In re UNION OF LONDON AND SMITH'S BANK LIMITED'S CONVEYANCE.

MILES *v.* EASTER.

[1931. U. 546.]

C. A.
1932
BENNETT J.
July 5, 6, 7, 8, 11, 12, 29.
C. A.
1933
Feb. 7, 9, 10, 13; *March* 17.

Restrictive Covenant—Benefit not running with the Land—Assignment by Covenantee of all adjoining Land—Enforceability of Covenant against Assign of Covenantor.

Where on a sale otherwise than under a building scheme a restrictive covenant is taken, the benefit of which is not on the sale annexed to the land retained by the covenantee so as to run with it, an assign of the covenantee's retained land cannot enforce the covenant against an assign (taking with notice) of the covenantor unless he can show (i.) that the covenant was taken for the benefit of ascertainable land of the covenantee capable of being benefited by the covenant, and (ii.) that he (the covenantee's assign) is an express assign of the benefit of the covenant.

But when the covenantee has once parted with the whole of his retained land he cannot thereafter effectually assign the benefit of the covenant.

So *held* by the Court of Appeal, affirming the decision of Bennett J.

Chambers v. *Randall* [1923] 1 Ch. 149 approved.

Ives v. *Brown* [1919] 2 Ch. 314 and *Lord Northbourne* v. *Johnston & Son* [1922] 2 Ch. 309 explained and distinguished.

ORIGINATING SUMMONS taken out by the plaintiff, Frederick Gaston Miles, against the defendants, Stephen Easter and Alice Charlotte Jane Easter, his wife, asking (inter alia) :—

1. That it might be declared that the restrictive covenant contained in a conveyance of October 23, 1908, whereby Nathaniel George Blaker, Herbert Harry Blaker and Cecil Somers Clarke (the purchasers) covenanted for themselves their heirs and assigns not to do anything on any of the land thereby conveyed which might be or might grow to be a nuisance or damage to the Shoreham and Lancing Land Company, Ld. (the vendors) or the Union of London and Smith's Bank, Ld., and not to erect or authorize to be erected on the hereditaments thereby conveyed any factory within 460 yards of the land coloured green therein referred to and not to erect any hotel public-house beer-house or

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beer-shop on the hereditaments thereby conveyed and not to authorize more than one grocer's licence for the sale of wine beer or spirits to be applied for or used within 460 yards of the said land coloured green, was not enforceable by the defendants or either of them against the plaintiff or his successors in title owner or owners of freehold property situate at Lancing aforesaid containing 147 acres or thereabouts and bounded in manner therein mentioned and which was more particularly described in a conveyance dated May 15, 1929, and made between George Hemsley of the one part and the plaintiff of the other part and delineated on a plan drawn thereon and coloured pink and purple.

2. That it might be declared that the restrictive covenant contained in a conveyance of May 11, 1909, whereby William Phillips (the purchaser) covenanted not to do anything on any of the land thereby conveyed which might be or grow to be a nuisance to Arthur Pullen Bury (the vendor) or to the neighbourhood and not to erect or authorize to be erected on any of the said land any factory hotel public-house beer-house or beer-shop and not to authorize any grocer's licence for the sale of wine beer or spirits to be applied for or used in respect of or on any part of the said land, was not enforceable by the defendants or either of them or by any other person against the plaintiff or his successors in title owner or owners of the freehold property thereinbefore described.

The summons was headed (inter alia) in the matter of the conveyances of October 23, 1908, and May 11, 1909.

The following statement of the facts is taken substantially from the considered judgment of Bennett J.: On June 24, 1907, a limited company called the Shoreham and Lancing Land Company, Ld. (hereinafter referred to as "the Shoreham Company"), acquired by purchase from Mr. Carr Lloyd a considerable area of land in the vicinity of Shoreham and Lancing, in the county of Sussex. The land so acquired was mortgaged by the Shoreham Company. In the year 1908 that company agreed to sell a part of the land they had purchased from Mr. Carr Lloyd to a Mrs. Blaker. She died

before any conveyance had been made to her of the land she had agreed to purchase. The executors of her will were Nathaniel George Blaker, Herbert Harry Blaker and Cecil Somers Clarke.

The conveyance of October 23, 1908, being the first of the conveyances mentioned in the title to the summons, was made for the purpose of carrying out the agreement of purchase made between the Shoreham Company and Mrs. Blaker. The parties to the deed were the Union of London and Smith's Bank, Ld., the first mortgagees, referred to in the deed as "the said Bank," of the first part, the Shoreham Company, referred to in the deed as "the vendors," of the second part, Lord Lucas, a second mortgagee, of the third part, George Cecil Buller, who was an incumbrancer upon the land conveyed, of the fourth part, and Mrs. Blaker's executors, referred to in the deed as "the purchasers," of the fifth part.

It appears from the recitals in this deed, and the fact is, that the land thereby conveyed was a part only of the land of the Shoreham Company. The lands conveyed by this deed had an area of 515 acres, 2 roods, 3 perches, and were delineated and described on the plan annexed thereto and thereon coloured pink, violet, brown and red. In addition to the land distinguished on this plan by these colours, there was other land which was owned and retained by the Shoreham Company and was distinguished on the plan by the colour green.

The plaintiff is the owner in fee of a portion of the land coloured pink on this plan. All of his holding is on the north side of the railway line shown on the plan. He derives his title from Mrs. Blaker's executors. After October 23, 1908, the defendant Mr. Easter became the owner in fee of the greater part of the land distinguished by the green colour on the plan. He derived his title thereto from the Shoreham Company. He is still the owner of a substantial part of it, but he has sold several parts of this land, and according to the evidence there are at the present time some fourteen or fifteen persons, in addition to Mr. Easter, who are the owners

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in fee of parcels of the land distinguished by the colour green on the plan annexed to the conveyance of October 23, 1908.

