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NOTICE AND THE "DEEDS OUT" PROBLEM

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I. The Problem

When a grantor conveys land which has been subjected to easements or equitable servitudes in favor of adjacent land previously conveyed by the grantor, there arises the serious question whether such interests are enforceable if the purchaser has not expressly taken the land subject to them. A cursory inspection of primary and secondary authority on the subject of easements and equitable servitudes would indicate that the answer depends upon whether, at the time of the sale, the purchaser of the "servient estate" has "notice" of the "burden" to which his land is allegedly subjected. It is the purpose of this article to determine the significance of notice in these circumstances and to ascertain when the foregoing test should be applied.

The problem appears worthy of attention because the fact pattern giving rise to disputes in this area is a recurring one. Thousands of new subdivisions have been developed in recent years with many more yet to come. In almost every case it will be deemed desirable, or even necessary, to impose easements and equitable servitudes for the benefit of the landowners in the subdivision enforceable *inter se*. Although there are ways, to be discussed below, in which the problem may be avoided, none is entirely satisfactory from the point of view of all parties concerned, and the frequency with which questions concerning easements and servitudes have given rise to litigation reinforces the suspicion that there is no simple panacea.

Several rather uncomplicated generalizations have often been employed in this area. A typical example is the "majority" rule stated in a frequently cited annotation:

> The weight of authority is to the effect that if a deed or contract for the conveyance of one parcel of land, with a covenant or easement affecting another parcel of land owned by the same grantor, is duly recorded, the record is constructive notice to a subsequent purchaser of the latter parcel. The rule is based generally upon the principle that a grantee is chargeable with notice of everything affecting his title which could be discovered by an examination of the records of the deeds or other muniments of title of the grantor.[1]

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1. Annot., 16 A.L.R. 1013 (1922). See generally 4 American Law of Property § 17.24 (Casner ed. 1952); 5 Tiffany, Real Property § 1266 (3d ed. 1939).

Such a statement, by its very terms, fails to distinguish between cases involving covenants and cases involving easements, thus ignoring the quite different theoretical and policy considerations in these two situations. This oversight is particularly significant with respect to the function of notice in such cases. Furthermore, it is doubtful whether all restrictive covenant cases can or should be assimilated under the same rule. In a case involving an express covenant arising out of an isolated transaction, the concept of notice may be relevant for reasons quite unconnected with its function in a case involving "reciprocal negative covenants." To compound the difficulty, the theory under which restrictive covenants or equitable servitudes are enforced is itself the subject of much dispute, and the rationale for requiring notice differs depending upon which theory is adopted.

Even a brief survey of the cases supports the conclusion that the courts cannot deal with such problems on the basis of simple majority and minority rules. This suggests a second reason why the problem of notice in this context is worthy of study. When a single generalization is called upon to resolve a number of complex legal problems where the competing interests are not always the same, it is inevitable that courts will place limits on the applicability of the generalization or will carve out appropriate exceptions. Another method of rendering such a generalization more flexible is to redefine substantially certain terminology of the rule. Observing such a process is intrinsically interesting, and may provide insight for the lawyer who practices in the area of land use, as well as for those who find fascination in what Holmes has called "the path of the law."

Although the specific fact situations differ greatly in the cases under consideration, a fairly definite pattern does emerge. The grantor sells tract A to grantee *A*, making certain promises, either in the form of restrictive covenants or easements, purporting to burden tract B, which the grantor retains. Such promises may be incorporated in the deed to tract A, may be oral, may be implied from the circumstances of the transfer, may be noted on a recorded plat, or may be contained in a separate written instrument. Grantee *A* records his deed. Then, without referring in the deed to the easements or covenants to which tract B was previously subjected, the grantor conveys tract B to grantee *B*, and *B* records.

Consideration and resolution of the problems created by the foregoing transactions must be approached from several aspects. First, an attempt will be made to trace the source of the rule or rules by which grantee *B* may be held to have taken tract B free of the interest claimed by the owner of tract A, with particular emphasis

on the impact of recording statutes on this situation. Second, the case law in this area will be discussed in terms of the various types of interests which might be claimed by the owner of tract A—express covenants, implied covenants, reciprocal negative covenants, express easements, easements by implication, easements by necessity, and easements by prescription. Third, an attempt will be made to evaluate the case law in light of the author's thesis that the traditional textbook generalizations have at best been too broad to be enlightening, and at worst have tended to prevent the courts from dealing adequately with the difficult theoretical and practical problems which they face in this area.

II. The Role of the Recording Statutes

A. *Legislative Objectives*

When one attempts to evaluate the impact of the recording statutes on the rights of purchasers of land burdened by easements or equitable servitudes, it is obviously relevant to consider the objectives that such legislation seeks to achieve. Philbrick, in his extensive treatment of this subject, explored the history of recording acts, pointing out that "recording was originally and primarily designed to force deeds upon the record as a substitute for the publicital element of feoffment, undoubtedly in order to guard against dangers to which that ancient mode of conveyancing was subject in lesser measure than were the deeds that displaced it."[2] Specifically, the danger presented by the change in modes of conveyancing was that a prospective purchaser might be defeated by a prior conveyance of a legal interest of which he had no knowledge.[3] No such danger usually existed under the feoffment system, which required livery of seizin, since the dispossessed owner would be required to regain possession before he could make a second conveyance.[4]

The impetus for purchasers to comply with recording statutes is provided by the fact that the acts give a landowner power, under certain circumstances, to convey a valid title by virtue of a deed second in time.[5] Typical of the early enactments in this country is

2. Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. Pa. L. Rev. 125, 137 (1944).

3. The common-law rule with respect to competing legal interests is that first in time is first in right. See generally 4 American Law of Property § 17.1 (Casner ed. 1952).

4. Thus, a fraudulent second conveyance was only possible where the first grantee was not in actual possession and did not oversee his holdings.

5. It does not necessarily follow from the requirement of recording that a grantor who has made a prior conveyance has the power to confer title on a subsequent

the Massachusetts statute of 1640 which declared that no conveyance should "be of force against any other person except the graunter and his heirs," unless it was recorded.[6] The process of judicial decision by which "any other person except the graunter and his heirs" came to be interpreted to mean a subsequent bona fide purchaser is not entirely clear.[7] Nevertheless, by the beginning of the nineteenth century several of the statutes had been changed to accord with this interpretation, and today this change has been accomplished in almost every state.[8] These laws provide in substance that all conveyances of real estate shall be void as against subsequent purchasers in good faith without notice, unless the conveyances are recorded in the registry of deeds for the county where the land lies.[9] The effect of such legislation is to protect subsequent purchasers of a legal interest,[10] and, conversely, to protect those who succeed to the rights of the prior grantee who has recorded.[11] Furthermore, the existence of the record, independent of the statutory sanction for failure to record, serves to give constructive notice to subsequent purchasers who might otherwise come within the scope of the traditional equity rule that a subsequent purchaser of a legal interest, for value and without notice, is protected against prior equities.[12]

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grantee. "A provision that a deed shall be recorded, is not in terms or by necessary implication, a provision that compliance with the statute shall render the instrument more efficacious than it would have been at common law." American Notes by Howe & Wallace to 2 WHITE & TUDOR, LEADING CASES IN EQUITY 202 (4th Am. ed. 1877). Philbrick suggests that the transition from feoffment to recording subjected the purchaser to a second danger: "the future danger of being himself divested of title in favor of a purchaser subsequent to himself." Philbrick, *supra* note 2, at 138. It would appear more logical, however, to treat this second danger as only a by-product of the attempt to prevent the first. Certainly under the traditional first-in-time rule no such danger existed. See note 3 *supra*. The paradoxical result is that the purchaser, in order to be protected from prior conveyances by deed, is exposed to the new danger of being defeated by conveyances by deed subsequent to his own.

6. PATTON, LAND TITLES § 8 n.95 (2d ed. 1957).

7. For a scholarly study of the early history of such legislation, see Philbrick, *supra* note 2, at 139-45.

8. There are excellent compilations to be found in 4 AMERICAN LAW OF PROPERTY § 17.5 (Casner ed. 1952); PATTON, *op. cit. supra* note 6, ch. 12.

