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CHAPTER 27

THE PASSING OF THE BENEFIT OF RESTRICTIVE COVENANTS

27.3 Annexation

27.3.1 THE TRADITIONAL VIEWPOINT ON ANNEXATION (applicable to pre-1926 covenants)

JAMAICA MUTUAL LIFE ASSURANCE SOCIETY v HILLSBOROUGH AND OTHERS [1989] 1 WLR 1101, Privy Council

FACTS: The owners of land sold plots to various parties, subject to a covenant against sub-division of the plots and prohibiting the use of the plots for the carrying on of any trade or business. The instruments of transfer of the plots did not expressly identify the land which the covenants were intended to benefit. One of the owners of the plots applied to the Supreme Court of Jamaica for a declaration as to the extent to which they were bound by the restrictive covenants contained in the instrument of transfer.

HELD: In the absence of express assignment of the benefit of the covenant to the vendors' successors in title, and in the absence of any possible inference that the vendors intended to annex the benefit of the covenants to the land retained by them, the benefit of the covenant had not passed and could not be enforced against the owner of the plot.

LORD JAUNCEY of Tullichettle: . . . There were in the instrument of transfer to Maurice William Facey no words stating that the restrictions therein were intended for the benefit of any land retained by Dunn and others. . .

In *Renals v Cowlshaw* (1878) 9 ChD 125, 130, Hall V-C said:

that in order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not shewing that the benefit of the covenant was intended to enure for the time being of each portion of the estate so retained or of the portion of the estate of which the plaintiff is assign) to claim the benefit of a restrictive covenant, this, at least, must appear, that the assign acquired his property with the benefit of the covenant, that is, it must appear that the benefit of the covenant was part of the subject-matter of the purchase.

In *Rogers v Hosegood* [1900] 2 Ch 388, 407–408, Collins LJ said:

When, as in *Renals v Cowlshaw*, there is no indication in the original conveyance, or in the circumstances attending it, that the burden of the restrictive covenant is imposed for the benefit of the land reserved, or any particular part of it, then it becomes necessary to examine the circumstances under which any part of the land reserved is sold, in order to see whether a benefit, not originally annexed to it, has become annexed to it on the sale, so that the purchaser is deemed to have bought it with the land . . .

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Both *Renals v Cowlshaw* and *Rogers v Hosegood* were referred to with approval in *Reid v Bickerstaff* [1909] 2 Ch 305 where Cozens-Hardy MR in the context of a submission that the benefit of a covenant was annexed to adjoining lands of the vendors said, at p. 321:

As to the second proposition the plaintiffs have a more plausible case, but I think they fail in establishing it. It is plain that they are not assignees of the covenant, of the existence of which they were not aware. It is equally plain that there is nothing in the deed of 1840, or in any document prior or subsequent thereto, to indicate that the covenant was entered into for the benefit of the particular parcels of which the plaintiffs are now owners. I cannot hold that the mere fact that the plaintiffs' land is adjacent and would be more valuable if the covenant were annexed to the land suffices to justify the court in holding that it was so annexed as to pass without mention by a simple conveyance of the adjacent land.

Applying the principles to be derived from these three cases to the matters to which their Lordships have just referred their Lordships consider that Carey JA was mistaken in concluding that the covenant in the applicant's title was annexed to any land. . .

27.3.1.2 The disadvantages of annexation only to the whole of the dominant land— the 'small plot-big plot' situation

***RE BALLARD'S CONVEYANCE* [1937] 2 All ER 691, Chancery Division**

FACTS: The owners of the 'Childwickbury Estate' sold sixteen acres on the edge of their 1,700 acre estate, subject to a restrictive covenant that the land sold should be used for agricultural purposes only. The covenant was expressed to be for the benefit of 'the whole of the Childwickbury Estate'.

HELD: There was no valid annexation. For a valid annexation the current owners of Childwickbury would have to have proved that all 1,700 acres were benefited by the 'agriculture only' covenant. In the judge's view, those parts of the estate close to the sixteen acres were capable of benefiting from the covenant, but those further away were not. The covenant was therefore unenforceable.

CLAUSON J: I . . . hold that the land for the benefit of which the covenant was taken was the land (about 1,700 acres) now vested in Childwickbury Stud, Ltd, by conveyance from Mr Joel, and that the fact that it claims by virtue of a purchase from Mrs Ballard would not affect its title to sue.

