott v. Laws*, 185 Ky. 440, 215 S. W. 81 (1919); (1920) 20 Col. L. Rev. 226; SUMMERS, *LAW OF OIL AND GAS* (1927) c. 8.

⁶⁰ See Sweet's test: the transfer by livery of seisin or only by grant. CHALLIS, *REAL PROPERTY* (3d. ed. 1911) 51; see also DIGBY, *op. cit. supra* note 15, at 183.

Sweet has a valuable article, *The 'Easement' of Tunnelling* (1916) 32 L. Q. REV. 70, where he collects English cases dealing with this distinction and criticizes the idea of an easement of tunnelling suggested in *Southeastern Ry. v. Associated Cement Mfrs.*, [1916] 1 Ch. 12.

⁶¹ Cf. *Winslow v. City of Vallejo*, *supra* note 46; *Goodrich v. Burbank*, *supra* note 20; *Simes, op. cit. supra* note 20, at 531; cases cited by Sweet, *op. cit. supra* note 60, at 75-79.

⁶² Clark, *op. cit. supra* note 1; Clark, *op. cit. supra* note 25.

dential property is now becoming the rule rather than the exception in or near our cities. The legal machinery to achieve this end has been found in the main not in the ancient rules of easements or covenants but in the activities of the court of equity in preventing fraud and unfair dealing. The basis of the modern rules rests upon the equitable doctrine of notice, that he 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 these restrictions.⁶³

THEORIES AS TO THE RUNNING OF EQUITABLE RESTRICTIONS

Though the general basis of these doctrines in the principles governing courts of equity is well understood, there is some variation of opinion as to the specific application of these principles. The two most thoroughly developed theories are first, that these restrictions are enforced as contracts concerning land;⁶⁴ and second, that they are enforced substantially as servitudes or easements on land.⁶⁵ It will be seen that the differences in these two theories lead to quite important variations in decision of several specific problems arising in connection with these interests.

Under the first theory the contract which embodies the re-

⁶³ *Tulk v. Moxhay*, 2 Phillips 774 (1848). The rule is often referred to as "the doctrine of *Tulk v. Moxhay*." See Jessel, M. R., in *London and Southwestern Ry. v. Gomm*, 20 Ch. D. 562, 577 (1882). Since the requirement of privity of estate so important in the law of real covenants does not apply here (*infra* note 68), one learned writer has spoken in this connection of the "equitable principle of privity of conscience." Abbott, *Covenants in a Lease which Run with the Land* (1921) 31 YALE L. J. 127, 131; quoted with approval in *Rosen v. Wolff*, 152 Ga. 578, 583, 110 S. E. 877, 880 (1922).

⁶⁴ 2 TIFFANY, *op. cit. supra* note 2, at 1434-1438, citing cases; Stone, *The Equitable Rights and Liabilities of a Stranger to a Contract* (1918) 18 COL. L. REV. 291; (1919) 19 *ibid.* 177; Ames, *Specific Performance For and Against Strangers to the Contract* (1904) 17 HARV. L. REV. 174 (stating the theory of unjust enrichment); Williams, *Is A Disseisor of Land Bound by Equities Incumbent Upon the Disseisor* (1906-1907) 51 SOL. J. 141, 155; Giddings, *Restrictions upon the Use of Land* (1892) 5 HARV. L. REV. 274; (1888) 4 L. Q. REV. 119; (1904) 17 HARV. L. REV. 415; *cf.* MAITLAND, *EQUITY* (1909) 165-170.

⁶⁵ Pound, *Progress of the Law, 1918-1919; Equitable Servitudes* (1920) 33 HARV. L. REV. 813; Jessel, M. R., in *London and Southwestern Ry. v. Gomm*, *supra* note 63; Note (1918) 31 HARV. L. REV. 876; (1914) 23 *ibid.* 201; G. L. CLARK, *EQUITY* (1919) 118, 119; G. L. Clark, *op. cit. infra* note 86; Scott, *The Rights of the Cestui que Trust* (1917) 17 COL. L. REV. 269, 281, 285; Keasbey, *Restrictions upon the Use of Land* (1893) 6 HARV. L. REV. 280; POMEROY, *EQUITY JURISPRUDENCE* (4th ed. 1918) §§ 1295, 1693; *cf.* (1921) 21 COL. L. REV. 826; (1926) 10 MINN. L. REV. 619; cases cited in 2 TIFFANY, *op. cit. supra* note 2, at 1434; Note (1922) 21 A. L. R. 1270, 1324.

striction is specifically enforced against both the promisee and those who take from him with notice. Those who may enforce the obligation include not only the promisee but those who take from him and also those in the neighborhood who may be considered beneficiaries of the contract. It also follows that there may be an action for damages for breach of the contract, possibly in situations where specific enforcement is not possible.⁶⁶