It was common ground between the parties that on the same day as that upon which the Shoreham Company acquired from Mr. Carr Lloyd the lands comprised in the conveyance of October 23, 1908, they also acquired from Mr. Carr Lloyd other lands in the vicinity of Shoreham and Lancing; but 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 from Mr. Carr Lloyd, whether for the purpose of resale or for development as a building estate. There was no evidence of the existence of any building scheme in pursuance of which the Shoreham Company intended to develop the land they had acquired from Mr. Carr Lloyd or any part thereof; and 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 purchasers' covenant.

It appears from the recitals to an indenture of January 19, 1912, made between the Shoreham Company of the first part, Richard Bragg of the second part, and the Seaside Land Company of the third part, that between June 24, 1907, and January 19, 1912, the Shoreham Company had from time to time sold portions of the land they had acquired from Mr. Carr Lloyd contemporaneously with the land comprised in the conveyance of October 23, 1908, and that the Shoreham Company were then in voluntary liquidation, Richard Bragg being their liquidator. In these circumstances, by the indenture of January 19, 1912, the Shoreham Company conveyed to the Seaside Land Company all the unsold portions of the land the Shoreham Company had bought from Mr. Carr Lloyd on June 24, 1907.

By an indenture dated October 19, 1920, and made between the Shoreham Company of the first part, Alexander Smith, who was then their liquidator, of the second part, the Seaside Land Company of the third part, the defendant Stephen Easter of the fourth part, and the defendant Alice Charlotte

Jane Easter, wife of the said Stephen Easter, of the fifth part, after reciting five indentures of June 24, 1907, whereby certain hereditaments which were referred to as the Shoreham Estate had been assured to the Shoreham Company in fee simple, and reciting that the Shoreham Company had sold certain hereditaments in land, part of the Shoreham Estate, and on completion of the said sale had assured the said lands and hereditaments to the respective purchasers thereof, subject to certain covenants restrictive of building upon and user of the said lands and hereditaments or otherwise contained in the assurances of the said respective purchasers thereof, and reciting a special resolution of the voluntary liquidation of the Shoreham Company, and reciting the indenture of January 19, 1912, between the Shoreham Company, Bragg, and the Seaside Company, whereby the lands and hereditaments thereby described, part of the then unsold portions of the Shoreham Estate, had been assured to the use of the Seaside Company in fee simple, and reciting that the Seaside Company from time to time sold divers further lands and hereditaments, part of the Shoreham Estate, and on completion of the said several sales had assured the same lands and hereditaments to the respective purchasers thereof, subject to certain covenants restrictive of building upon or of user of the same lands and hereditaments contained in the assurances of the said respective purchasers thereof, and reciting that certain portions of the Shoreham Estate had not been sold by the Seaside Company and that the Seaside Company was still in possession thereof, it was witnessed that in consideration of the sum of one guinea to Smith, as liquidator of the Shoreham Company, and of one guinea to the Seaside Company paid by the defendant Stephen Easter, the Shoreham Company and the Seaside Company respectively, according to their respective estates and interest as beneficial owners and if and so far as they respectively lawfully could or might thereby respectively grant unto the defendant Stephen Easter of the benefit in common with the Seaside Company and other persons (if any) entitled thereto, the covenants restrictive of building upon

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and user of the several parts already sold of the Shoreham Estate contained in the respective assurances to the respective purchasers thereof, to hold the same unto the said Stephen Easter, his heirs and assigns.

By an indenture dated October 15, 1921, made between the Shoreham Company of the first part, its liquidator of the second part, the Seaside Company of the third part, a company called the South Coast Construction Company, Ld., of the fourth part, the defendant Stephen Easter of the fifth part, Mrs. Easter of the sixth part, and Mrs. Dorothy Vera Hamilton of the seventh part, an assignment was made by the Shoreham Company, the Seaside Company and the Construction Company, to the defendant Stephen Easter of all the benefit of the covenants restrictive of building upon or user of the several parts already sold of the Shoreham Estate lying to the west of the entrance to Shoreham Harbour contained in the respective assurances to the respective purchasers thereof, with certain exceptions which are not material.

The facts relating to the second question raised by the summons were as follows :—

By an indenture of May 10, 1909, Mrs. Blaker's executors conveyed part of the land which had been conveyed to them on October 23, 1908, to a Mr. Pullen Bury. Mr. Pullen Bury proceeded at once to divide up into parcels what he had purchased from Mrs. Blaker's executors and to convey those parcels to a number of different purchasers, and on May 11, 1909, he conveyed one of those parcels to Mr. Phillips. The parcel conveyed to Phillips included the land now owned by the plaintiff. Phillips entered into a restrictive covenant with Mr. Pullen Bury, and the plaintiff at the time of his purchase had notice of this restrictive covenant. The covenant is in these terms : " The purchaser for himself his heirs and assigns owner or owners for the time being of the hereditaments hereby conveyed but not so as to make the purchaser or any person claiming under him personally liable after he or they shall have parted with the said hereditaments hereby covenants with the vendor his heirs and assigns not to do anything on any of the land hereby conveyed which

may be or grow to be a nuisance or damage to the vendor or to the neighbourhood and not to erect or authorise to be erected on any of the said land any factory hotel public house beer house or beer shop and not to authorise any grocer's licence for the sale of wine beer or spirits to be applied for or used in respect of or on any part of the said land."