That brings me to the remaining question, namely: Is the covenant one which, in the circumstances of the case, comes within the category of a covenant the benefit of which is capable of running with the land for the benefit of which it was taken? A necessary qualification, in order that the covenant may come within that category, is that it concerns or touches the land with which it is to run : see *per* Farwell J, in *Rogers v Hosegood* [1900] 2 Ch 388, at p. 395. That land is an area of some 1,700 acres. It appears to me quite obvious that, while a breach of the stipulations might possibly affect a portion of that area in the vicinity of Mr Wright's land, far the largest part of this area of 1,700 acres could not possibly be affected by any breach of any of the stipulations.

Counsel for the respondent company asked for an adjournment in order to consider whether it would call evidence (as I was prepared to allow it to do) to prove that a breach of the stipulations, or of some of them, might affect the whole of this large area. However, ultimately no such evidence was called.

The result seems to me to be that I am bound to hold that, while the covenant may concern or touch some comparatively small portion of the land to which it has been sought to annex it, it fails to concern or touch far the largest part of the land. I asked

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in vain for any authority which would justify me in severing the covenant, and treating it as annexed to or running with such part of the land as is touched by or concerned with it, though, as regards the remainder of the land, namely, such part as is not touched by or concerned with the covenant, the covenant is not, and cannot be, annexed to it, and accordingly does not, and cannot, run with it. . .

27.3.1.3 The modern trend in 'small plot-big plot' cases

MARTEN v FLIGHT REFUELLING LTD [1961] 2 All ER 696, Chancery Division

FACTS: Mrs Marten had a beneficial interest under a strict settlement in the 7,500 acre Crichel Estate, Dorset. When she was still an infant, the trustees of the settlement sold a farm comprising part of the estate (562 acres, in fact) to Mr Harding. He covenanted that he would use the land for agricultural purposes only. In course of time the defendant company came to own the 'farm', and began to use the land for industrial purposes. When Mrs Marten attained majority, the trustees executed an assent vesting the estate in her, but the assent made no express mention of the covenant. Mrs Marten brought the present action for an injunction restraining the defendant's industrial use of the 'farm' land.

HELD: She was entitled to the benefit of the restrictive covenant. Accordingly, the injunction was granted.

WILBERFORCE J: . . . an intention to benefit may be found from surrounding or attending circumstances. . .

. . . it was said that a mere examination of the figures showed that the covenant could not benefit the estate: the Crichel Estate extends to some seven thousand five hundred acres, and it was asked how such covenant could benefit the estate as a whole. In my view, there is no such manifest impossibility about this. I have already referred to the character of the estate, and I can well imagine that for the owner of it, whether he wished to retain it in his family or to sell it as a whole, it might be of very real benefit to be able to preserve a former outlying portion from development. This seems to me to be a question of fact to be determined on the evidence: and I note that, when a similar argument was placed before the court in *Re Ballard's Conveyance* [see 27.2.1.2], Clauson J, while accepting it in the absence of evidence, showed it to be his opinion that evidence could have been called. . .

27.3.1.4 Annexation destroyed on sub-division of the dominant land

RUSSELL v ARCHDALE [1962] 3 All ER 305, Chancery Division

FACTS: A company owned certain land which it conveyed to the defendant, the company retaining other land in the neighbourhood. The defendant purchaser entered into various restrictive covenants 'so as to . . . benefit and protect the vendor's adjoining and neighbouring land'. Some years later the plaintiffs bought *part* of the company's retained land. The conveyance was expressed to include the benefit of the covenants entered into by the defendants. On the question whether the plaintiffs could enforce the restrictive covenants:

HELD: The annexation of the covenants to 'the vendor's adjoining and neighbouring land' was an annexation to the *whole* of the vendor's adjoining and neighbouring land and not to *each and every part* of it. Accordingly, as the plaintiffs had acquired a part only of the land, they could not enforce the benefit of the covenant.

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BUCKLEY J: No doubt every case of this kind, being one of construction, must be determined on the facts and the actual language used, but . . . I cannot see that the mere fact that the land intended to be benefited is described by such an expression as 'the land retained by the vendor', is sufficient to enable the court to come to the conclusion that the covenant is intended to benefit each and every part of that land. . . . That being so, it must follow that the plaintiffs cannot enforce the covenant merely by reason of its annexation to the 'adjoining and neighbouring land' of the vendors under the conveyance of July 6 1938, since they (the plaintiffs) have acquired part only of that land.