Though this view has the support of able writers and courts, there seem to be serious difficulties, both theoretical and practical, to it. We have seen that the contract theory alone was not sufficient to justify the running of real covenants. The concepts of an agreement touching and concerning the land, and of privity of estate were employed to justify such transfer.⁶⁷ But with these interests the requirements of real covenants are seemingly to be repudiated,⁶⁸ and jurisdictions which frown upon such covenants greet these interests with favor.⁶⁹ But it may be that the obligation can be considered to run to takers with notice on the ground of estoppel. And the benefit may run to assignees on the theory of the assignment of choses in action, though it seems rather that as an appurtenance it will run without separate mention.⁷⁰ These objections which suggest that the restriction, if not to be treated on the basis of the covenant running with the land, is at least similar to the easement, possibly are not absolutely opposed to the contract theory. It is difficult, however, to see even on the widest application of the rule that third party beneficiaries to a contract may sue upon it, how a justification is stated for the right of action freely accorded various individuals.⁷¹ The well settled rule is that

⁶⁶ 2 TIFFANY, *op. cit. supra* note 2, at 1436, 1437.

⁶⁷ See Clark, *op. cit. supra* note 1.

⁶⁸ That privity of estate is not necessary, see *Parker v. Nightingale*, 6 Allen 341 (Mass. 1863); *Chesebro v. Moers*, 233 N. Y. 75, 134 N. E. 842, 21 A. L. R. 1270 (1922); *Ames, op. cit. supra* note 64, at 183; *cf. authorities cited infra* notes 72, 73. In *Norcross v. James*, 140 Mass. 188, 2 N. E. 946 (1885), Holmes, J., held that the restrictions must touch or concern the land, and held further that restrictions against competition did not satisfy this requirement since they affected only the financial not the "physical advantage" of the land; a distinction which seems hard to justify whether or not the requirement be here applied. *Cf. Clark, op. cit. supra* note 1, at 128, n. 26; 2 TIFFANY, *op. cit. supra* note 2, at 1430, 1431. *Contra: Natural Products Co. v. Dolese & Shepard Co.*, 309 Ill. 230, 140 N. E. 840 (1923); (1923) 33 YALE L. J. 447. Under the views suggested in Clark, *op. cit. supra* note 1, such restrictive agreements would necessarily "touch and concern" the servient estate, and, unless intended to be in gross, some dominant estate also.

⁶⁹ As in New York and England. *Cf. Clark, op. cit. supra* note 1.

⁷⁰ See *Rogers v. Hosegood*, [1900] 2 Ch. 388, 407; 2 TIFFANY, *op. cit. supra* note 2, at 1446; Note (1922) 21 A. L. R. 1281, 1290.

⁷¹ This difficulty is recognized by Tiffany. 2 TIFFANY, *op. cit. supra* note 2, at 1446-1449. See discussion in Note (1912) 12 COL. L. REV. 158, 160.

where land has been developed according to a neighborhood plan of restriction, any one purchasing in reliance on such restriction may sue any one else in the neighborhood taking with notice, no matter when each purchased.⁷² So a prior taker may sue a later taker, and vice versa, and on division of land one may sue another though each claim through the same original grantee or grantor.⁷³ It seems an unreal conclusion to say that when A promised a realty development company not to conduct a business upon Blackacre, a contract was made of which an intended beneficiary was A's son, B, in a suit against A's daughter, C, upon descent and division of Blackacre.

The practical results of this theory may be a failure to benefit the persons whose interest actually should be protected,⁷⁴ and a possibility of giving a right where none should exist. The latter point is illustrated by certain New York cases which have held the restriction unenforceable because of changed conditions of the neighborhood,⁷⁵ but have suggested that an action for damages might lie on the contract.⁷⁶ In a late case, a purchaser was held entitled to decline such a title on the ground that the possibility of such suit rendered the title not marketable.⁷⁷ The

⁷² The cases are discussed by the authors cited *supra* notes 64, 65, and are collected in Note (1922) 21 A. L. R. 1281, 1306-1324. See also Note (1924) 33 A. L. R. 676 and *infra* note 73; cf. *Shoyer v. Mermelstein*, 93 N. J. Eq. 57, 114 Atl. 788 (1921); (1921) 20 MICH. L. REV. 119.

⁷³ *Winfield v. Henning*, 21 N. J. Eq. 188 (1870); *Boyden v. Roberts*, 131 Wis. 659, 111 N. W. 701 (1907); *Sanborn v. McLean*, 233 Mich. 227, 206 N. W. 496 (1925); (1926) 10 MINN. L. REV. 619; see Pound, *op. cit. supra* note 65, at 819; Note (1922) 21 A. L. R. 1281, 1306, 1324; (1921) 5 MINN. L. REV. 486; *Stone, op. cit. supra* note 64, at 188, 189; cf. *Korn v. Campbell*, 192 N. Y. 490, 85 N. E. 687 (1903), 37 L. R. A. (N. S.) 1 (1912); *King v. Dickeson*, 40 Ch. D. 596 (1889); *Dana v. Wentworth*, 111 Mass. 291 (1873). There is some apparent conflict, but this, it seems, goes solely to the question whether such restrictions among grantees taking from one grantor should be upheld as applied to a particular tract of land where there is not a general neighborhood development. *Tiffany* suggests that in the former case one part of the tract is *prima facie* not restricted in favor of another part. 2 *TIFFANY, op. cit. supra* note 2, at 1446; cf. (1907) 7 COL. L. REV. 623. It is doubtful if such a rule of presumption is a fair one. The facts and circumstances of each case should be looked at to indicate the purpose of the restriction; where it is to protect the development of the property, it would seem that the restriction should be applied to all parts of the tract itself.