On April 10, 1931, Mr. Arthur Pullen Bury entered into a deed with the defendants whereby, in consideration of the sum of 40*l.* paid to Mr. Pullen Bury by the defendants, Mr. Pullen Bury, as beneficial owner, if and so far as he lawfully could or might, thereby granted the benefit in common with other persons (if any) entitled thereto of the covenants restrictive of building upon or user of parts of the premises originally conveyed to Mr. Pullen Bury which had been sold contained in the respective assurances of the respective purchasers thereof, except the covenants intended to be thereby released. At the date of this deed Mr. Pullen Bury had sold all the land conveyed to him by Mrs. Blaker's executors on May 10, 1909, and the defendants were the owners in fee of a considerable part of the lands comprised in that conveyance.

Cleveland-Stevens K.C. and *Raymond Jennings* for the plaintiff. The sole legal question is whether in the circumstances certain covenants, the benefit of which had been assigned to the defendants, are enforceable against the plaintiff. These covenants are not covenants the benefit of which could or did run with the land. If the benefit of these covenants passed it passed by the assignments. The only persons benefited by the assignments are Mr. and Mrs. Easter.

[They referred to *Renals* v. *Cowlishaw* (1); *Brigg* v. *Thornton* (2); *Rogers* v. *Hosegood* (3); and *Dyson* v. *Forster*. (4)]

On the authority of *Renals* v. *Cowlishaw* (1) and *Rogers* v. *Hosegood* (3) it is submitted that it is impossible to contend that the benefit of these covenants was so effectually

(1) (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866.
(2) [1904] 1 Ch. 386, 395.
(3) [1900] 2 Ch. 388, 397.
(4) [1909] A. C. 98, 102.

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annexed by some one that on the conveyance of part of the lands, without more, the benefit passed to purchasers under those conveyances.

The next point is the question whether the assignments in 1920, 1921 and 1931 were effective to pass to Mr. and Mrs. Easter, or both, the benefit of the covenants in the conveyances of 1908 and 1909. If the benefit of the covenants was so annexed that without any express assignment the benefit would pass to the defendants, that would be an end of the case. The benefit of the covenants not being such as to pass automatically on a conveyance without express assignment, a benefit of this kind could have passed only if it had been assigned by the Shoreham Company and Mr. Pullen Bury respectively, while they respectively retained the land for the benefit of which it is assumed that the covenants were taken.

[They referred to Williams on Vendor and Purchaser, 3rd ed., vol. i., p. 467; Jolly on Restrictive Covenants, 2nd ed., p. 47, para. 2; and to *Ives* v. *Brown* (1); *Lord Northbourne* v. *Johnston & Son* (2); *Chambers* v. *Randall* (3); *Formby* v. *Barker* (4); *London County Council* v. *Allen* (5); and *Long Eaton Recreation Grounds Co.* v. *Midland Ry.* (6)]

Topham K.C. and *F. Baden Fuller* for the defendants. When the question whether the benefit of a covenant runs in equity is being considered, it is purely an equitable consideration as soon as the original covenantors cease to be involved.

In the case of a covenant with a man who no longer has any land capable of being benefited by that covenant, he cannot sue an assign because there is an equitable remedy against that assign. If an assign of a covenant chooses to sue, having no land capable of being benefited, he will get no help from the Court of Chancery. In every deed of the plaintiff's title he and his successors take the land subject to the deed of October 23, 1908, or later to the deed of 1909.

(1) [1919] 2 Ch. 314.
(2) [1922] 2 Ch. 309.
(3) [1923] 1 Ch. 149.
(4) [1903] 2 Ch. 539.
(5) [1914] 3 K. B. 642.
(6) [1902] 2 K. B. 574.

It is not necessary that the deed should expressly say that the covenant is for the benefit of any particular land in order to annex the covenant: see *Western* v. *MacDermot.* (1) In a covenant with X. and his assigns the word "assigns" means "assigns of the land" if it can be found out from the deed as a whole to what land reference is made: see *Renals* v. *Cowlishaw.* (2) Here "assigns" means "assigns of the land coloured green."

[They referred to *Rogers* v. *Hosegood* (3); *In re Sunnyfield* (4); *Ives* v. *Brown* (5); and *Everett* v. *Remington.* (6)]

The mere fact that the covenant has for some years been separate is not enough to prevent an assignee from suing after he obtains the covenant, provided that the Court regards him, in equity, as a person covered by the word "assign." An assignee of the covenant cannot sue an assignee of the burdened land, unless he is an assignee of some land for the benefit of which the covenant was intended to be assigned. Severance does not prevent a covenant from being assignable by a subsequent deed.

[They referred to *Chambers* v. *Randall* (7) and *Lawrence* v. *Cassel.* (8)]

Cleveland-Stevens K.C. in reply. As soon as the Shoreham Company in 1912 had parted with the whole of the green land the covenant became a covenant in gross and was no longer capable of assignment. When a person gets rid of all his land he puts it out of his power to sue on the covenants afterwards. There appears to be no case in which it has been held that a covenant of this kind can be assigned.

[He referred to *Kelsey* v. *Dodd.* (9)]

Cur. adv. vult.

1932. July 29. BENNETT J. read the following judgment: The first question raised by this summons is whether certain

(1) (1866) L. R. 1 Eq. 499, 506.
(2) 9 Ch. D. 125.
(3) [1900] 2 Ch. 388.
(4) [1932] 1 Ch. 79, 85.
(5) [1919] 2 Ch. 314.
(6) [1892] 3 Ch. 148.
(7) [1923] 1 Ch. 149.
(8) [1930] 2 K. B. 83.
(9) (1881) 52 L. J. (Ch.) 34.

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covenants contained in a conveyance dated October 23, 1908, being the first of the conveyances mentioned in the title to the summons, are capable of being enforced by the defendants or either of them against the plaintiff. The covenants are covenants restricting the user of the land thereby conveyed. The plaintiff is now the owner in fee of a part of the land thereby conveyed. At the time the plaintiff acquired the land he now owns, he had notice of the restrictive covenants. It has been conceded on the defendants' behalf that the burden of these restrictive covenants runs with the land he now owns.