27.3.2 FEDERATED HOMES AND 'STATUTORY ANNEXATION'

***FEDERATED HOMES LTD v MILL LODGE PROPERTIES LTD* [1980] 1 All ER 371, Court of Appeal**

FACTS: A firm called Mackenzie Hill Ltd owned a large amount of development land in Newport Pagnell (just north of Milton Keynes). It had outline planning permission to develop the land with 1,250 houses. It sold part of that land to Mill Lodge. The conveyance included a restrictive covenant:—

In carrying out the development of the . . . land the purchaser shall not build at a greater density than a total of 300 dwellings so as not to reduce the number of units which the vendor might eventually erect on the retained land under the existing planning consent.

Mackenzie Hill later sold the land they retained in the area to Federated Homes. The Court of Appeal had (*inter alia*) to decide whether the above clause effected an annexation so that on the sale of the 'retained land' the right to enforce the covenant passed automatically to Federated Homes.

HELD: The clause effected a valid annexation of the benefit of the covenant to the land owned by Federated Homes Ltd.

BRIGHTMAN LJ: In my judgment the benefit of this covenant was annexed to the retained land, and I think that this is a consequence of s. 78 of the Law of Property Act 1925, which reads:

(1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed. For the purposes of this subsection in connection with covenants restrictive of the user of land 'successors in title' shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

(2) This section applies to covenants made after the commencement of this Act, but the repeal of section fifty-eight of the Conveyancing Act 1881, does not affect the operation of covenants to which that section applied.

Counsel for the defendants submitted that there were three possible views about s. 78. One view, which he described as 'the orthodox view' hitherto held, is that it is merely a statutory shorthand for reducing the length of legal documents. A second view, which was the one that counsel for the defendants was inclined to place in the forefront of his argument, is that the section only applies, or at any rate only achieves annexation, when the land intended to be benefited is signified in the document by express words or necessary implication as the intended beneficiary of the covenant. A third view is that the section applies if the covenant in fact touches and concerns the land of the covenantee, whether that be gleaned from the document itself or from evidence outside the document.

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For myself, I reject the narrowest interpretation of s. 78, the supposed orthodox view, which seems to me to fly in the face of the wording of the section. Before I express my reasons I will say that I do not find it necessary to choose between the second and third views because, in my opinion, this covenant relates to land of the covenantee on either interpretation of s. 78. Clause 5(iv) shows quite clearly that the covenant is for the protection of the retained land and that land is described in cl. 2 as 'any adjoining or adjacent property retained by the Vendor'. This formulation is sufficient for annexation purposes: see *Rogers v Hosegood* [1900] 2 Ch 388.

There is in my judgment no doubt that this covenant 'related to the land of the covenantee', or, to use the old-fashioned expression, that it touched and concerned the land, even if counsel for the defendants is correct in his submission that the document must show an intention to benefit identified land. The result of such application is that one must read cl. 5(iv) as if it were written: 'The purchaser hereby covenants with the vendor and its successors in title and the persons deriving title under it or them, including the owners and occupiers for the time being of the retained land, that in carrying out the development of the blue land the purchaser shall not build at a greater density than a total of 300 dwellings so as not to reduce the number of units which the vendor might eventually erect on the retained land under the existing planning consent.' I leave out of consideration s. 79 as unnecessary to be considered in this context, since Mill Lodge is the original covenantor.

The first point to notice about s. 78(1) is that the wording is significantly different from the wording of its predecessor, s. 58(1) of the Conveyancing and Law of Property Act 1881. The distinction is underlined by sub-s. (2) of s. 78, which applies sub-s. (1) only to covenants made after the commencement of the Act. Section 58(1) of the earlier Act did not include the covenantee's successors in title or persons deriving title under him or them, nor the owners or occupiers for the time being of the land of the covenantee intended to be benefited. The section was confined, in relation to realty, to the covenantee, his heirs and assigns, words which suggest a more limited scope of operation than is found in s. 78.

If, as the language of s. 78 implies, a covenant relating to land which is restrictive of the user thereof is enforceable at the suit of (1) a successor in title of the covenantee, (2) a person deriving title under the covenantee or under his successors in title, and (3) the owner or occupier of the land intended to be benefited by the covenant, it must, in my view, follow that the covenant runs with the land, because *ex hypothesi* every successor in title to the land, every derivative proprietor of the land and every other owner and occupier has a right by statute to the covenant. In other words, if the condition precedent of s. 78 is satisfied, that is to say, there exists a covenant which touches and concerns the land of the covenantee, that covenant runs with the land for the benefit of his successors in title, persons deriving title under him or them and other owners and occupiers.