⁷⁴ Compare some of the cases referred to *supra* note 73.

⁷⁵ See *infra* note 121.

⁷⁶ *McClure v. Leaycraft*, 183 N. Y. 36, 75 N. E. 961 (1905), 5 ANN. CAS. 45 (1907); *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. 741 (1892); *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691 (1892).

⁷⁷ *Bull v. Burton*, 227 N. Y. 101, 124 N. E. 111 (1919) (a four to three decision); see criticism by Pound, *op. cit. supra* note 65, at 820, 821; Note (1918) 31 HARV. L. REV. 876; cf. Note (1919) 5 CORN. L. Q. 98; Note (1919) 68 U. OF PA. L. REV. 75; Note (1920) 20 COL. L. REV. 76; *Genske v.*

real purpose of the restriction, to preserve the character of the neighborhood, is no longer possible. Yet the encumbrance still remains as a club which may be used against the realty owner.

RESTRICTION AS AN "EQUITABLE EASEMENT"

It seems preferable, therefore, to adopt the view of Dean Pound and other learned writers⁷⁸ that these restrictions be considered as servitudes upon the land, similar at least to easements and profits. In general the benefit may be considered as appurtenant to the land in the development scheme and to run with it, or any parts thereof on division, as does an easement on like division of the dominant estate.⁷⁹ And the burden will run to all takers of the land, there being mutual cross servitudes.⁸⁰ When such burdens are terminated by change in the character of the neighborhood—now a recognized form of termination—⁸¹ or otherwise, the interest definitely ceases. No pale relics are left to trouble and not to benefit the property owners.

Mr. Herbert Tiffany and others have raised certain objections to this view.⁸² It is believed that these are not wholly persuasive. He first refers to the requirement, applied in England, at least, that there must be a dominant tenement. This rule is discussed below in connection with the question who may enforce such restrictions.⁸³ As there suggested it is in line with the English hostility to easements in gross and it may well yield to a different rule in this country. The other objection is that it is inconsistent to recognize an easement enforceable "in equity" but not "at law." This deserves some serious consideration but in answer one may wonder whether such portions of the rule as would deny recognition of the interest "at law" should not be discarded. No reason seems apparent why these restrictions should now be considered merely "equitable" interests. It is true that they were first enforced by courts of equity against those taking with notice.⁸⁴ It is true further that the only completely adequate remedy is, and is likely to remain, the equitable remedy of injunction. But admitting this, the fact remains that

Jensen, 188 Wis. 17, 205 N. W. 548, (1925); (1926) 74 U. OF PA. L. REV. 515; Isaacs v. Schmuck, 245 N. Y. 77, 156 N. E. 621 (1927) (restrictions against the sale of liquor render the title not marketable notwithstanding the Prohibition Amendment; decision perhaps justifiable on the ground that the restrictions were broader than the Amendment).

⁷⁸ *Supra* note 65.

⁷⁹ *Supra* note 33.

⁸⁰ Compare the party wall easements. Clark, *op. cit. supra* note 25.

⁸¹ See *infra* note 121.

⁸² 2 TIFFANY, *op. cit. supra* note 2, at 1434, 1435; cf. Stone, *op. cit. supra* note 64.

⁸³ *Infra* p. 160.

⁸⁴ *Supra* note 63.

such restrictions under our American recording systems become encumbrances indistinguishable from recognized easements such as negative easements of view.⁸⁵

It is difficult to see, in fact, why the analogy is not substantially complete. Damages seem to be a proper even if not adequate remedy for infringement, and the restriction may so far be an encumbrance on the title as to render it unmarketable at law as well as in equity.⁸⁶ It is clear that damages may perhaps be given on the theory that the restriction may also constitute a covenant running with the land.⁸⁷ But there is authority that the restriction is enforceable against adverse possessors with notice,⁸⁸ a result quite satisfactory but one somewhat inconsistent with its treatment as merely a covenant.⁸⁹ It is true that these interests both as to benefit and burden embrace more territory than do most easements. But the intention being clear, there seems no theoretical objection to mutual easements attach-

⁸⁵ As in *Cadwalader v. Bailey*, *supra* note 19; *cf. Stone, op. cit. supra* note 64, at 292, n. 3. These restrictions are often called "negative easements." Compare *Jessel, M. R., in London & Southwestern Ry. v. Gomm, supra* note 63, and authorities cited *supra* note 65.