The second question raised by the summons raises similar points regarding restrictive covenants imposed upon the same land by a conveyance of May 11, 1909, being the second of the conveyances mentioned in the title to the summons. Apart from the question of costs, these are the only two questions to be decided on the summons, which has been amended by deleting all reference to the Law of Property Act, 1925, raising the questions as questions of construction affecting the plaintiff and the defendants only, the question of construction arising out of the language of the two conveyances and of their effect in the events which have happened, the parties being agreed as to the facts.

The history of the matter begins in the month of June, 1907. [His Lordship then stated the facts as above set out down to the point at which he stated that Easter and some fourteen or fifteen other persons at the date of the summons were the owners of the land coloured green, and continued:] It was admitted at the hearing by Mr. Topham, on behalf of the defendants, that all the plaintiff's land is more than 460 yards away from the land coloured green on the plan. It is clear that if it be intended to annex to a parcel of land the benefit of a covenant restricting the user of another parcel of land, the deed entered into to give effect to this intention must define the parcel of land to which the benefit of the covenant is to be annexed: see *Renals* v. *Cowlishaw*. (1) In my judgment, the deed ought

(1) 11 Ch. D. 866, 868.

also to make it plain that it is intended to annex the benefit of the covenant to the defined parcel.

The law relating to covenants restricting the user of land entered into by persons who do not stand towards one another in the relationship of landlord and tenant is of modern origin. It is, I think, still in course of development. The annexation to one parcel of land of the benefit of a covenant restricting the user of another parcel creates a relationship between the two parcels analogous to that of dominant and servient tenement, and if the parties intended to do this, they ought, in my judgment, to do it in such a manner and by the use of such language as to leave no room for doubt as to whether or not it has been done.

I now proceed to consider the meaning and effect of the covenants contained in the conveyance of October 23, 1908. The deed contains a declaration in these terms: "The expression 'the vendors' as hereinbefore used shall where the context admits include besides the Shoreham and Lancing Land Company Limited their successors and assigns and the expression 'the purchasers' as hereinbefore used shall where the context admits include besides the said Nathaniel George Blaker Herbert Harry Blaker and Cecil Somers Clarke their heirs executors administrators and assigns."

The deed contains certain covenants entered into by the vendors as well as covenants entered into by the purchasers. The first of the vendors' covenants so far as material is as follows: "The vendors for themselves and their successors in title and assigns do hereby (with the consent of the Bank Lord Lucas and George Cecil Buller as such mortgagees or incumbrancers as aforesaid) covenant with the purchasers their heirs and assigns or other the person or persons who shall for the time being be the owner or owners of the lands hereby conveyed or any part or parts thereof (all of whom are included under the expression 'the owner of the land coloured pink' as hereinafter used)" to do certain things upon the land.

It is, I think, clear that, although the vendors are made to covenant for themselves and their successors in title and

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assigns, the only persons who could have enforced this covenant were the Shoreham Company, because in the first place the covenant is an affirmative covenant, that is to say, a covenant to do certain things, and in the second place, there is nothing to indicate an intention to burden the owner for the time being of any particular land with the obligation of performing the covenant. It also is, I think, clear that by making the vendors covenant not merely with the purchasers but also with their heirs or assigns or other the person or persons who shall for the time being be the owners of the land thereby conveyed or any part or parts thereof, the draftsman was minded to make the benefit of the covenant run with the land. It is not necessary to consider or to determine whether he was successful.

The next covenant by the vendors throws further light on the draftsman's intention. It is in these terms: "The vendors for themselves their successors and assigns as owners of the land coloured green on the plan hereto do hereby (with the consent of the said Bank Lord Lucas and George Cecil Buller as such mortgagees or incumbrancers as aforesaid) further covenant with the purchasers their heirs and assigns or other the owners or owner for the time being of the land coloured pink or any part or parts thereof not to do or permit or suffer to be done anything upon the said land coloured green on the said plan hereto or any part thereof which would interrupt or interfere with the natural course of the stream or watercourse running from the south-west corner of the said land coloured pink into the west portion of the said land coloured green and to keep the said stream or watercourse at the western end of the said land coloured green clear of all weeds and other obstructions and not to throw or permit or suffer to be thrown therein any spoil rubbish or refuse whatsoever and not to throw or permit or suffer to be thrown into the said stream or watercourse on the said land coloured green (while the said stream or watercourse at the south-west side of the said land coloured pink shall flow into the said land coloured green) any spoil rubbish or refuse whatsoever which may

contaminate the quality of the water therein and not to do or so far as possible permit to be done anything upon the said land coloured green which may be or which may grow to be a nuisance or damage to the owner of the said land coloured pink or any part thereof and not to erect or permit to be erected on the said land coloured green any factory."

The phrase, "the vendors for themselves their successors and assigns as owners of the land coloured green," indicates, in my judgment, the intention to throw the burden of the negative and restrictive covenant which follows upon and to annex it to the green land, whilst the fact that the covenant is given to "the purchasers their heirs and assigns or other the owners or owner for the time being of the land coloured pink or any part or parts thereof" is, in my judgment, a clear indication of the intention to annex the benefit of the covenant to each and every part of the pink land. Therefore the draftsman has shown that when he desires to annex the benefit and burden respectively of restrictive covenants to different parcels of land he knows the appropriate language to use in order to do so.