This approach to s. 78 has been advocated by distinguished textbook writers: see Dr Radcliffe in the *Law Quarterly Review*, Professor Wade in the *Cambridge Law Journal* under the apt cross-heading 'What is wrong with section 78?', and Megarry and Wade on the *Law of Real Property*. Counsel pointed out to us that the fourth edition of Megarry and Wade's textbook indicates a change of mind on this topic since the third edition was published in 1966.

Although the section does not seem to have been extensively used in the course of argument in this type of case, the construction of s. 78 which appeals to me appears to be consistent with at least two cases decided in this court. The first is *Smith v River Douglas Catchment Board* [1949] 2 All ER 179. In that case an agreement was made in April 1938 between certain landowners and the catchment board under which the catchment board undertook to make good the banks of a certain brook and to maintain the same, and the landowners undertook to contribute towards the cost. In 1940 the first plaintiff took a conveyance from one of the landowners of a part of

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the land together with an express assignment of the benefit of the agreement. In 1944 the second plaintiff took a tenancy of that land without any express assignment of the benefit of the agreement. In 1946 the brook burst its banks and the land owned by the first plaintiff and tenanted by the second plaintiff was inundated. The two important points are that the agreement was not expressed to be for the benefit of the landowner's successors in title; and there was no assignment of the benefit of the agreement in favour of the second plaintiff, the tenant. In reliance, as I understand the case, on s. 78 of the Law of Property Act 1925, it was held that the second plaintiff was entitled to sue the catchment board for damages for breach of the agreement. It seems to me that that conclusion can only have been reached on the basis that s. 78 had the effect of causing the benefit of the agreement to run with the land so as to be capable of being sued on by the tenant. . .

I find the idea of the annexation of a covenant to the whole of the land but not to a part of it a difficult conception fully to grasp. I can understand that a covenantee may expressly or by necessary implication retain the benefit of a covenant wholly under his own control, so that the benefit will not pass unless the covenantee chooses to assign; but I would have thought, if the benefit of a covenant is, on a proper construction of a document, annexed to the land, *prima facie* it is annexed to every part thereof, unless the contrary clearly appears. . .

In the end, I come to the conclusion that s. 78 of the Law of Property Act 1925 caused the benefit of the restrictive covenant in question to run with the red land and therefore to be annexed to it, with the result that the plaintiff company is able to enforce the covenant against Mill Lodge, not only in its capacity as owner of the green land, but also in its capacity as owner of the red land. . .

27.3.2.3 Drafting of restrictive covenants in the light of *Federated Homes*

***ROAKE v CHADHA AND ANOTHER* [1983] 3 All ER 503, Chancery Division**

FACTS: A clause in a 1934 conveyance expressly stated that the benefit of a number of restrictive covenants was not to pass by annexation.

HELD: The judge rejected an argument that the benefit of the covenants had nevertheless been annexed by virtue of s. 78 of the Law of Property Act 1925. Careful drafting had excluded the effect of s. 78.

HIS HONOUR JUDGE PAUL BAKER QC: . . . Counsel for the plaintiffs' method of applying it is simplicity itself. The *Federated Homes* case shows that s. 78 brings about annexation, and that the operation of the section cannot be excluded by a contrary intention. As I have indicated, he supports this last point by reference to s. 79, which is expressed to operate 'unless a contrary intention is expressed', a qualification which, as we have already noticed, is absent from s. 78. Counsel for the plaintiffs could not suggest any reason of policy why s. 78 should be mandatory, unlike, for example, s. 146 of the 1925 Act, which deals with restrictions on the right to forfeiture of leases and which, by an express provision, 'has effect notwithstanding any stipulation to the contrary'.

I am thus far from satisfied that s. 78 has the mandatory operation which counsel for the plaintiffs claimed for it. But, even if one accepts that it is not subject to a contrary intention, I do not consider that it has the effect of annexing the benefit of the covenant in each and every case irrespective of the other express terms of the covenant. I notice that Brightman LJ did not go so far as that, for he said in the *Federated Homes* case [1980] 1 All ER 371 at 381, [1980] 1 WLR 594 at 606:

I find the idea of the annexation of a covenant to the whole of the land but not to a part of it a difficult conception fully to grasp. I can understand that a covenantee

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may expressly or by necessary implication retain the benefit of a covenant wholly under his own control, so that the benefit will not pass unless the covenantee chooses to assign; but I would have thought, if the benefit of a covenant is, on a proper construction of a document, annexed to the land, *prima facie* it is annexed to every part thereof, unless the contrary clearly appears.