9. This statement, of course, is not accurate with respect to a so-called "pure race" type of statute. *E.g.*, N.C. CODE §§ 47-18, -20 (1943).

10. The protection thus afforded abrogates the common-law rule as to conflicts between legal interests. See note 3 *supra*; 4 AMERICAN LAW OF PROPERTY §§ 17.1-.3, 17.6 (Casner ed. 1952).

11. This protection has been referred to as one of the primary purposes of the recording laws. See American Notes by Howe & Wallace to 2 WHITE & TUDOR, *op. cit. supra* note 5, at 203.

12. "By this . . . doctrine, the constructive notice given by a registration stands on exactly the same footing, produces the same effect, and is of the same nature as any other species of absolute constructive notice recognized by equity . . . ." 2 POMEROY, EQUITY JURISPRUDENCE § 665, at 886 (5th ed. 1941). See 4 AMERICAN LAW OF PROPERTY § 17.1 (Casner ed. 1952).

The point of the foregoing discussion is to avoid confusing the legal *effects* of such legislation with the concept of legislative *purpose*. For example, the purpose of the Statute of Uses was not to create a new method of land transfer in England, but that was certainly its effect. Similarly, it would appear dangerous to interpret judicial decisions spelling out the legal effect of the recording system as constituting a *ratio legis* which may then be used in applying such legislation to other types of cases. It is submitted that the great divergence of opinion with respect to the fundamental purpose of the recording statutes may be attributed to a failure to make this distinction.[13] Fundamentally, most "recording acts" may be broken down into two parts: sections which establish the machinery for recording, and sections dealing with the effect of recording or failure to record.[14] The latter sections, by imposing sanctions for failure to record, undoubtedly have the effect of coercing recordation of the various documents covered by the former sections, and it can be persuasively argued that such was their primary purpose, if not always their ultimate effect.

B. *The Fundamental Defect in the Recording Acts*

What emerges from such an analysis is not particularly comforting to those who would articulate a *ratio legis* by which to decide cases. Philbrick, for instance, suggests that our problems will largely be resolved if we regard promotion of recording as the primary policy of the recording statutes.[15] We do this, he contends, by favoring the subsequent purchaser at the expense of the non-recording prior grantee. He objects strenuously to the subversion of this objective which results from deciding cases according to "the equities of the transaction," thus favoring (in certain circumstances) a non-recording prior grantee over a subsequent recording grantee by treating the recording statutes as merely an extension of the equitable doctrine of notice. He considers it unfortunate that the principle of notice was ever injected into the recording system, and would therefore limit its application by having the courts impose a rule "that

13. Philbrick lists seven different "purposes" which have been offered by various writers who have concerned themselves with the problem: securing a prompt recordation, protecting subsequent purchasers, preserving an accessible history of each title, protecting those who might succeed to the rights of the recording grantee, saving from improvident investments those subsequent purchasers who search the record, saving from loss a subsequent purchaser who either searches the record or makes due investigation when put upon inquiry, and providing constructive notice. Philbrick, *supra* note 2, at 146.

14. *Cf.* 4 AMERICAN LAW OF PROPERTY § 17.7 (Casner ed. 1952).

15. See Philbrick, *supra* note 2, at 149.

such purchaser should not be defeated by a doctrine of notice that is unreasonable in the burden it puts . . .[upon the purchaser] either as respects the requirement of an unreasonable search of the record, or as respects the nature or the extent of the inquiry to be made."[16]

Aside from the circular nature of this reasoning, the objection to such an approach for our purposes is that it fails to take into account situations where the prior grantee has in fact recorded.[17] Indeed, this is the crucial point so often overlooked by the cases and the commentators. In the vast majority of cases dealt with in this article, the first grantee has recorded the deed which created the disputed easements or restrictive covenants at the same time that it created in him an independent tenement.

There are two bases upon which one might argue in favor of recognizing the claim of a prior grantee who has recorded his deed. First, there is the technical argument that in the case of easements the language of the recording statute permits a departure from the first-in-time rule only when the first grantee has not recorded.[18] Second, as a matter of policy it is obvious that any theory which favors subsequent purchasers will defeat the objective of encouraging recording, since we have assumed that the first grantee has complied with the recording laws to the extent possible. The dilemma in such a case is fundamental. The machinery of recording as it now exists is not designed to cope with this situation, with the result that recording is an unsatisfactory "substitute for the publicital element of feoffment." Under either a grantor-grantee or a tract index, it is unlikely that grantee *B*, by virtue of the record, will actually be aware of the existence of easements or restrictions created in the deed to grantee *A*, unless *B* is required to examine all deeds given by his grantor during the time the grantor had title to tract B. Many courts have regarded such a "deeds out" requirement as "unreasonable," with the consequence that the decision in each case turns on the court's view of the functions of notice. On the other hand, courts must also be concerned with protecting the reasonable expectations of grantee *A*, who has made an honest attempt to comply fully with

16. *Id.* at 155.

17. Philbrick does suggest that in order to implement his approach the "courts should constantly and consistently put the burden of proving notice on the prior grantee, both in inquiry notice and in doubtful cases of record notice." *Ibid.* It would seem, however, that the typical situation with which we are dealing should not be regarded as involving a "doubtful case of record notice," since notice should be legally irrelevant once the prior grantee has recorded. To treat it otherwise is to commit the very error to which Philbrick objects: "an exaltation of the element of notice over recording policy." *Ibid.*

18. See note 98 *infra* and accompanying text.

the law by recording his deed to tract A. Let us examine the cases to determine how the courts have resolved this conflict with respect to the various types of interest involved.

III. Equitable Servitudes

A. *Theories of Enforcement*

In the majority of cases in this area, the subject of the dispute was a restrictive covenant or a so-called "equitable servitude."[19] A court's view of the function of notice in such cases may vary considerably, depending upon which theory of enforcement of equitable servitudes is adopted. For instance, under the unjust-enrichment theory suggested in the leading case of *Tulk v. Moxhay*[20] and developed by Ames,[21] there can be no unjust enrichment if the parties bargained for the land with knowledge of the burden of the restriction, since it is their unrealized expectations which form the basis of the unjust enrichment.[22] Several writers have developed a contract theory for the enforcement of equitable servitudes. Under this concept, equity will impose a duty upon all third persons with notice to refrain from conduct which might deprive the promisee of the equitable right to specific performance of his contract.[23] Although the point is seldom discussed, presumably under this theory the right to specific performance exists as against any possessor who takes the land with notice of the burden, whether or not he is a purchaser for value.[24]

Perhaps the most widely accepted theory, developed by Pound[25] and Clark,[26] is that equity treats the restrictive covenant as an equitable interest in land analogous to an easement. In other words, the

19. Although there has been considerable dispute over the appropriate terminology to be applied to this type of burden, some authorities preferring the term "negative easements" or "rights in the nature of easements," the term "equitable servitudes" advocated by Pound seems most appropriate and will hereafter be used in this article. See Pound, *Progress of the Law, 1918-1919: Equity*, 33 Harv. L. Rev. 813 (1919).

20. 2 Ph. 774, 41 Eng. Rep. 1143 (Ch. 1848).

21. Ames, *Specific Performance For and Against Strangers*, 17 Harv. L. Rev. 174 (1903).

22. For a refutation of the unjust enrichment theory, see Clark, *Equitable Servitudes*, 16 Mich. L. Rev. 90, 91 (1917).

23. See Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 18 Colum. L. Rev. 291 (1918). The contract rights of the promisee are treated as impliedly assigned to subsequent purchasers of the benefited land. See also Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 19 Colum. L. Rev. 177 (1919).

24. See Reno, *The Enforcement of Equitable Servitudes in Land*, 28 Va. L. Rev. 951, 974 (1942).

25. See Pound, *supra* note 19.

26. See Clark, Real Covenants and Interests Running With the Land 172 (2d ed. 1947).

owner of the dominant estate is regarded as having an equitable property interest in the servient estate which is specifically enforceable as in the case of any interest in land, subject to the traditional equity rule referred to above[27] that a subsequent purchaser of a legal interest, for value and without notice, is protected against prior equities.