⁸⁶ *Cf. Bull v. Burton, supra* note 77. It has been held in Missouri that express words of covenant are necessary. *Zinn v. Sidler*, 268 Mo. 680, 187 S. W. 1172 (1916); *O'Malley v. Smith*, 203 S. W. 849 (Mo. App. 1919). See criticism by Pound, *op. cit. supra* note 65, at 816, saying that the weight of authority is *contra*; *cf. Parker v. Nightingale, supra* note 63; *Giddings, op. cit. supra* note 64, at 277; G. L. Clark, *Equitable Scrivitudes* (1917) 16 MICH. L. REV. 90, 97; *Tallmadge v. East River Bank*, 26 N. Y. 105 (1862).

⁸⁷ That a "negative" running covenant (restricting *privileges* of use) may be upheld "at law" is well settled. See *Clark, op. cit. supra* note 1; *cf. Cockson v. Cock*, Cro. Jac. 125 (1606); *American Strawboard Co. v. Halderman Paper Co.*, 83 Fed. 619 (C. C. A. 6th, 1897); *Bald Eagle Valley R. R. v. Nittany Valley Ry.*, 171 Pa. 284, 33 Atl. 239 (1895); *Gilmer v. Mobile & M. Ry.*, 79 Ala. 569 (1885); *Parrott v. Atl. & N. C. R. R.*, 165 N. C. 295, 81 S. E. 348 (1914), Ann. Cas. 1915D 265; *Thruston v. Minke*, 32 Md. 487 (1870); *cf. also* cases cited *supra* notes 76, 77. Dean Ames' suggestion to the contrary (*Ames, op. cit. supra* note 64, at 178) is not general American law, though it may accord with the English view and with that of some American jurisdictions opposed to the running of the burden of covenants with estates in fee. *Cf. also* G. L. Clark, *op. cit. supra* note 86, at 91.

⁸⁸ *Re Nisbet & Potts' Contract*, [1905] 1 Ch. 391, *aff'd*, [1906] 1 Ch. 386. This view is approved by Professor Bordwell, *Disseisin and Adverse Possession* (1924) 33 YALE L. J. 285, 292. See also Note (1905) 18 HARV. L. REV. 608; *Williams, op. cit. supra* note 64; *cf. Maitland, op. cit. supra* note 64, at 168-170; *Sweet, Title by Adverse Possession* (1907) 19 JUR. REV. 67. But *cf. 2 Tiffany, op. cit. supra* note 2, at 1438; *Scott, op. cit. supra* note 65, at 285; G. L. Clark, *op. cit. supra* note 86, at 93; *Stone, op. cit. supra* note 64, at 307; *cf. also Mander v. Falcke*, [1891] 2 Ch. 554.

⁸⁹ See *Clark, op. cit. supra* note 1; also cases cited *supra* note 88. Professor Bordwell argues also for a more extensive running of covenants than merely with the estate in the land, as is the traditional view. See *Bordwell, op. cit. supra* note 88, at 292.

ing to land in this way. The mutual cross easements of the party wall furnish an analogy.⁹⁰

FORM OF LANGUAGE CREATING THE RESTRICTION

The above conclusion that this restriction should be treated in substance as an easement indicates the form of language in which it should most properly be couched. There seems to have been some tendency to employ the language of contract or of condition. Both seem unfortunate. The contract form emphasizes the personal nature of the interest which is probably contrary to the purpose of restriction. It may lead to a conclusion that only the grantor is bound in damages and that the land itself is unrestricted or on the other hand that damages are to be collected when the land encumbrance has long become valueless.⁹¹ As a condition a right of re-entry will be left in the grantor (usually a realty development company) thus creating a cloud on title, perhaps again long after a complete change in the character of the neighborhood in favor of one who has no real interest in the premises.⁹² But if the restriction is stated merely as a servitude binding upon the granted land in favor of all other land of a certain described area, these difficulties are avoided.

A serious conflict exists as to whether the servitude should be considered as an interest in land so that a writing is necessary for its creation. Mr. Herbert Tiffany, for example, inclines to the view that such interests being purely equitable (and to this extent personal) need not be in writing.⁹³ It is difficult to see why they do not affect the land pretty substantially and why they are not within the policy of the statute. Again following the analogy of easements it would seem that a writing should be considered necessary⁹⁴ unless there is estoppel or part performance.⁹⁵

⁹⁰ See (1909) 9 COL. L. REV. 74; Clark, *op. cit. supra* note 1, at 306, nn. 15, 16; *cf.* Allen v. City of Detroit, 167 Mich. 464, 13 N. W. 317 (1911), 36 L. R. A. (N. S.) 890 (1912); (1926) 10 MINN. L. REV. 619. For other similarities under the Rule against Perpetuities see Clark, *op. cit. supra* note 25, at 314, and in methods of termination see *infra* p. 162. As to the undesirability in general of a continued separation of law and equity see CLARK, CODE PLEADING (1928) c. 2.