So at least in some circumstances Brightman LJ is considering that despite s. 78 the benefit may be retained and not pass or be annexed to and run with land. In this connection, I was also referred by counsel for the defendants to Sir Lancelot Elphinstone's *Covenants Affecting Land* (1946) p. 17, where the author says, with reference to this point (and I quote from a footnote on that page):

. . . but it is thought that, as a covenant must be construed as a whole, the court would give due effect to words excluding or modifying the operation of the section.

The true position as I see it is that, even where a covenant is deemed to be made with successors in title as s. 78 requires, one still has to construe the covenant as a whole to see whether the benefit of the covenant is annexed. Where one finds, as in the *Federated Homes* case, the covenant is not qualified in any way, annexation may be readily inferred; but, where, as in the present case, it is expressly provided that 'this covenant shall not enure for the benefit of any owner or subsequent purchaser of any part of the Vendor's Sudbury Court Estate at Wembley unless the benefit of this covenant shall be expressly assigned', one cannot just ignore these words. . .

27.4 Assignment of the Benefit of Restrictive Covenants

27.4.1 THE RULES FOR A VALID ASSIGNMENT

***MILES v EASTER* [1933] Ch 611, Court of Appeal**

FACTS: A 1908 conveyance contained a covenant made by the purchasers that they would not do anything which might cause a nuisance to the vendor's land. The conveyance showed that the vendors retained land in the vicinity, referring as it did to a 'foreshore belonging to the vendors', but the deed did not go further in defining the land.

HELD: Due to uncertainty as to the land intended to benefit, the plaintiff had failed to show that the benefit of the restrictive covenant made in the 1908 deed had vested in them.

ROMER LJ: . . . It is plain, however, from these and other cases, and notably that of *Renals v Cowlishaw* (1878) 9 ChD 125, that if the restrictive covenant be taken not merely for some personal purpose or object of the vendor, but for the benefit of some other land of his in the sense that it would enable him to dispose of that land to greater advantage, the covenant, though not annexed to such land so as to run with any part of it, may be enforced against an assignee of the covenantor taking with notice, both by the covenantee and by persons to whom the benefit of such covenant has been assigned, subject however to certain conditions. In the first place, the 'other land' must be land that is capable of being benefited by the covenant—otherwise it would be impossible to infer that the object of the covenant was to enable the vendor to dispose of his land to greater advantage. In the next place, this land must be 'ascertainable' or 'certain,' to use the words of Romer and Scrutton LJJ respectively. For, although the Court will readily infer the intention to benefit the other land of the vendor where the existence and situation of such land are indicated in the conveyance or have been otherwise shown with reasonable certainty, it is impossible to do so from vague references in the conveyance or in other documents laid before the Court as to the existence of other lands of the vendor, the extent and situation of which are undefined. In the third place, the covenant cannot be enforced by the

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covenantee against an assign of the purchaser after the covenantee has parted with the whole of his land.

. . . it is impossible to ascertain with any certainty what lands retained by the covenantees when the conveyance of October 23 1908, was executed were intended to be protected by the covenant so that the covenantees might thereafter dispose of them to greater advantage. That conveyance shows that the vendors were possessed of other land in the vicinity, reference being made in the deed to 'foreshore belonging to the vendors west of the harbour entrance,' without further defining it, and to land coloured yellow on the plan attached to the deed in terms that clearly indicate their ownership of such land. But our attention is also called to certain transactions between the covenantees and a company called The Service Land Company Ltd, in the month of January 1912, that show that in October 1908, the covenantees were possessed of still other lands at Lancing and Shoreham of considerable, though, so far as the Court is concerned, of undefined extent. Referring to these other lands, Bennett J said: 'There was no evidence before me as to where such other lands were situate or as to the area thereof. There was no evidence before me as to the purposes for which the Shoreham Company acquired these lands, whether for the purpose of resale or for development as a building estate. . . I am really left to guess at the reasons, if any, which led to the introduction in the conveyance of October 23 1908, of the purchaser's covenant.' In these circumstances, the learned judge declined to draw the conclusion that the covenant was inserted in the conveyance for the protection of all the other lands of the Shoreham Company so as to enable them to dispose of such lands to the best advantage. And he was justified in so doing. It is impossible to ascertain whether all or some, and if so which, part of such lands were capable of being protected by the reservation of the covenant. When, therefore, by indentures of October 19 1920, and October 15 1921, the Shoreham Company and the Seaside Company (to whom the Shoreham Company had previously sold the whole of their still unsold lands) purported to assign to the defendant Easter the benefit of the restrictive covenant, there can be no sure ground for thinking that any of such still unsold lands were lands for the protection of which the covenant had been obtained. It is plain that at that time all the lands coloured green had been disposed of. The defendants have accordingly failed to show that there is now vested in them, or either of them, the right to enforce the restrictive covenant contained in the deed of October 23, 1908. . .