Seldom is any one of these theories consistently relied on in a jurisdiction; in many cases the courts of the same state will be found to have employed a combination of all of them.[28] Some writers have charitably ascribed this confusion to the fact that the courts want to achieve socially desirable results without being unduly restricted by doctrine.[29] Certainly it is true that the equitable servitude device has fulfilled the socially desirable function of allowing private individuals to exercise control over the use of land which they do not own, free from the rigid technicalities which encumbered other legal devices designed to accomplish similar objectives.[30] Nevertheless, it is the opinion of this writer that the almost universal failure to articulate a fundamental rationale for the law of equitable servitudes is not really explainable as a product of judicial sophistication. For every case decided by an enlightened court intent on preserving the flexibility of a valuable legal tool, there are ten decided on the basis of faulty authority which reach results that are at best dubious.[31]

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27. See text accompanying note 12 *supra.*

28. "In the end we may find that they have come together so often and in so many ways that there is no longer space between the paths, no longer choice to make between them. What began as a contractual right may be so protected by remedies, legal and equitable, that it will be indistinguishable from a real interest . . . ." Bristol v. Woodward, 251 N.Y. 275, 289, 167 N.E. 441, 446 (1929) (Cardozo, J.).

29. See Reno, *supra* note 24, at 978.

30. *E.g.*, nuisances, conditions with right of entry, determinable fees, and easements and covenants which run with the land. See CHAFEE & RE, CASES ON EQUITY 401-02 (4th ed. 1958).

31. In Massachusetts, for instance, the traditional reluctance to enforce third-party beneficiary contracts would appear to offer an argument against adoption of the contract theory of enforcement of equitable servitudes, and in favor of the property theory. In Sprague v. Kimball, 213 Mass. 380, 100 N.E. 622 (1912), the court appeared to adopt the property theory by holding that the real property sections of the Statute of Frauds are applicable to such agreements, thus rendering unenforceable an oral agreement by the common grantor to impose certain common restrictions on lots to be conveyed in the future. The court did not discuss the fact that technically the Statute of Frauds is not complied with in many cases of express covenants enforced by the grantor against the grantee, since the writing is often not signed by the party to be charged. Compare Snow v. Van Dam, 291 Mass. 477, 197 N.E. 224 (1934). The unfortunate consequences of not working out the theoretical underpinnings of the law of equitable servitudes are demonstrated by the later case of Patrone v. Falone, 345 Mass. 659, 189 N.E.2d 228 (1963), where the court inexplicably refused to enforce an express restriction even though the deed stated that "these restrictions are imposed for the benefit of the other lot-owners in the development." For a brave but futile effort to resolve this muddle, see the excellent Note, 44 B.U.L. REV. 231 (1964).

Nowhere is the headnote syndrome—that plague occasioned by the amazing proliferation of case authority available in recent years—more apparent than here.[32]

B. *Recording Acts and the Concept of Constructive Notice*

For our purposes it is perhaps sufficient to note that, whatever the theory employed by the courts in this area, notice of the existence of the restriction on the part of the purchaser of the retained servient estate is deemed necessary in order to allow the enforcement of the servitude by the owner of the dominant estate. In the typical situation previously described, if grantee *A*'s deed to tract A contained an express restriction on the use of the grantor's retained land (tract B), then grantee *A* (or his purchaser or assignee) must demonstrate that grantee *B* took tract B with knowledge of the restriction. In terms of the effect of the recording statute, the question is whether the recording of the deed to tract A constitutes constructive notice to the purchaser of tract B. If it does not, the purchaser of tract B takes free and clear of the restriction unless he has some form of actual notice.

In virtually all of the early cases, the courts found notice and decided in favor of the owner of the dominant estate. In the leading case of *Holt v. Fleischman*,[33] for example, the court recognized the difficulty in treating the deed to grantee *A* as being in grantee *B*'s "chain of title," but concluded that since "it is intimately related" to the land retained by the common grantor, it therefore serves to give the subsequent purchaser "constructive notice." In 1910 the Supreme Court of Missouri reached the same conclusion, but also relied on the concept of inquiry notice, since the deed to the subsequent purchaser contained the language, "all of the said above de-

32. The symptoms characteristic of the headnote syndrome are the citation of voluminous authority on questions of law where few cases exactly in point are likely to have been decided. The disease produces bad law. Unfortunately, few headnoters are as candid as J. W. Shepard, reporter for the Supreme Court of Alabama, who footnoted his syllabus in the case of Drake v. State, 51 Ala. 30 (1874), as follows: "The reporter does not believe that the opinion in this case was intended to change the settled rule of law, as laid down in the several cases cited, and he has therefore made the headnote conform to those cases, and not to the language of the opinion."

33. 75 App. Div. 593, 78 N.Y. Supp. 647 (1902). The only authority cited in this case is Mott v. Oppenheimer, 135 N.Y. 312, 31 N.E. 1097, 17 L.R.A. 409 (1892). The *Mott* case, although frequently cited in early cases dealing with the general problem, is not in point. It merely holds that the omission of a reference to a restrictive covenant in the deed of the servient estate on which the defendant relies does not serve to make him a BFP if such restrictions are contained in prior deeds in his direct chain of title.

scribed real estate being subject to all restrictions now of record against same."[34] In 1912 the New Jersey court held in a similar case[35] that the deed to the first grantee constitutes constructive notice of all restrictions contained therein to grantees of the retained land, but the opinion suggests that this result is only appropriate in cases involving adjoining lots. Thus we see for the first time a court concerned with the scope of the title search it is imposing on the subsequent purchaser. In the 1915 Maryland case of *Lewis v. Carter*,[36] the court rejected the frequently stated argument that a grantor's promise to make all retained land subject to such restrictions is personal to the grantor and thus unenforceable against subsequent grantees, regardless of notice.[37]

In the same year that *Lewis* was decided, the New Jersey court, in *Glorieux v. Lighthipe*,[38] rejected the contention that the deed to the first grantee constitutes constructive notice to a subsequent purchaser of the retained tract. The court construed the wording of the New Jersey statute, which made recording notice only as to subsequent purchasers, to refer to "subsequent purchasers of the same land," and therefore refused to enforce the restriction against a subsequent purchaser of the retained land who had no actual notice. In support of this result, the court offered the following policy argument: "A purchaser may well be held bound to examine or neglect at his peril, the record of conveyances under which he claims; but it would impose an intolerable burden to compel him to examine all conveyances made by everyone in his chain of title."[39]

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34. King v. St. Louis Union Trust, 226 Mo. 351, 126 S.W. 415 (1910). It is difficult to see how the doctrine of inquiry notice can be invoked by such a general statement in a deed, and, indeed, the court cited no authority. With respect to the "chain of title" problem, the court reasoned that because the authorities state that the vendee is not expected to look for conveyances from his vendor prior to the time the vendor acquired title, by implication he is required to search the registry for all conveyances from the vendor after the latter acquired title. In addition to *Holt* and *Mott v. Oppenheimer*, *supra* note 33, the court cited two other cases, neither of which was on point.

35. Howland v. Andrus, 80 N.J. Eq. 276, 83 Atl. 982 (1912). This was a case of first impression in New Jersey, and the court cited no authority from any jurisdiction in support of its result.

36. 124 Md. 678, 93 Atl. 216 (1915).

37. The court also rejected the argument that there can be no constructive notice since the recording statute does not authorize the recording of a restrictive covenant. The court reasoned that "the restrictions imposed by the deed on the land retained by the grantor constitute an easement in favor of the property conveyed" and that the interest was therefore recordable. *Id.* at 680, 93 Atl. at 218.

38. 88 N.J.L. 199, 96 Atl. 94 (1915).