I now come to the covenant which gives rise to the first question on the summons, and it is in the following terms: "The purchasers so as to bind their trust estate but not their own personal or private estates for themselves their heirs and assigns do hereby covenant with the vendors their successors and assigns and also as a separate covenant with the said Bank their successors and assigns (but not so as to make the purchasers or any person claiming under them personally liable after parting with the land in respect of which any breach of this covenant shall subsequently be committed) not to do anything on any of the lands hereby conveyed which may be or may grow to be a nuisance or damage to the vendors or to the said Bank and not to erect or authorise to be erected on the hereditaments hereby conveyed any factory within 460 yards of the said land coloured green and not to erect any hotel public-house beer-house or beer-shop on the hereditaments hereby conveyed

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and not to authorise more than one grocer's licence for the sale of wine beer or spirits to be applied for or used within 460 yards of the said land coloured green."

In view of the fact that no part of the plaintiff's holding is within 460 yards of the land coloured green, the only covenants with which I am concerned are, first, the covenant not to erect any hotel, public-house, beer-house or beer-shop on the hereditaments thereby conveyed; and secondly, not to do anything on any of the lands thereby conveyed which might be or might grow to be a nuisance or damage to the vendors or to the Bank.

The first contention on behalf of the defendants was that the benefit of these covenants was annexed to the land coloured green on the plan so as to run therewith without express assignment. In my judgment this contention cannot prevail. One must have regard to the language employed in the deed, and there is a striking contrast between the language employed in the preceding covenant given by the vendors and the language employed in the purchasers' covenant now under consideration. In the case of the covenant given to the purchasers by the vendors it was given to them, their heirs and assigns or other the owner or owners for the time being of the land coloured pink or any part or parts thereof—words which seem to me to show exactly the intention of annexing the benefit of the covenant to every part of the land so coloured. The covenant now under consideration is given to the vendors, their successors and assigns, and also as a separate covenant to the Bank, their successors and assigns. It is not given to the owner or owners for the time being of the land coloured green or any part thereof. It would not be right to conclude that the omission of any reference to the green land was accidental or due to careless drafting, and yet a reference to it is, in my judgment, necessary if the defendants' construction is to prevail. I cannot imply a reference to it, and therefore there is, in my judgment, no basis for the defendants' contention, and on a proper construction of the covenant no annexation of the benefit of it to any defined land of the vendors.

This conclusion makes it necessary for me to determine whether the purchasers' covenant can be enforced by an express assignee of the benefit thereof against an assignee of a part of the lands to which the burden of such covenants was annexed. [His Lordship then resumed the statement of the facts as above set out, and stated further facts down to the statement of the effect of the deed of assignment by the Shoreham Company to Mr. Easter, dated October 15, 1921, and continued:] Upon the footing that the benefit of the purchasers' covenants contained in the conveyance of October 23, 1908, was not annexed to the land coloured green thereon, so as to run therewith without express assignment, the defendant Stephen Easter claims to be entitled to enforce those covenants against the plaintiff by virtue of the express assignment contained in those deeds.

In my judgment, in order that an express assignee of a covenant restricting the user of land may be able to enforce that covenant against the owner of the land burdened with the covenant, he must be able to satisfy the Court of two things. The first is that it was a covenant entered into for the benefit or protection of land owned by the covenantee at the date of the covenant. Otherwise it is a covenant in gross, and unenforceable except as between the parties to the covenant: see *Formby* v. *Barker*. (1) Secondly, the assignee must be able to satisfy the Court that the deed containing the covenant defines or contains something to define the property for the benefit of which the covenant was entered into: see James L.J. in *Renals* v. *Cowlishaw*. (2)

I will assume in favour of the defendants that the purchasers' covenants were entered into for the benefit or protection of land owned by the Shoreham Company on October 23, 1908. I can find nothing in the deed to define the property for the benefit of which the covenants were entered into.

In my judgment, therefore, the answer to the first question is that the defendants cannot, nor can either of them, enforce

(1) [1903] 2 Ch. 539, 554. (2) 11 Ch. D. 866, 868.

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against the plaintiff the purchasers' covenant contained in the conveyance of October 23, 1908.

I now turn to the second question raised by the summons, which asks: "That it may be declared that the restrictive covenant contained in the above mentioned conveyance of May 11, 1909, whereby the said William Phillips (the purchaser) covenanted not to do anything on any of the land thereby conveyed which might be or grow to be a nuisance or damage to the said Arthur Pullen Bury (the vendor) or to the neighbourhood and not to erect or authorize to be erected on any of the said land any factory hotel public-house beer-house or beer-shop and not to authorize any grocer's licence for the sale of wine beer or spirits to be applied for or used in respect of or on any part of the said land is not enforceable by the defendants or either of them or by any other person against the plaintiff or his successors in title owner or owners of the freehold property hereinbefore described." [His Lordship then stated the facts relating to the second question raised by the summons as above set out, and continued:] The defendants argued, first, that the benefit of the covenants entered into by Phillips as purchaser with Pullen Bury as vendor in the conveyance of May 11, 1909, was annexed to some land of Pullen Bury's acquired by him from Mrs. Blaker's executors and retained by him at the time of the conveyance to Phillips, and that the defendants, as owners of the land or part thereof to which the benefit of Phillips' covenants was annexed, could enforce them against the plaintiff.

In my judgment this argument fails, for the reason (*a*) that the conveyance makes no attempt to annex the benefit of the covenant to any land retained by Pullen Bury, and (*b*) contains no definition of any land to which the benefit of the covenant was annexed.

The second argument was based on the express assignment of the benefit of the covenants contained in the deed of April 10, 1931. But this argument also fails, in my judgment, because of the absence in the conveyance of May 11, 1909, of any definition of the land for the benefit of which the covenant was given.

On those grounds, therefore, the plaintiff is, in my judgment, entitled to the two declarations for which he asks on the originating summons.

J. L. D.

The defendants appealed. The appeal was heard on February 7, 9, 10 and 13, 1933.