⁹¹ See *supra* p. 155; Bull v. Burton, *supra* note 77.

⁹² The fact that a right of re-entry for condition broken is reserved does not necessarily operate to prevent the condition from being also treated as a restriction. Weil v. Hill, 193 Ala. 407, 69 So. 438 (1915); 2 TIFFANY, *op. cit. supra* note 2, at 1427.

⁹³ *Ibid.* 1432; Thornton v. Schobe, 79 Colo. 25, 243 Pac. 617 (1926); (1926) 24 MICH. L. REV. 854; Johnson v. Mt. Baker Park Pres. Church, 113 Wash. 458, 194 Pac. 536 (1920); (1921) 19 MICH. L. REV. 751; Hall v. Solomon, 61 Conn. 476, 23 Atl. 876 (1892); *cf.* (1922) 7 COL. L. REV. 622.

⁹⁴ Ham v. Massasoit Real Est. Co., 42 R. I. 293, 107 Atl. 205 (1919), noted by Dean Pound, *op. cit. supra* note 65, at 817; (1920) 29 YALE L. J. 580;

ENFORCEMENT OF AFFIRMATIVE OBLIGATIONS

The English cases hold directly that only negative restrictions will be enforced in equity and that agreements calling for affirmative acts will not be enforced against takers with notice.⁹³ In the American cases there seems to be some conflict with at least considerable apparent tendency to follow the English rule.⁹⁷ On the other hand several text writers have strongly urged the desirability of enforcing all agreements, whether affirmative or negative, where the equitable remedy is the only adequate one.⁹⁵

It seems clear that this problem cannot be considered apart from the question how far covenants shall be permitted to run with the land. If a fully developed scheme of running covenants, such as is suggested in an earlier essay,⁹⁹ is permitted, there will be numerous cases where the doctrine of covenants and restrictions overlap, and where the plaintiff should have a remedy under either doctrine.¹⁰⁰ There is under modern procedure no occasion to limit the remedy on a running covenant to damages, but the more complete equitable remedies should be allowed.¹⁰¹ But where the local policy is distinctly against the

(1920) 19 MICH. L. REV. 219; *Sprague v. Kimball*, 213 Mass. 380, 100 N. E. 622 (1913); *Davis v. Robinson*, (1925) 189 N. C. 589, 127 S. E. 697 (1925); *Pierson v. Canfield*, 272 S. W. 231 (Tex. Civ. App. 1925); (1921) 8 CONN. L. Q. 72; Note (1920) 5 A. L. R. 448.

⁹⁵ *Phillips v. West Rockaway Land Co.*, 226 N. Y. 507, 124 N. E. 87 (1919); (1919) 33 HARV. L. REV. 112; (1920) 6 VA. L. REV. 232. So there is a conflict whether such restriction is property and whether damages must be given on its taking in eminent domain proceedings. Cf. *Flynn v. New York, W. & B. Ry.*, 218 N. Y. 140, 112 N. E. 913 (1916), and *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242, 117 N. E. 214 (1917), with *Doan v. Cleveland Short Line Ry.*, 92 Ohio St. 461, 112 N. E. 505 (1915); see 2 TIFFANY, *op. cit. supra* note 2, at 1428; (1907) 21 HARV. L. REV. 139; *Town of Stamford v. Vuono*, 113 Atl. 245 (Conn. 1928).

⁹⁶ *Haywood v. Brunswick Permanent Benefit Bldg. Soc.*, L. R. 3 Q. B. D. 403 (1881); *Hall v. Ewin*, 37 Ch. D. 74 (1887). But cf. *Holmes v. Buckley*, Prec. Ch. 39 (1691).

⁹⁷ *Miller v. Clary*, 210 N. Y. 127, 103 N. E. 1114 (1913), L. R. A. 1913E 222, Ann. Cas. 1915B 872. Tiffany states that the great majority of agreements enforced have been restrictive although he cites some cases where affirmative obligations have been upheld. 2 TIFFANY, *op. cit. supra* note 2, at 1429, 1430.

⁹⁸ *Pomeroy*, *loc. cit. supra* note 65; cf. *Stone*, *op. cit. supra* note 61, at 303-307; *G. L. Clark*, *op. cit. supra* note 86, at 100; *Giddings*, *op. cit. supra* note 65, at 279; 2 TIFFANY, *op. cit. supra* note 2, at 1430. But see *Ames*, *op. cit. supra* note 64, at 176; *Scott*, *op. cit. supra* note 65, at 281, n. 48, 285.

⁹⁹ *Clark*, *op. cit. supra* note 1.

¹⁰⁰ Cf. cases *supra* note 87.