39. *Id.* at 202, 96 Atl. at 96. The court also rejected the limitation to adjoining land suggested in *Howland v. Andrus*. See note 35 *supra* and accompanying text. "[It] is not suggested by any language in the statute and would lead to an anomalous situation. It would charge with notice the purchaser of an adjoining lot, but

Of all the subsequent cases which have reaffirmed the position taken by the court in *Holt* that the recording of the deed to grantee *A* is constructive notice to grantee *B*, relatively few have addressed themselves to the policy argument in *Glorieux*. An exception is the case of *Finley v. Glenn*,[40] where the Pennsylvania court pointed out that, under the recording statute, "when plaintiff, the first grantee, recorded his deed, he did all that he could do to give notice of the restrictions."[41] This observation, it seems, goes to the heart of the matter. It is good to be concerned with the title-search burden placed on the subsequent purchaser, but what of the burden on the first grantee who has complied with the recording requirement but is nevertheless threatened with loss of the benefit of a valuable restrictive covenant? Unfortunately, the problem, which, as will be shown below, is far from unsolvable, is seldom discussed in terms of competing interests unnecessarily jeopardized by certain mechanical defects in the recording system. Instead, the courts have generally focused attention on only one side of the problem—usually the title-search burden upon the buyer of the servient estate—or, even less excusably, have been content to cite collections of cases standing for a non-existent "general rule."

C. *The Chain-of-Title Approach*

One unfortunate tangent taken by many courts concerns the problem of the "chain of title." The rule that a recorded deed lying outside of a purchaser's chain of title is not constructive notice of the instrument as to that purchaser is, of course, applied in a wide variety of situations.[42] The rationale of the rule is that under the prevailing grantor-grantee method of indexing records there is little likelihood that even the most diligent grantee will be able to find pertinent instruments executed by a "stranger" to the chain of title under which he claims,[43] or executed by a person "within" the chain of title, but prior or subsequent to the time he was a record owner of the title affected.[44]

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not the purchaser of an adjoining lot but one, on the same large tract." *Id.* at 200, 96 Atl. at 95.

40. 303 Pa. 131, 154 Atl. 299 (1931).

41. *Id.* at 133, 154 Atl. at 302.

42. For an excellent survey and discussion, see 5 TIFFANY, REAL PROPERTY § 1265 (3d ed. 1939).

43. See, *e.g.*, Standard Oil Co. v. Slye, 164 Cal. 435, 129 Pac. 589 (1913); Greer v. Carter Oil Co., 373 Ill. 168, 25 N.E.2d 805 (1940); Sinclair v. Gunzenhouser, 179 Ind. 78, 98 N.E. 37 (1912).

44. Many of these cases involve the so-called "after-acquired title" doctrine. See, *e.g.*, 4 TIFFANY, REAL PROPERTY § 1231 (3d ed. 1939).

For present purposes, then, the question is whether the same rationale can be applied to a situation where the person executing the instrument at issue appears as a grantee in the chain of title of the servient estate and executed the instrument while the owner of record, but where, in the execution of the instrument, the granting of a restrictive covenant as to the land in question is only secondary to the primary purpose of conveying other land owned by the common grantor. In both classes of cases there exists the practical problem of title search, but in the typical "chain of title" case it is the position of the grantor that causes the difficulty, whereas in our problem it is the character of the instrument which leads the abstracter astray. When viewed in this light, the chain-of-title approach is merely a circuitous way of articulating the burden-of-title-search argument. Unfortunately, most courts have tended to ignore the rationale of the chain-of-title rule and have assumed without discussion its applicability, the question for their purposes being whether the deed to the first grantee is to be technically regarded as part of the chain of title of the grantee of the retained land. Thus it is not surprising that the courts approaching the problem from this viewpoint have given a variety of answers. In the *Holt* case, for example, the court disposed of the problem by observing that, while the deed is not directly within the second grantee's chain of title, "yet it is intimately related to the land retained . . . [by the common grantor] when she made the covenant."[45]

The case of *King v. St. Louis Union Trust*[46] is an even better example of a court failing to examine the rationale of the chain-of-title rule. After referring to cases involving after-acquired titles, the court concluded in a classic *non sequitur* that, because the vendee in such situations is not expected to look for conveyances from his vendor prior to the time the vendor acquired title, by implication he *is* required to search the registry for all conveyances from his vendor after the time the vendor acquired title. To round out the picture of confusion thus presented, at least one court seems to have indicated that the question is not whether the deed is "in" the chain of title, but rather whether the deed "affects or relates to" the chain of title.[47] Under this wording of the requirement, the extent to which the covenant affects the land, rather than the problem of title search, would appear to be crucial. This is arguably a commendable shift

45. Holt v. Fleischman, 75 App. Div. 593, 600, 78 N.Y. Supp. 647, 652 (1902). The significance of the "intimate relationship" is not explained.

46. 226 Mo. 351, 126 S.W. 415 (1910).

47. Maule Indus. v. Scheffield Steel Prods., 105 So. 2d 798 (Fla. 1958).

of emphasis, but it is questionable whether it relates to the traditional "chain of title" doctrine. In still another case[48] the suggestion was made that deeds in these situations may be regarded as being within the chain of title in the sense that a deed of trust, judgment, or other record lien imposed during the period of the common grantor's ownership is within the chain of title. If one considers the rationale behind the chain-of-title requirement, however, it becomes apparent that such an analogy breaks down; the title-search problem is by no means the same.

Among the decisions which have held that grantee *B* does not have constructive notice of the deed to grantee *A*, there has been a greater appreciation of the rationale of the chain-of-title requirement.[49] In the leading New York case of *Buffalo Academy of the Sacred Heart v. Boehm Bros.*,[50] the court explicitly recognized the relationship between the chain-of-title requirement and the burden-of-title-search problem:

> [T]his rule [the chain-of-title rule] would seem to be implicit in the acts providing for the recording of conveyances. Recording constitutes notice only of the instruments in the chain of title of the parcel granted. To have to search each chain of title from a common grantor lest notice be imputed would seem to negative the beneficent purposes of the recording acts.[51]

This quotation, which reflects a commendable understanding of the policy behind the rule of law invoked, also suggests the difficulties which are encountered in trying to resolve the problem by resort to the *ratio legis* of the recording system. Certainly the rule rejected by the court would not negate the "beneficent purposes of the recording acts," if one such purpose is to compel every person "receiving such an interest (by which the ownership and enjoyment of land can be affected) to place it upon the records, in order that he may thereby protect his own rights as well as those of all others who may afterwards acquire an interest in the same property."[52] On the contrary, the decision of the court irrevocably prejudiced the rights of

48. Reed v. Elmore, 246 N.C. 221, 98 S.E.2d 360 (1957) (concurring opinion).

49. However, a few of these cases have invoked the chain-of-title rule without any supporting discussion. See Thompson v. Radall, 173 Ga. 696, 161 S.E. 377 (1931); *cf.* Sullivan v. Mifford, 143 Iowa 210, 121 N.W. 569 (1909). Similarly, other courts have applied this rule in addition to accepting the argument relating to the unreasonable title-search burden that would otherwise be imposed on grantee *B*. See, *e.g.*, Hancock v. Gumm, 151 Ga. 667, 107 S.E. 872 (1921).

50. 267 N.Y. 242, 196 N.E. 42 (1935).

51. *Id.* at 250, 196 N.E. at 45.

52. This *ratio legis* was stated in 2 POMEROY, EQUITY JURISPRUDENCE § 649 (5th ed. 1941).

a recording purchaser (grantee *A*) as well as "those of all others who may afterwards acquire an interest in the same property."

D. *Balancing the Equities Between Two Innocent Parties*

In reality, as has been suggested previously, a satisfactory solution to this problem cannot really be achieved by resort to analysis of the "purpose" of the recording system. Rather, it would appear preferable to recognize that in these cases the recording system is often incapable (through no fault of grantee *A*) of giving constructive notice to grantee *B* without imposing upon him a very substantial title-search burden. Before a court can choose between grantee *A* and grantee *B*, several important questions should be answered. How great in fact is the burden on grantee *B*? How substantial are the interests of grantee *A*? Can the interests of grantee *A* be protected by means other than at the expense of grantee *B*?