Topham K.C. and *F. Baden Fuller* for the appellants.

Cleveland-Stevens K.C. and *Raymond Jennings* for the respondent.

The arguments on the appeal were substantially the same as those used in the Court below. In addition to the cases there cited, *Reid* v. *Bickerstaff* (1) and *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (2) were referred to.

Cur. adv. vult.

1933. March 17. The judgment of the Court (LORD HANWORTH M.R., LAWRENCE and ROMER L.JJ.) was read by

ROMER L.J. This is an appeal by the defendants from an order made by Bennett J. on July 29, 1932, whereby it was declared that certain restrictive covenants affecting lands of the plaintiff at Shoreham and Lancing in the county of Sussex, and contained in two indentures dated respectively October 23, 1908, and May 11, 1909, are not enforceable by the defendants or either of them against the plaintiff.

The relevant facts, as to which there is no dispute, are fully stated in the judgment of the learned judge and need not be repeated here. The questions arising on the appeal depend upon the application to those facts of the law relating to restrictive covenants affecting land. That the plaintiff is bound by the covenants in question is not disputed, in view of the fact that he purchased his lands with notice of them. What is in dispute is the question whether the defendants are entitled to the benefit of such covenants. Now the defendants are not the original covenantees, and it therefore becomes necessary to ascertain what person other

(1) [1909] 2 Ch. 305. (2) [1926] A. C. 108.

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than the original covenantee is entitled to the benefit of a restrictive covenant affecting land. This question was put to himself by Hall V.-C. in *Renals* v. *Cowlishaw* (1), and the answer was given in a judgment so well known that it is unnecessary to refer to it at length. It is a judgment that has received the approval both of this Court and of the House of Lords, and has always been regarded as a correct statement of the law upon the subject. Stated shortly it laid down this: that, apart from what are usually referred to as building scheme cases (and this is not a case of that sort), a purchaser from the original covenantee of land retained by him when he executed the conveyance containing the covenant will be entitled to the benefit of the covenant if the conveyance shows that the covenant was intended to enure for the benefit of that particular land. It follows that, if what is being acquired by the purchaser was only part of the land shown by the conveyance as being intended to be benefited, it must also be shown that the benefit was intended to enure to each portion of that land. In such cases the benefit of the restrictive covenant will pass to the purchaser without being mentioned. It runs with the land. In all other cases the purchaser will not acquire the benefit of the covenant unless that benefit be expressly assigned to him—or, to use the words of the Vice-Chancellor (2), "it must appear that the benefit of the covenant was part of the subject-matter of the purchase."

In *Renals* v. *Cowlishaw* (1) the covenant was entered into with the covenantee, his heirs and assigns, and it appears to have been argued that the use of the word assigns showed an intention that the benefit of the covenant should run with the land. But, to use the language of Farwell J. in *Rogers* v. *Hosegood* (3), "there was nothing to shew what assigns were intended by the words of the covenant; there was no necessary implication that each assign of each parcel of the vendor's land, whether acquired before or after the date of the deed, was to have the benefit of the covenant;

(1) 9 Ch. D. 125. (2) 9 Ch. D. 125, 130.
(3) [1900] 2 Ch. 388, 396.

the inference, indeed, was to the contrary, and the Courts accordingly held that the covenant did not run, but must be expressly assigned in order to pass. Contrast this with the case of the ordinary covenants for title : these undoubtedly run with the land, and each purchaser of each portion of the land gets the benefit of the covenants so far as they relate to the land purchased by him. In both these cases the covenants are entered into with the heirs and assigns, but in the first case the word 'assign,' on the true construction of the deed, means 'assign of the covenant,' in the latter 'assign of the land, to which is annexed the benefit of the covenant by virtue of the evidence of intention so to contract which is found in the deed and the surrounding circumstances.'" In *Rogers* v. *Hosegood* (1) itself the benefit of the covenant was held to run with the land of the covenantees, for the covenant had been entered into with them, their heirs and assigns, with the express intent that the covenant would enure to the benefit of the covenantees, their heirs and assigns and others claiming under them to all or any of their lands adjoining or near to the premises then being conveyed to the covenantor. In *Renals* v. *Cowlishaw* (2) the benefit of the covenant had never been expressly assigned by the covenantee. In neither of these cases, therefore, did it become necessary for the Court to inquire into the circumstances in which an express assignee of the benefit of a covenant that does not run with the land is entitled to enforce it. In the present case, however, it is necessary to do so, inasmuch as the defendants claim to be the express assignees of the benefit of the restrictive covenants contained in the deeds of October 23, 1908, and May 11, 1909.

Now it may be conceded that the benefit of a covenant entered into with the covenantee or his assigns is assignable. The use of the word " assigns " indicates this : see Williams on Personal Property, 18th ed., p. 33. But it by no means follows that the assignee of a restrictive covenant affecting land of the covenantor is entitled to enforce it against an assign of that land. For the burden of the covenant did not

(1) [1900] 2 Ch. 388. | (2) 9 Ch. D. 125.

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run with the land at law, and is only enforceable against a purchaser with notice by reason of the equitable doctrine that is usually referred to as the rule in *Tulk* v. *Moxhay*. (1) It was open, therefore, to the Courts of Equity to prescribe the particular class of assignees of the covenant to whom they should concede the benefit of the rule. This they have done, and in doing so have included within the class persons to whom the benefit of the covenant could not have been assigned at law. For at law the benefit could not be assigned in pieces. It would have to be assigned as a whole or not at all. And yet in equity the right to enforce the covenant can in certain circumstances be assigned by the covenantee from time to time to one person after another. Who then are the assignees of the covenant that are entitled to enforce it? The answer to this question is to be found in several authorities which it now becomes necessary to consider.