¹⁰¹ The equitable remedy is at times awarded where the remedy of damages is said to be inadequate. Cf. *Thruston v. Minke*, *supra* note 87 (where the burden would run); *Countryman v. Deck*, 13 Abb. N. C. 110 (N. Y. 1883); *Randall v. Latham*, 36 Conn. 48 (1869); *Hollander v. Central Metal*

encumbrances of running covenants (as it is in England and New York and to a less extent, in other jurisdictions),¹⁰² it would seem inconsistent to adopt a contrary policy as to interests substantially identical, if not potentially more burdensome. On the whole it would seem desirable to consider these interests as restricted to easements, to uphold them only as negative restrictions, and to allow the affirmative running encumbrances to wait upon the development of a more enlightened policy towards the covenant running with the land.¹⁰³

WHO MAY SUE TO ENFORCE RESTRICTIONS

We have already seen that the benefit of the servitude may run rather widely in favor of all property owners of a neighborhood.¹⁰⁴ May the benefit, however, remain in gross while the burden runs? The English courts have held that it may not,¹⁰⁵ and have stuck to this decision in later cases even though its harsh results have occasionally been regretted.¹⁰⁶ This result is in general accord with their attitude of opposition to easements in gross,¹⁰⁷ and it further finds some support in the stated rule of equity that only a property interest is protected, and that, too, where actual or threatened damage is shown.¹⁰⁸ In the United States the English rule has had support,¹⁰⁹ but at least one important jurisdiction has decided squarely to the contrary in a decision supported by some text writers but criticised by many.¹¹⁰

& Supply Co., 109 Md. 131, 71 Atl. 442 (1908); see *Clegg v. Hands*, 44 Ch. D. 503, 518, 523 (1890).

¹⁰² Clark, *op. cit. supra* note 1, at 144.

¹⁰³ *Ibid.*; cf. Professor Bordwell's suggestion of treating covenants also as easements. Bordwell, *op. cit. supra* note 88, at 292.

¹⁰⁴ See *supra* notes 72, 73. In such case a release by the original promisee is ineffective. *Armstrong v. Leverone*, 105 Conn. 464, 136 Atl. 71 (1927); *Muller v. Weiss*, 91 N. J. Eq. 29, 108 Atl. 768 (1919).

¹⁰⁵ *Formby v. Barker*, [1903] 2 Ch. 539.

¹⁰⁶ *London County Council v. Allen*, [1914] 3 K. B. 642 (following the modern authorities with reluctance); see (1914) 30 L. Q. REV. 388; 13 Mich. L. R. 150; *Chambers v. Randall*, [1923] 1 Ch. 149; Note (1924) 157 LAW TIMES 188. In *Ives v. Brown*, [1919] 2 Ch. 314, the personal representative and the devisee of the covenantee were allowed to join. See (1924) 18 MICH. L. REV. 435. An enforceable oral contract of purchase has been held sufficient as a dominant tenement. *Bessinet v. White*, [1926] 1 D. L. R. 95; (1926) 39 HARV. L. REV. 775; (1926) 26 COL. L. REV. 366; cf. (1922) 36 HARV. L. REV. 107 (a "business" as a dominant tenement).

¹⁰⁷ *Supra* note 13.

¹⁰⁸ See cases cited *supra* notes 105, 106; *infra* note 109. Cf. Stone, *op. cit. supra* note 64, at 314, 315; G. L. Clark, *op. cit. supra* note 86, at 97.

¹⁰⁹ *Los Angeles University v. Swarth*, 107 Fed. 798 (C. C. A. 9th, 1901); *Foreman v. Sadler's Ex'rs*, 114 Md. 574, 80 Atl. 298 (1911); *Genung v. Harvey*, 79 N. J. Eq. 57, 80 Atl. 955 (1911).

¹¹⁰ *Van Sant v. Rose*, 260 Ill. 401, 103 N. E. 194 (1913), *aff'd* 170 Ill. App.

In earlier essays reasons were advanced for believing that in cases where the intent was clear, the benefit should be allowed to remain in gross while the burden passes with a servient estate. This is in accordance with the American attitude towards easements in gross¹¹¹ and also covenants in gross.¹¹² Furthermore, there seems no reason why equity should not act to protect such interest when validly created as it does the easement in gross. Some well reasoned cases point out that the processes of the courts should be available to prevent fraudulent or improper conduct where the plaintiff is under only a moral or other non-legal obligation to seek protection for his neighbors.¹¹³ Here such a case may arise where the neighbors either have no rights or their rights are not clear. The case will not occur often, for ordinarily the burden will be clearly appurtenant, in which event it should rarely, if ever, be held also in gross to the original promisee. But in the occasional case it may prove a desirable right as against a person who is acting with obvious unfairness towards his neighbors. The objections stated as an absolute rule of law seem unsubstantial and of a technical and academic character.¹¹⁴

RUNNING OF THE BURDEN

The burden of these servitudes is enforced against those who take with notice or who are not purchasers for value.¹¹⁵ Under our American recording system, the record is, therefore, most important as an element in the running of the burden. The same rule necessarily applies to easements, profits, covenants and other encumbrances. The rule is well settled that a pur-

572 (1912). The case is criticised in (1914) 9 ILL. L. REV. 58; (1916) 11 ILL. L. REV. 283; (1914) 27 HARV. L. REV. 493; G. L. Clark, *op. cit. supra* note 86, at 97. See also 2 TIFFANY, *op. cit. supra* note 2, at 1441. But *cf.* Stone, *op. cit. supra* note 64, at 313; Clark, *op. cit. supra* note 1. Dean Stone gives Borough Bill Posting Co. v. Levy, *supra* note 16, as in accord, though this is often considered as a typical easement in gross. See *supra* notes 16, 17. The point was not decided in *St. Stephen's Church v. Church of Transfiguration*, 201 N. Y. 1, 94 N. E. 191 (1911), *aff'd* 130 App. Div. 166, 114 N. Y. Supp. 623 (1st Dept. 1909).