1. *Burden Imposed on Grantees of the Servient Estate*

With respect to the burden on grantee *B*, most courts[53] have approved the language of the *Glorieux* opinion and have refused "to compel him to examine all conveyances made by everyone in his chain of title."[54] Clearly, such a burden would often be intolerable, but this seems to be an overstatement of the case. It would be more accurate to say that grantee *B* would be compelled to examine all conveyances made by everyone in his chain of title while those persons where the owners of record of the property he is purchasing. Since under the grantor-grantee system of indexing the title searcher will make note of all such deeds, the question is whether the abstracter may disregard "deeds out" (of the chain of title) which appear, on the basis of the brief geographical description in the index, not to affect the locus. It is arguable that the burden imposed by not allowing the abstracter to disregard such "deeds out" is de minimis unless a prior grantor, within the period of the title search,[55] was the developer of a large subdivision. In most cases,

53. See, *e.g.*, Hancock v. Gumm, 151 Ga. 667, 107 S.E. 872 (1921); Young v. Calley Land Co., 103 N.J. Eq. 478, 143 Atl. 627 (1928); Buffalo Academy of the Sacred Heart v. Boehm Bros., 267 N.Y. 242, 196 N.E. 42 (1935).

54. See note 39 *supra* and accompanying text.

55. In practice, the period of time that will be covered in a title search varies greatly among jurisdictions. In Massachusetts many attorneys follow the rule of "sixty years to a warranty deed," whereas in other jurisdictions it is expected that the abstracter will go back to the beginning of the chain of title. See, *e.g.*, CASNER & LEACH, CASES ON PROPERTY 896, 926 (1951). Local practice is, of course, affected by the various types of marketable title acts. For example, a recent Massachusetts act, MASS. GEN.

presumably, the number of "deeds out" would be few, and the fact that equitable servitudes are normally appurtenant[56] could still further reduce the number of "deeds out" to be examined by excluding "deeds out" to tracts sufficiently remote from the locus as to prevent them from being the dominant estate.[57]

In cases where the developer of a large subdivision is in the chain of title, it may well be that the burden on the abstracter is rather considerable, although no effort has apparently been made to pass legislation ameliorating the burden in jurisdictions where it has been imposed.[58] Whether the burden is lessened by the use of a tract index is not clear, although tract indexing has been suggested as a solution to the problem.[59] The question, with respect to the tract index, is whether the person responsible for the indexing will recognize that a "deed out" contains restrictions which relate to the retained land. If he tract-indexes only deeds containing a specific description of property, a deed making a general reference to all other land retained by the grantor might be ignored. Furthermore, it should be recognized that, even if we could conclude that the tract index is an effective tool for discovering relevant "deeds out," the widespread use of the tract index by private abstract and title corporations is not necessarily determinative of the question of record or constructive notice, since the use of such indexes is seldom required by statute.[60] Thus, one might argue that a subsequent pur-

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LAWS ANN. ch. 184, § 26-30 (Supp. 1964), requires periodic re-recording of restrictive covenants. For an analysis of the problems raised by such legislation, see 44 B.U.L. REV. 201 (1964).

56. While it is perhaps theoretically possible that a grantor might impose equitable servitudes in gross by means of a deed to land not intended as the dominant estate, it is doubtful in many jurisdictions whether such a restriction would be enforceable against a subsequent purchaser of the servient tenement even if he had notice. See London County Council v. Allan, [1914] 3 K.B. 642 (n.s.) *Contra*, VanSant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913). See generally 1 CHAFEE & SIMPSON, CASES ON EQUITY 774-77 (1st ed. 1934).

57. It must be emphasized that this suggestion cannot be supported by case authority. The author knows of no cases which have expressly held that a tract remote from the land subject to the equitable restrictions cannot, as matter of law, be the dominant estate. On the other hand, in all cases herein discussed involving the "deeds out" problem, the dominant and servient estates have in fact been in the same vicinity.

58. According to a leading work in Massachusetts title practice, experienced title examiners apparently assume the responsibility for examing such "deeds out" as a matter of course; only passing reference was made to the onerous nature of such a procedure. See CROCKER, NOTES ON COMMON FORMS 557 (7th ed. 1955). The leading Massachusetts cases on this question assume that there is constructive notice. See, *e.g.*, Beekman v. Schirmer, 239 Mass. 265, 132 N.E. 45 (1921); Riley v. Barron, 227 Mass. 325, 116 N.E. 473 (1917).

59. See Note, 21 CORNELL L.Q. 479 (1936).

60. For a general discussion of the statutory use of the tract index, see Fairchild, *Improvement in Recording and Indexing Methods for Real Property Instruments*, 28 GEO. L.J. 307 (1939).

chaser has actual notice if the "deed out" appears in his abstract,[61] perhaps even arguing that the abstract company is negligent if it fails to include such deeds,[62] and yet refuse to treat the "deed out" as constituting constructive notice of the restrictions therein contained.[63]

Before leaving the question of the extent of the burden on the subsequent purchaser of the servient estate, it should be noted that in a way it is artificial to restrict that inquiry to the burden of title search. One might logically also discuss the "burden" on grantee *B* in terms of the inconvenience caused by compliance with the restrictions involved. How seriously will he be injured if forced to comply with the restrictions allegedly imposed on his tract by the common grantor? Arguably this question might also be considered in terms of the interest of the community in having the restriction enforced. The latter consideration is particularly significant, it would seem, if one regards private land-use controls as a desirable adjunct of public controls, such as zoning and subdivision requirements. Although judicial toleration for arguments of this sort varies considerably, it is curious that the case law and the secondary material are virtually devoid of any discussion along the lines here suggested.

2. *Importance of Protecting the Dominant Estate*

It would appear incontrovertible that grantee *A*'s ownership interest in the dominant estate is very substantial indeed. The literature in this field has repeatedly emphasized that the development of the law of equitable servitudes was in response to the need of an increasingly urbanized society for effective control of private land

61. See Taylor v. Melton, 130 Colo. 272, 274 P.2d 977 (1954), where the defendant was held to have had notice of a "deed out" which appeared in the abstract of title. This decision is interesting in light of the fact that Colorado is presumably a "non-deeds out" jurisdiction by virtue of the holding in Judd v. Robinson, 41 Colo. 222, 92 Pac. 724 (Super. Ct. 1907) (*semble*).

62. This argument was unsuccessful in Lizzo v. Craft, 135 N.Y.S.2d 748 (Sup. Ct. 1954), *appeal dismissed*, 284 App. Div. 862, 135 N.Y.S.2d 777 (1954), even though there was some evidence that it was the practice of the abstract company to include such "deeds out" in abstracts prepared for transactions involving other lots in the area.

63. One difficulty with the argument that the existence of a tract index does not result in constructive notice of "deeds out" because it is not required by statute is that in other contexts the question of constructive notice has frequently been divorced from the question of whether the statute specifies that the index is itself a part of the record. For example, even where the statute does not so specify, a majority of courts hold that the recording acts protect the grantee of a properly recorded, but improperly indexed, deed. See 4 AMERICAN LAW OF PROPERTY § 17.25; 5 TIFFANY, REAL PROPERTY § 1274 (3d ed. 1939). These decisions would appear to refute the contention that the question of notice depends on the title-search burden, that is, the probability that the subsequent purchaser will be able to discover the pertinent document by a diligent search of the records.

use beyond that provided by the traditional tort doctrines of trespass and nuisance.[64] The willingness of the courts to abandon the traditional restrictive notions of privity of estate and contract in an effort to create an effective remedy for the enforcement of equitable servitudes offers an indication of the importance of what is at stake.[65] Furthermore, we see that even with the advent of effective public land-use controls, the private control—because of its flexibility with respect to both enforcement and substantive scope—continues to flourish.[66] Nearly every authority in the land-use planning area expounds virtues of the private control and recommends its utilization. The elaborate procedural safeguards employed by marketable title legislation,[67] as well as the applicability of just-compensation requirements to equitable servitudes in eminent domain proceedings,[68] are further indications that we are dealing with a valuable right, whether it is characterized as property or as contractual.