27.5 Building Schemes or Schemes of Development

27.5.1 THE CONDITIONS REQUIRED FOR A VALID BUILDING SCHEME

***ELLISTON v REACHER* [1908] 2 Ch 374, Chancery Division**

FACTS: A building scheme was created in 1861. The plots were sold from an office in Ipswich, but the scheme itself was on 10 acres of land at Felixstowe. Anybody entering the office at Ipswich would have seen on the wall a large plan of the scheme, with the restrictive covenants endorsed prominently on the plan. Potential purchasers could buy a copy of this plan for 1s 6d. The covenants were of a kind to preserve the 'exclusive' nature of the area.

HELD: It was a natural inference from the advertising that the creator of the scheme intended the covenants to be mutually enforceable.

PARKER J: I pass, therefore, to the consideration of the question whether the plaintiffs can enforce these restrictive covenants. In my judgment, in order to bring the principles of *Renals v Cowlshaw* (1878) 9 ChD 125 and *Spicer v Martin* (1888) 14 App Cas 12 into operation it must be proved that both the plaintiffs and

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defendants derive title under a common vendor; that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors. If these four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor irrespective of the dates of the respective purchases. I may observe, with reference to the third point, that the vendor's object in imposing the restrictions must in general be gathered from all the circumstances of the case, including in particular the nature of the restrictions. If a general observance of the restrictions is in fact calculated to enhance the values of the several lots offered for sale, it is an easy inference that the vendor intended the restrictions to be for the benefit of all the lots, even though he might retain other land the value of which might be similarly enhanced, for a vendor may naturally be expected to aim at obtaining the highest possible price for his land. Further, if the first three points be established, the fourth point may readily be inferred, provided the purchasers have notice of the facts involved in the three first points; but if the purchaser purchases in ignorance of any material part of those facts, it would be difficult, if not impossible, to establish the fourth point. It is also observable that the equity arising out of the establishment of the four points I have mentioned has been sometimes explained by the implication of mutual contracts between the various purchasers, and sometimes by the implication of a contract between each purchaser and the common vendor, that each purchaser is to have the benefit of all the covenants by the other purchasers, so that each purchase is in equity an assign of the benefit of these covenants. In my opinion the implication of mutual contract is not always a perfectly satisfactory explanation. It may be satisfactory where all the lots are sold by auction at the same time, but when, as in cases such as *Spicer v Martin*, there is no sale by auction, but all the various sales are by private treaty and at various intervals of time, the circumstances may, at the date of one or more of the sales, be such as to preclude the possibility of any actual contract. For example, a prior purchaser may be dead or incapable of contracting at the time of a subsequent purchase, and in any event it is unlikely that the prior and subsequent purchasers are ever brought into personal relationship, and yet the equity may exist between them. It is, I think, enough to say, using Lord Macnaghten's words in *Spicer v Martin*, that where the four points I have mentioned are established, the community of interest imports in equity the reciprocity of obligation which is in fact contemplated by each at the time of his own purchase. . .

Proceeding with the facts as we know them, it appears that, though the lots were according to the sale plan to be offered to the members of the society in August 1860, the society did not complete its title to the property until early in January 1861. The unexecuted engrossment bears date a few days after such completion. It appears also that the society prepared and procured to be printed a form of conveyance for use on the sale of every lot, and that such printed form was in fact used on the sales of the lots purchased by the predecessors in title of the plaintiffs and defendants respectively. Further, a copy of the sale plan was pasted on canvas and hung up in the offices of the society, and as and when plots were sold such plots

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were marked off on the plan in Indian ink. Most if not all of the plots were so marked off as sold before the end of the year 1865. . .

Under all the circumstances of the case it is in my opinion sufficiently established not only that the predecessors of the plaintiffs and the defendants respectively had notice of the intention of their common vendors that the restrictions in question should enure for the benefit of all the lots offered for sale, but that they made their respective purchases on that footing. . .