¹¹¹ *Supra* notes 77, 78.

¹¹² Clark, *op. cit. supra* note 1.

¹¹³ *Brett v. Cooney*, 75 Conn. 338, 53 Atl. 729 (1902); *Morrow v. Ursini*, 96 Conn. 219, 113 Atl. 388 (1921); Note (1903) 16 HARV. L. REV. 509; see Clark, *op. cit. supra* note 1, at 131, n. 43.

¹¹⁴ One objection is based upon the rule that change in the condition of the dominant land marks the end of the restriction. *Infra* note 61. It is claimed that *a fortiori* where there is no dominant land the restriction should not be enforced. Nevertheless, it would seem that the same rule of termination may be applied whether there is a dominant tenement or not.

¹¹⁵ Hence Professor G. L. Clark states that an adverse possessor of the servient land should be bound even though he has no notice. G. L. Clark, *op. cit. supra* note 28, at 93; *cf.* Note (1905) 18 HARV. L. REV. 603.

chaser takes with notice from the record only of encumbrances in his direct chain of title. Hence in the absence of actual notice, before or at the time of his purchase, an owner of land in the neighborhood is only bound by the restrictions if they appear in some deed of record in the conveyances to himself and his direct predecessors in title.¹¹⁶ In this connection some discussion has occurred where one makes an agreement concerning any property he may later acquire in the neighborhood. It seems clear that this agreement, even if recorded, is not in the chain of title of any after acquired property of the promisor and, hence, that there is not notice of it from the record. In a leading New York case there were apparent suggestions in the opinion contrary to this, but these were probably inadvertent since the decision itself properly rests upon the actual fraud of the defendant, the wife of the original promisor.¹¹⁷

In an earlier essay it was pointed out that the burden of such a restriction may be in gross while the benefit runs. These are usually cases of personal promises not to compete.¹¹⁸

TERMINATION OF RESTRICTIONS

It seems clear that all the rules as to the ending of easements and profits, including those as to abandonment by the dominant owners, should apply to these interests.¹¹⁹ In addition, two other rules have been emphasized by courts in refusing to enforce servitudes. One is where the plaintiff has been guilty of laches in pressing his suit or has himself violated the restrictions.¹²⁰ The other is where because of the changed conditions in the neighborhood, not occasioned by the defendants, the preservation of the original character of the property is no longer possible.¹²¹

¹¹⁶ *Hancock v. Gumm*, 151 Ga. 667, 107 S. E. 872 (1921); (1921) 21 Col. L. REV. 826; *Beetchenow v. Arter*, 45 R. I. 133, 119 Atl. 758 (1923); *Glorieux v. Lighthipe*, 88 N. J. L. 199, 96 Atl. 94 (1915); *Peck v. Conway*, 119 Mass. 546 (1876); 2 *TIFFANY*, *op. cit. supra* note 2, at 1439. Where the instrument is not a conveyance, but merely an agreement, though appearing properly in the chain of title, a subsequent purchaser is held to have constructive notice, unless by the local law the agreement is not entitled to be recorded. *Ibid.* 1440.

¹¹⁷ *Lewis v. Gollner*, 129 N. Y. 227, 29 N. E. 81 (1891); *cf.* G. L. Clark, *op. cit. supra* note 28, at 98.

¹¹⁸ *Clark*, *op. cit. supra* note 1, at 129; *National Union Bank v. Segur*, 39 N. J. L. 173 (1877); *Norman v. Wells*, 17 Wend. 136 (N. Y. 1837). The Massachusetts rule is apparently *contra*. See *supra* note 68.

¹¹⁹ See *Clark*, *op. cit. supra* note 25, at 313, 314; G. L. Clark, *op. cit. supra* note 86, at 104.

¹²⁰ *Loud v. Pendergast*, 206 Mass. 122, 92 N. E. 40 (1910); *Gage v. Schavoir*, 100 Conn. 652, 124 Atl. 535; *Schwarz v. Holycross*, 83 Ind. App. 658, 149 N. E. 699 (1925). See law review notes cited *infra* note 121.