3. *Additional Methods for Protecting the Dominant Estate*

It would thus appear highly desirable that the courts, in dealing with equitable servitudes, recognize what both sides in such a controversy may have at stake. But even if such judicial understanding becomes commonplace, in many of these situations one of two innocent persons will be injured by any decision the court reaches. This possibility brings into focus the question of how the owner of the dominant estate may protect himself. In this respect, two levels of inquiry are relevant. Can he protect himself within the framework of the present recording system? If not, how can the system be reasonably altered to accomplish that objective?

The first of these inquiries is obviously relevant to the process of deciding existing controversies. If the owner of the dominant estate, although technically in compliance with the requirements of the recording statute, has overlooked a method of employing the recording system which is more reasonably calculated to give actual notice to a diligent purchaser of the servient estate, then perhaps the courts

64. For an extensive citation of background material, see CHAFEE & RE, CASES ON EQUITY 401 (4th ed. 1958).

65. See 1 CHAFEE & SIMPSON, CASES ON EQUITY 799, 842 (1st ed. 1934).

66. For a discussion of the impact of zoning on the validity or enforceability of private covenants, see La Follette, *Equitable Restriction and Government Regulation of Private Land Use*, 10 SYRACUSE L. REV. 78 (1958); Van Hecke, *Zoning Ordinances and Restrictions in Deeds*, 37 YALE L.J. 407 (1928).

67. See, *e.g.*, MASS. GEN. LAWS ANN. ch. 184, § 26-30 (Supp. 1964).

68. For an excellent discussion, see BEUSCHER, LAND USE CONTROLS 147-49 (3d ed. 1964).

should take a jaundiced view of his invocation of a "balancing test" based on the mutual "innocence" of both parties to the litigation.[69]

In many cases, of course, the developer may have solved the problem by recording, prior to the public sale of any parcels within the subdivision, a master plan or plat on which all restrictions and easements are duly noted. In such circumstances nearly all authorities agree that subsequent purchasers receive both the benefit and the burden of such easements and restrictions.[70] Unfortunately, from the developer's point of view such a practice may prove undesirable, in that it deprives him of flexibility in responding to experience gathered in marketing the first homes in the subdivision.[71] Furthermore, a master plan is seldom used in the case of isolated transactions where a single large lot is subdivided into only two or three smaller lots.[72] Another possible solution is for the purchaser to demand a covenant in his deed that the grantor will include in each deed creating an independent tenement in the remaining land a recital that the estate is subject to the easements and covenants contained in the earlier grantee's deed.[73] The difficulty with this solution is that there is no way the first grantee can be sure that the grantor will keep his promise. The tremendous amount of litigation in the area is evidence that the grantor often fails to comply with the agreement. Money damages are obviously an inadequate remedy.

It might be wise for the cautious grantee, rather than relying on the grantor's covenant, to demand from the grantor a separate deed expressly imposing restrictions on the land retained by the grantor, which would be described with the same formalities as required for the transfer of the fee. The recording of such an instrument should theoretically give notice to any subsequent purchaser of the servient estate, under either a grantor-grantee or a tract indexing system and regardless of whether the jurisdiction adheres to the "deeds out"

69. *Cf.* Gilpin v. Jacob Ellis Realties, Inc., 47 N.J. Super. 26, 135 A.2d 204 (App. Div. 1957).

70. It is not always clear whether this result is based on the doctrine of "constructive" notice, or "inquiry" notice. See Adams v. Rowles, 228 S.W.2d 849 (Sup. Ct. Tex. 1950). Compare the discussion in URBAN LAND INSTITUTE, THE HOMES ASSOCIATION HANDBOOK § 22.22 (1964). See also BEUSCHER, LAND USE CONTROLS 120 (3d ed. 1964).

71. This may be partially avoided by utilizing the so-called "staged development," where the builder develops a tract in smaller units, establishing the restrictions for each separate section or stage as it is reached. See the excellent discussion in URBAN LAND INSTITUTE, *op. cit. supra* note 70, § 22.4. The same problem may be occasioned by application of the doctrine of reciprocal negative easements in cases where there is no recorded plat. See note 84 *infra*.

72. Even this may technically qualify as a "subdivision" within the purview of subdivision control legislation requiring that the seller file a plat. See, *e.g.*, MASS. GEN. LAWS ANN. ch. 41, § 81L (Supp. 1964).

73. See Philbrick, *Limits of Record Search and Notice*, 93 U. PA. L. REV. 259, 274 (1945).

rule.[74] An alternative, which involves some tinkering with the mechanics of the recording system, is legislation permitting the owner of the dominant estate (grantee *A*) to record an affidavit analogous to the statutory mechanic's lien notice employed in most jurisdictions.[75]

E. *Covenants That Are Personal to the Grantor*

So far, we have discussed situations where the intent of the parties is fairly certain. The grantor clearly intended to impose the restrictions on the retained land, and the question for the court is whether that intent should be effectuated as against innocent subsequent purchasers of the servient estate. The courts have often resolved the cases in terms of "notice," but we have traced the theoretical and practical difficulties of such an approach. There is, however, another category of restrictive covenant cases which the courts have frequently treated as being theoretically similar to the situation described above, but which in reality involve quite different considerations. In the latter group of cases, the real issue is whether the grantor actually intended to impose restrictions on the land retained.

If the language contained in the deed to grantee *A* is construed as creating a mere personal undertaking by the grantor, the question of whether a subsequent purchaser of the "servient" estate had notice of the restriction becomes irrelevant. In one of the earliest cases in which this argument was raised, the court was dealing with a covenant which declared that "each and every one of the lots" would be "subject to all of the restrictions" imposed on tract A "whether the said lots be sold or retained" by the grantor.[76] The court held that this language was a clear indication that the covenant was not personal to the grantor, and therefore proceeded to consider the question of notice. Other courts have found language purporting to bind the grantor's "heirs and assigns" determinative that the covenant was not personal.[77] A typical situation giving rise to the argument that a covenant is personal to the grantor involves a provision in the deed

74. The beneficial effect of this simple expedient must be characterized as theoretical, since the author knows of no litigated cases where it was employed, or of any area where it is the local practice.

75. A similar device is employed by the new Massachusetts Marketable Title Act, MASS. GEN. LAWS ANN. ch. 184, § 26-30 (Supp. 1964), in connection with the requirement that restrictions be re-recorded after thirty years. In order to be effective against a parcel the notice of extension must: (1) be indexed in the grantor's index under the names of the persons specified therein as the owners of the subject parcel; (2) be noted on the margins of the record of the instrument creating the restrictions if it is recorded; and (3) be indexed in a special tract index to be maintained for such purpose by each register of deeds.

76. Lowes v. Carter, 124 Md. 678, 93 Atl. 216 (1915).

77. See, *e.g.*, Wood v. Stehrer, 119 Md. 143, 147, 86 Atl. 128, 129 (1912).

to grantee *A* promising that covenants identical to those imposed on tract A will be included in all subsequent deeds by the grantor to other purchasers of nearby land. Although such covenants have on occasion been characterized as personal to the grantor,[78] it is arguable that subsequent purchasers of the other lots with notice of the covenant might still be bound under an application of the maxim, "equity regards as done that which ought to be done."[79]

F. *The Effect of a Common Plan*

In many cases the courts have intertwined the argument that the covenant is personal with the argument of lack of notice, and for this reason it is difficult to ascertain the position of such jurisdictions with respect to the question of record or constructive notice by virtue of "deeds out."[80] This is particularly true in cases where the court purports to base its decision on the existence or non-existence of a common plan or scheme. A casual reading of many such opinions will lead to the conclusion that, in order to enforce a covenant in a case involving a plaintiff other than the original grantor, the individual seeking to enforce the restriction must demonstrate that the covenant was imposed as part of a common plan or scheme.[81] Initially this might seem to be simply another way of determining whether a covenant is personal to the original grantor,[82] but a careful analysis will indicate that at the conceptual level, at least, the problem is far more complex, with the theoretical function of the

78. See, *e.g.*, Buckley v. Mooney, 339 Mich. 398, 63 N.W.2d 655 (1954).

79. *Id.* at 400, 63 N.W.2d at 659 (dissenting opinion).