In *Formby* v. *Barker* (2) a vendor, on the occasion of the sale of the whole of his land, exacted from the purchaser a restrictive covenant as to its user. The vendor having died, his executor sought to enforce the covenant against an assignee of the purchaser. Inasmuch as there was no land retained by the vendor on the occasion of the sale the covenant was merely personal to the vendor, and was accordingly held to be unenforceable by the vendor's executor as his assignee against the assignee of the purchaser. "If restrictive covenants," said Romer L.J. (3), "are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant—that is, as one obtained by him for some personal purpose or object. It appears to me that it is not legally permissible for him to assign the benefit of such a covenant to any person or persons he may choose, so as to place the assign or assigns in his position." To a like effect was the decision in *London County Council* v. *Allen*. (4) In that case the covenantees had never had any

(1) (1848) 2 Ph. 774.
(2) [1903] 2 Ch. 539.
(3) [1903] 2 Ch. 539, 554.
(4) [1914] 3 K. B. 642.

interest at all in the land in respect of which the owner had entered into a restrictive covenant. It was held that the covenantees were not entitled to enforce the covenant against an assignee of the covenantor. Buckley L.J. said (1) that "the doctrine in *Tulk* v. *Moxhay* (2) does not extend to the case in which the covenantee has no land capable of enjoying, as against the land of the covenantor, the benefit of the restrictive covenant." Scrutton J. said (3): "If the covenant does not run with the land in law, its benefit can only be asserted against an assign of the land burdened, if the covenant was made for the benefit of certain land, all or some of which remains in the possession of the covenantee or his assign, suing to enforce the covenant."

It is plain, however, from these and other cases, and notably that of *Renals* v. *Cowlishaw* (4), 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 L.JJ. 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

(1) [1914] 3 K. B. 660.
(2) 2 Ph. 774.
(3) [1914] 3 K. B. 642, 672.
(4) 9 Ch. D. 125.

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vendor, the extent and situation of which are undefined. In the third place, the covenant cannot be enforced by the covenantee against an assign of the purchaser after the covenantee has parted with the whole of his land.

This last point was decided, and in our opinion rightly decided, by Sargant J. in *Chambers* v. *Randall*. (1) As pointed out by that learned judge, the covenant having been entered into to enable the covenantee to dispose of his property to advantage, that result will in fact have been obtained when all that property has been disposed of. There is therefore no longer any reason why the Court should extend to him the benefit of the equitable doctrine of *Tulk* v. *Moxhay*. (2) That is only done when it is sought to enforce the covenant in connection with the enjoyment of land that the covenant was intended to protect. But it was also held by Sargant J. in the same case (1), and in our opinion rightly held, that although on a sale of the whole or part of the property intended to be protected by the covenant the right to enforce the covenant may be expressly assigned to the purchaser, such an assignment will be ineffective if made at a later date when the covenantee has parted with the whole of his land. The covenantee must, indeed, be at liberty to include in any sale of the retained property the right to enforce the covenants. He might not otherwise be able to dispose of such property to the best advantage, and the intention with which he obtained the covenant would be defeated. But if he has been able to sell any particular part of his property without assigning to the purchaser the benefit of the covenant, there seems no reason why he should at a later date and as an independent transaction be at liberty to confer upon the purchaser such benefit. To hold that he could do so would be to treat the covenant as having been obtained, not only for the purpose of enabling the covenantee to dispose of his land to the best advantage, but also for the purpose of enabling him to dispose of the benefit of the covenant to the best advantage. Where, at the date of the assignment of the benefit of the covenant,

(1) [1923] 1 Ch. 149. (2) 2 Ph. 774.

the covenantee has disposed of the whole of his land, there is an additional reason why the assignee should be unable to enforce it. For at the date of the assignment the covenant had ceased to be enforceable at the instance of the covenantee himself, and he cannot confer any greater rights upon the assignee than he possessed himself. In opposition to this view we were very properly pressed by counsel with two earlier decisions of Sargant J.

The earlier of these is *Ives* v. *Brown*. (1) In that case the survivor of two joint covenantees was the owner of other land held by herself as trustee for herself for life with remainder to her testamentary appointees. By her will she appointed the lands to the plaintiff Ives for life, but not in such a way as to pass to him the benefit of the restrictive covenant which accordingly devolved upon her death upon her two executors, of whom the plaintiff Ives was one. In an action brought by Ives alone to enforce the covenant against an assignee of the covenantor, it was objected that he was not entitled to maintain the action. The learned judge thereupon gave leave to the plaintiff to amend by adding as a co-plaintiff the other executor, and eventually granted an injunction to restrain a breach of the covenant. After holding that the testamentary appointment did not amount to an assignment of the benefit of the restrictive covenant, he added (2): "and it was, therefore, necessary in my judgment that her legal personal representatives should be joined in the action." The learned judge does not, however, appear to have addressed his mind to the question whether the legal personal representatives of a covenantee can enforce a restrictive covenant unless they are possessed of land that the covenant was intended to protect, and that question does not appear to have been argued. But it may well have been that the executors still had the legal estate of the land vested in them, and if that were so, then they could not be said to have had no interest in the land.

The second case was that of *Lord Northbourne* v. *Johnston & Son*. (3) But the assignment of the benefit of the

(1) [1919] 2 Ch. 314. (2) Ibid. 324. (3) [1922] 2 Ch. 309.

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covenant in that case was made by a representative of the covenantees who, at the time of the assignment, held such benefit as a bare trustee for the plaintiff, to whom had been conveyed at an earlier date the land for the protection of which the covenant had originally been obtained. It is true that after the conveyance the covenantees were not possessed of any of that land, but they continued to hold the benefit of the covenant as trustees for the plaintiff, and the right to enforce it was treated accordingly as being kept alive for his benefit. In neither of these two cases did the learned judge intend to decide, nor did he in fact decide, that a covenantee who has parted with all the land for the protection of which the covenant was imposed can thereafter confer upon an assignee of the covenant the right to enforce it. Indeed, in *Chambers* v. *Randall* (1), as already stated, it was definitely decided by the learned judge that he could not.