¹²¹ See cases collected in Note (1928) 54 A. L. R. 812-837; see also cases cited *supra* notes 76, 77; *infra* note 122; *Pound*, *op. cit. supra* note 65, at

These are often spoken of as an application of the theory that equitable remedies are a matter of grace, not of right.¹²² Such theory is at least a partial explanation of the way in which the principles of equity developed. It has, however, great disadvantages as a general theory of property law. It tends to unsettle property rights, since the result in each case will depend on a particular judge's views of justice. The decisions under the so called "balancing of the equities" doctrine as applied in granting or refusing an injunction against committing a nuisance indicate how variable such justice is. And it tends to make the outcome depend on a comparison of the value of the interests of plaintiff and defendant, and thus effects a preference to large property holders before the law, which has distinct social disadvantages.¹²³ In our present problem such explanation has the added disadvantage of leading a court to believe that the now useless restriction may still be of validity "at law" and remain an encumbrance on title.¹²⁴ It seems much better to treat these as recognized methods of termination of restrictions both "in equity" and "at law." They are similar in general character to the abandonment of an easement and have at times been

819, 821; Note (1918) 31 HARV. L. REV. 876; *Postley v. Kafka*, 213 App. Div. 595, 211 N. Y. Supp. 382 (1st Dept. 1925); (1926) 35 YALE L. J. 515; (1926) 12 VA. L. REV. 502; Note (1914) 14 COL. L. REV. 438. See extensive provisions under the new English Property Acts. 15 Geo. V. c. 20, § 84 (1925); Bordwell, *English Property Reform and Its American Aspects* (1927) 37 YALE L. J. 178, 207. By Statute in Massachusetts such restrictions, unlimited as to time, run only for thirty years. MASS. GEN. LAWS (1921) c. 184, § 23; *supra* note 53.

¹²² *Forstmann v. Joray Co.*, 244 N. Y. 22, 154 N. E. 652 (1926); Note (1927) 12 CORN. L. Q. 518; *Bauby v. Krasow*, 139 Atl. 508 (Conn. 1927), criticised in (1928) 37 YALE L. J. 832; see also (1928) 41 HARV. L. REV. 802.

¹²³ This familiar problem in the law of nuisance has been often discussed. Note (1922) 36 HARV. L. REV. 211; (1926) 39 HARV. L. REV. 1038; (1928) 22 ILL. L. REV. 775; Note (1923) 9 CORN. L. Q. 63; (1923) 23 COL. L. REV. 684; (1922) 20 MICH. L. REV. 799; (1925) 23 MICH. L. REV. 406. Compare with these discussions Comment (1927) 37 YALE L. J. 96; Note (1927) 6 TEX. L. REV. 83; (1925) 11 VA. L. REV. 403, and McClintock, *Discretion to Deny Injunction Against Trespass and Nuisance* (1928) 12 MINN. L. REV. 565. The latter authorities assert that other matters than comparative values may motivate the courts in withholding injunctions. It seems, however, that where some definite recognized principle of equity, *e.g.*, the doctrine of laches, is not relied on the court tends to appeal to general considerations not capable of definite evaluation and eventually relies largely, if not wholly, upon the more specific evidence of size and value of investment of the parties. *Cf.* (1928) 37 YALE L. J. 832, *supra* note 122, as to defendant's "intrenchment behind considerable expenditure," citing *Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37 (1910).

¹²⁴ See *Bull v. Burton*, *supra* note 77, and the criticism of Pound, *op. cit. supra* note 65, at 820, 821, of this case and cases cited *supra* note 76.

spoken of as implied conditions of the original grant.¹²⁵ Since these doctrines are based on obvious common sense, and in line with the general policy of disposing of encumbrances on title, especially where no longer of general usefulness,¹²⁶ they should receive the same recognition in property law accorded the doctrine of abandonment.

¹²⁵ See Note (1918) 31 HARV. L. REV. 876, 877; 2 TIFFANY, *op. cit. supra* note 2, at 1458.

¹²⁶ See *supra* note 24. Compare the general rule that restrictions must be strictly construed. *Easterbrook v. Hebrew Ladies' Orphan Society*, 85 Conn. 289, 82 Atl. 561 (1912); *Voorhees v. Blum*, 274 Ill. 319, 113 N. E. 593 (1916); (1917) 1 MINN. L. REV. 182; *Pierson v. Rellstab Bros.*, 219 App. Div. 552, 219 N. Y. Supp. 404 (2d Dept. 1927); *Bowers v. Fifth Ave. & 77th St. Corp.*, 125 Misc. 343, 209 N. Y. Supp. 743 (Sup. Ct. 1925); *Griswold R. & H. Corp. v. West End Ave. Corp.*, 125 Misc. 30, 209 N. Y. Supp. 764 (Sup. Ct. 1925); *Muller v. Cavanaugh*, 94 N. J. Eq. 619, 121 Atl. 339 (1923); *Small v. Parkway Auto Supplies, Inc.*, 258 Mass. 30, 154 N. E. 321 (1926); *cf. Jones v. Mulligan*, 121 Atl. 608 (N. J. Eq. 1923); (1923) 22 MICH. L. REV. 63.