80. The early New York cases, for example, took the position that grantee *B* (servient estate) is held to constructive notice of covenants contained in prior deeds to grantee *A* (dominant estate). See Holt v. Fleischman, 75 App. Div. 593, 78 N.Y. Supp. 647 (1902); Whistler v. Cole, 81 Misc. 519, 143 N.Y. Supp. 478 (1913); Mott v. Oppenheimer, 135 N.Y. 312, 31 N.E. 1097 (1892) (by implication). However, in the leading case of Buffalo Academy of the Sacred Heart v. Boehm Bros., 267 N.Y. 242, 196 N.E. 42 (1935), the court, in holding for the owner of the servient estate, articulated two different possible grounds for its decision: (1) "the covenant on the part of the grantor only purports to be a personal undertaking . . . ," and (2) "in the absence of actual notice before or at the time of his purchase . . . an owner of land is only bound by restrictions if they appear in some deed of record in the conveyance to himself or his direct predecessors in title." *Id.* at 248, 250, 196 N.E. at 44, 45. See also Lizzio v. Craft, 135 N.Y.S.2d 748 (Sup. Ct. 1954). It was not until the 1961 case of Eppolito v. Medlicott, 211 N.Y.S.2d 302 (Sup. Ct. 1961) that we find an unequivocal statement that a purchaser is not bound by constructive notice, even though the covenant is construed as being intended to run with the land. It is interesting to note that the court then proceeded to hold in favor of the owner of the dominant estate on the ground that the defendant had actual notice.

81. This is sometimes stated as if it were an absolute rule of law. See, *e.g.*, Craven County v. First Citizens Bank & Trust Co., 237 N.C. 502, 75 S.E.2d 620 (1953).

82. "[S]ince the *locus in quo* had never been subject to any general plan of development the restrictive covenants in the deeds executed by the original developer as its successors, were never enforceable except as personal covenants." Reed v. Elmore, 246 N.C. 221, 234, 98 S.E.2d 360, 367 (1957) (dissenting opinion).

existence of a common plan differing greatly depending upon the facts and upon the theory of enforcement employed.

Consider, for example, a situation where a restrictive covenant is included in all deeds executed by the common grantor in a subdivision, and a suit to enforce the restriction is brought by an earlier purchaser against a later purchaser. The enforcement action might be based on contract theory, since the existence of a common scheme can be used to show the grantor's intent to make the prior purchaser (grantee *A*) a third party beneficiary of the covenant included in the later deed to grantee *B*.[83] Similarly, the common plan might be used to demonstrate the existence of an implied reciprocal negative easement in favor of the tract belonging to grantee *A* and burdening the land retained by the grantor and subsequently conveyed to grantee *B*. This second method of enforcement is based on property theory.[84]

Under the contract theory of enforcement, notice should not be a problem in such cases because the covenant being enforced by grantee *A* is contained in the defendant's own deed or a deed in his direct chain of title. However, under the property theory of enforcement, where grantee *A* is enforcing a right acquired under a theory of implied reciprocal negative easements, the question of notice could still be theoretically at issue, since grantee *A*'s rights arise out of covenants made in his own deed and not those contained in the deed to grantee *B*.[85] If grantee *B* could show that he purchased with-

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83. "The right of an owner of a lot to enforce a covenant (to which he is not a party or an assign) restrictive of the use of other lands is dependent on the covenant having been made for the benefit of this lot. . . . The right of grantees from the common grantor to enforce, *inter se*, covenants entered into by each with said grantor, is confined to cases where there has been proof of a general plan or scheme for the improvement of the property and its consequent benefit, and the covenant has been entered into as part of a general plan to be exacted from all purchasers, and to be for the benefit of each purchaser . . . ." Mulligan v. Jordon, 50 N.J. Eq. 363, 365, 24 Atl. 543, 544 (1892). See also Higdon v. Jaffa, 231 N.C. 242, 245, 56 S.E.2d 661, 666 (1949), where the property theory of enforcement was apparently ruled out by virtue of the following clause in the plaintiff's deed: "Nothing herein contained shall be held to impose any restriction on or easements in any land of the [grantor] not hereby conveyed." Compare Humphrey v. Beall, 215 N.C. 15, 200 S.E. 918 (1939), where the failure to include the restrictive covenant in 4 lots out of 180 was deemed fatal to the plaintiff's case, even though the defendant's deed was one of those containing a restrictive covenant.

84. "If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of the restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold. For want of a better descriptive term this is styled a reciprocal negative easement. It runs with the land sold . . . and abides with the land retained . . . . It is not personal to the owners but operates upon use of the land by any owner having actual or constructive notice thereof." Sanborn v. McLean, 233 Mich. 227, 229, 206 N.W. 496, 497 (1925).

85. This is because of the historical difficulties inherent in an attempt to create an easement in favor of a third person. See 3 POWELL, REAL PROPERTY § 407, at 405 (1952).

out notice of the rights acquired by grantee *A*, he could theoretically prevail over grantee *A*, even though he would be subject to an action by the common grantor or by a purchaser of a lot from the common grantor subsequent to the time of his own acquisition. However, there are four ways in which *B* could be held to have received the requisite notice: actual notice, constructive notice of the deed to grantee *A* in a "deeds out" jurisdiction, "inquiry" notice derived from the existence of covenants in *B*'s own deed, and "inquiry" notice derived from observation of the character of the subdivision or the condition of the neighborhood. It is only under the last approach that the existence of a uniform plan would serve a notice function in addition to the function of implying a reciprocal negative easement, and the evidence of what constitutes a uniform plan for the former purpose would obviously be quite different from that required for the latter.[86]

The same basic theoretical analysis applies in part in cases where the common grantor has omitted the restrictive covenants in some of the deeds, and an earlier grantor whose deed contained restrictions is attempting to enforce them against a later purchaser whose deed is free of restrictions. Again, under the theory of implied reciprocal negative easements,[87] the rights of grantee *A* are not dependent on the existence of covenants contained in the deed to grantee *B*, and the notice problem is likewise the same,[88] except that there can

86. Where the existence of a common scheme serves a notice function, the facts at the time of the sale to the subsequent purchaser should be determinative. Where the common scheme is used to imply a reciprocal negative covenant, however, the crucial point in time for determining the common scheme would appear to be the time of the sale to the lot owner seeking enforcement. *But see* Grant v. Hickols Oil Co., 84 Ohio App. 509, 87 N.E.2d 708 (1948), for a rather typical example of judicial failure to analyze carefully the significance of a common scheme in such a context. Compare Werner v. Graham, 181 Cal. 174, 183 Pac. 945 (1919), where the court explicitly recognized the illogic of allowing restrictions imposed in later deeds to be used as evidence that a common plan was intended at the time the common grantor sold to grantee *A*. If evidence that he included restrictions in later deeds is irrelevant to prove that he intended reciprocal negative covenants, surely his failure to do so should be equally irrelevant. There is considerable case authority for the proposition that a failure to place restrictions in every deed is not determinative of the right to enforce *inter se*. *E.g.*, Tubbs v. Green, 30 Del. Ch. 151, 55 A.2d 445 (1947); Wayne v. Baker, 6 Ill. App. 2d 369, 128 N.E.2d 345 (1955); Adams v. Parater, 206 Md. 224, 111 A.2d 590 (1954).

87. A few courts have refused to employ a theory of implied reciprocal negative covenants in such cases, on the ground that such a covenant is an interest in land covered by the Statute of Frauds and thus not provable by parol evidence. See, *e.g.*, Hege v. Sellers, 241 N.C. 240, 84 S.E.2d 892 (1954); see also Sprague v. Kimball, 213 Mass. 380, 100 N.E. 622 (1912).