Such being the law, it only remains to apply it to the facts of the present case; and the first question that has to be considered is whether or no an intention is shown in the deed of October 23, 1908, that the restrictive covenants should enure for the benefit of any particular land of the covenantees. As to this, it is contended on behalf of the appellants that an intention is shown in the deed to attach the benefit to the land coloured green upon the plan annexed to it. It is conceded by them that if they are wrong in this contention there is no other land of the vendors for the benefit of which the covenants can be said to enure. Now for the purpose of considering this question there is one outstanding fact to be borne in mind, a fact that naturally had considerable effect upon the mind of Bennett J. It is this. In the indenture are contained certain restrictive covenants on the part of the vendors as to the user of the land coloured green, and those covenants are expressed to be made with the "purchasers their heirs and assigns or other the owner or owners for the time being of the land coloured pink or any part or parts thereof." These are apt words to

(1) [1923] 1 Ch. 149.

ensure that the benefit of the covenant should run with the pink land and every part of it, and one cannot doubt that in framing them the author had *Renals* v. *Cowlishaw* (1) and *Rogers* v. *Hosegood* (2) in mind. To use the words of Bennett J., "the draftsman has shown that when he desires to annex the benefit and burden respectively of restrictive covenants to different parcels of land he knows the appropriate language to use in order to do so." No such language is, however, used in relation to the restrictive covenants entered into by the purchasers. If the omission were due to design it would be conclusive of the matter. It would, however, be possible to attribute the omission to carelessness, if one could find elsewhere in the deed a strong indication of intention to make the benefit of the purchasers' covenant enure to the green land. The appellants contend that this strong indication is afforded by the fact that the restrictive covenants entered into by the vendors in relation to the green land and those entered into by the purchasers in relation to the pink land are more or less reciprocal covenants, and that just as the vendors' covenants were entered into for the benefit of the pink lands, so too were the purchasers' covenants entered into for the benefit of the green lands. But an examination of the two sets of covenants renders this argument untenable. For though the vendors covenant not to do anything upon the green land that may be a nuisance or damage to the owner of the land coloured pink or any part thereof, the corresponding covenant on the part of the purchasers is not to do anything on the land coloured pink that might be a nuisance or damage to the vendor or to the Bank (who were the mortgagees), no mention being made of the green land or any other land of the vendors or the Bank. It is hardly permissible to regard this further omission as being unintentional. There must be some limit to the carelessness to be attributed to the draftsman. But the appellants also rely upon the fact that the purchasers covenant not to erect any factory upon the lands coloured pink within 460 yards of the land coloured green, and not to authorize more than

(1) 9 Ch. D. 125. (2) [1900] 2 Ch. 388.

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one grocer's licence for the sale of wine, beer or spirits to be applied for or used within the same distance. This circumstance does, no doubt, give some ground for the suggestion that these two restrictions were intended for the benefit of the green land as distinct from any other lands of the vendors and that, therefore, the restrictions as a whole should be so regarded. But these two references to the green land do no more than define the part of the pink land that was to be subject to the two restrictions in question, and such restrictions may quite conceivably have been intended also to protect the land coloured yellow on the plan, land that, as is shown by the conveyance itself, was also land of the vendors, and land of which part at any rate was, as appears from the plan, capable of being benefited by such restrictions. In these circumstances it is impossible, having regard to the remarkable difference between the wording of the covenants by the vendors and purchasers respectively, to avoid drawing the inference that it was not intended to annex the benefit of the purchasers' covenant to the land coloured green. That is the inference that Bennett J. drew, and in our opinion he was right in so doing. The benefit of such covenant did not, therefore, run with the green land, and the next question is whether the defendant Easter is entitled to enforce the covenant as express assignee of the benefit of it. In our opinion he is not. To start with, 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, Ld., 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. It is not necessary, in these circumstances, to consider the question whether, in any case, the right to enforce the restrictive covenant against the assigns of the covenantors had not come to an end when the Shoreham Company conveyed to the Seaside Company the whole of their lands still remaining unsold without assigning at the same time the benefit of the covenant. It is only necessary to say that

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it appears to us more than doubtful whether in the contract for sale that preceded that conveyance the benefit of the covenant was included.

It only remains to consider the question whether the restrictive covenant contained in the deed of May 11, 1909, is enforceable against the plaintiff by the defendants. This question can be dealt with quite shortly. There is no indication whatsoever to be found in the conveyance that the benefit of the restrictive covenant by Phillips was annexed to any other defined land belonging to Bury so as to pass with it to subsequent purchasers from him of such land. The right to enforce the covenant would not therefore pass to any such purchaser, unless the covenant was obtained by Bury for the purpose of enabling him to dispose of the remainder of his land to the greatest advantage, and unless the benefit of the covenant were expressly assigned by Bury to such purchaser before Bury had disposed of the whole of his land. Inasmuch as at the date of the assignment by Bury to the defendants of the benefit of the covenant, Bury had disposed of the whole of his land, the defendants could not in any case acquire from him any right to enforce the covenant, and it is unnecessary to consider whether such covenant was or was not imposed for the benefit of any and what other land retained by Bury on the occasion of the sale to Phillips.

The result is that we agree with Bennett J.'s decision upon both questions raised by the originating summons. The appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Surtees & Co.*

Solicitors for respondent: *Palmer, Bull & Co., for F. W. A. Cushman & Son, Brighton.*

W. I. C.