88. With respect to the notice problem in this situation, see, *e.g.*, Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925), where the court held that because of the character of the neighborhood, the defendant was "put to inquiry" and that if he had made inquiry he would have found "of record" (presumably by virtue of the other deeds from the common grantor) the existence of the restrictions. Other Michigan cases illustrate the other ways in which the notice requirement can be satisfied.

obviously be no "inquiry" notice derived from restrictive covenants contained in grantee *B*'s deed. In such a situation, however, if we employ a contract theory of enforcement we see that there are new and different problems both with respect to the question of notice and the nature of the right sought to be enforced by grantee *A*. Since there is no express covenant binding on grantee *B* which can be enforced by grantee *A* as a third party beneficiary, notice should be irrelevant unless it can be shown that the common grantor has breached a promise to include such covenants in all subsequent deeds. If that can be established, then a purchaser who had notice of the promise might be bound under a theory of estoppel. The showing of a common scheme might serve two functions in such a case. It may be evidence of a promise by the common grantor to insert the covenants in later deeds,[89] and it may serve as a basis for imputing knowledge to grantee *B*.[90]

Before leaving the subject of the "common scheme" as it relates to the question of notice, mention should be made of cases dealing with the so-called "resubdivision" problem. If the grantor (*O*) sells tracts of land to *A* and *B* respectively, inserting in each deed certain restrictive covenants, and *A* then resubdivides his tract into a number of smaller lots, a question may arise as to whether the owners of these lots may enforce *inter se* the restrictions contained in *A*'s deed, when no similar restrictions were inserted in the subsequent deeds from *A*. The cases dealing with the resubdivision situation often purport to make the existence or non-existence of a common plan

E.g., McQuade v. Wilcox, 215 Mich. 302, 183 N.W. 771 (1921) (constructive notice by virtue of "deeds out"); Allen v. City of Detroit, 167 Mich. 464, 133 N.W. 317 (1911) (actual notice by virtue of a written memorandum). See also Stark v. Robar, 339 Mich. 145, 63 N.W.2d 606 (1954). These cases illustrate the confusion which may exist within the same jurisdiction concerning the notice problem. After the "deeds out" holding of McQuade v. Wilcox, *supra*, it is difficult to see why the concept of actual or inquiry notice need be utilized in such situations. On the other hand, in jurisdictions which refuse to imply reciprocal negative covenants, the court will refuse to enjoin restrictions even though the purchaser has "actual" notice. *E.g.*, McCurdy v. Stodard Realty Corp., 295 Ky. 587, 175 S.W.2d 28 (1943). *But see* McLean v. Thurman, 273 S.W.2d 825 (Ky. Ct. App. 1954).

89. For a classic example of this approach, see Johnson v. Mt. Baker Park Presbyterian Church, 113 Wash. 458, 194 Pac. 536 (1920).

90. It should be noted that there is usually no notice problem involved in cases where a subsequent purchaser is suing a prior purchaser on the basis of a covenant inserted in the first grantee's deed. The court may be concerned with the theory of enforcement (*i.e.*, whether grantee *B* is an assignee of the common grantor's covenant or the purchaser of a dominant estate) and may employ the concept of a "common scheme" accordingly, but will not encounter a notice problem with respect to grantee *A* (the covenant is in his deed or the deed of his predecessor in title) or grantee *B* (since it is well settled that ordinarily at the time of purchase one need not have notice of the existence of a restriction benefiting his land in order subsequently to enforce it). Rogers v. Hosegood, [1900] 2 Ch. 388. *But see* Union of London and Smith's Bank Ltd's Conveyance, [1933] 1 Ch. 611.

determinative of the question of enforcement.[91] Unfortunately, the cases frequently fail to distinguish between situations where *A* fails to insert restrictions in the deeds of the resubdivided lots and cases where he inserts new restrictions or attempts to incorporate restrictions contained in his deed from *O*. Conceptually, the problem of allowing the owners of the resubdivided lots to enforce *inter se* is quite difficult in the former cases,[92] while in the latter situations the problem is no different from what has been previously discussed.[93] The purpose of showing a "common scheme," therefore, differs accordingly. For our purposes it is important to note that such cases typically do not raise a notice question since, even in a "non-deeds out" jurisdiction, the purchaser of the resubdivided lots will have constructive notice of the covenants contained in the deed from *O* to *A*. Thus, if one can solve the conceptual difficulties attendant upon making such covenants enforceable by *A*'s vendees, the question of notice simply disappears.

G. *Summary*

With respect to the enforcement of equitable servitudes, we can define two distinct situations where a court must consider the question of notice. First, there is the situation where the common grantor, in selling a portion of his land, has inserted in the deed an express restriction purporting to burden his retained land, but has failed to insert that restriction in subsequent deeds of the retained land. Because of the equitable nature of such an interest, the courts have traditionally refused to enforce the covenant against a subsequent

91. See, *e.g.*, Silberman v. Uhrlaub, 116 App. Div. 869, 102 N.Y. Supp. 299 (1907).

92. Neither the traditional contract nor property theories of enforcement are adequate to explain how a subsequent purchaser of a lot previously included in a larger tract burdened by a restrictive covenant can acquire the benefit of such a restriction with respect to any tracts which make up the original servient estate. Using the example set forth in the text, we can see how *O* can enforce against *A* and *B* or their subgrantees; how *A* and *B* can enforce against each other; and even how the subgrantees from *A* can sue *B* or his subgrantees and vice versa. To allow one of *B*'s subgrantees to enforce against another, however, requires resort to an almost metaphysical analysis. Chafee and Re, for example, suggest that we might "regard the area as like a checkerboard with every square bound and benefited as a whole, or . . . that each square inch of soil is bound and benefited with respect to every other square inch, even though situated inside a single original lot." CHAFEE & RE, CASES ON EQUITY 447 (4th ed. 1958).

93. These cases do not really raise the typical resubdivision problem, although they are often treated as if they did. There is no logical reason for treating such a situation as any different from other cases where a common grantor (here the common grantor is *A*, not *O*) inserts restrictions in deeds to lots in a subdivision. Although the deeds from *A* may incorporate restrictions appearing in his original deed from *O*, *O*'s intent should be irrelevant in transactions between *A* and his grantees. *But see* Wright v. Pfrimmer, 99 Neb. 447, 156 N.W. 1060 (1916), and Weiser v. Freeman, 227 Pa. 78, 75 Atl. 1021 (1910), where the courts focused attention on the intent of *O* rather than the intent of *A*.

purchaser of the servient estate who takes without notice of the existence of the restriction. Such notice may be actual, inquiry, or constructive. We have explored the several approaches which have been taken by the various courts with respect to the question of constructive notice by virtue of "deeds out," observing that those courts which find notice usually emphasize the importance of the interest to the owner of the dominant estate, while those refusing to find notice emphasize the "burden of title search" problem.

Second, there are situations where the restrictions on the retained land are not expressly imposed by a clause in the deed to grantee *A*. Under these circumstances grantee *A* must establish that the land subsequently conveyed by the common grantor is burdened by restrictions similar to those imposed on his own tract and that he, as the owner of tract A, is the beneficiary of such restrictions. If he relies on a theory of implied reciprocal negative covenants, he must also establish that the subsequent purchaser of tract B had notice of the restrictions. This he may do by virtue of the doctrine of inquiry notice, by actual notice, or by the doctrine of constructive notice in a "deeds out" jurisdiction. In this situation, presumably the function of the recording system is to give the subsequent purchaser constructive notice of the fact which gives rise to the implied covenants —the imposition of the restrictions on other "deeds out" by the common grantor.

IV. Easements

A. *Legal Interests v. Equitable Interests*

In an examination of the effect of the recording laws on easements (as opposed to equitable servitudes), it is initially important to analyze the principles which the courts must apply in deciding between the claims of the respective grantees. No longer are we dealing with a situation where a court can apply the traditional doctrine that an innocent purchaser of a legal interest takes free and clear of outstanding equities. Unlike a situation involving equitable servitudes, an easement is a legal interest and as such was not historically subject to being defeated by an innocent purchaser for value.[94] Although there is authority for the proposition that by virtue of the recording acts all legal interests are to be treated as equities,[95] it is submitted that there is little judicial or statutory justification for so

94. See note 3 *supra*.

95. "[A]t common law an innocent purchaser of a legal title took clear of trusts and equities, but not of legal conveyances, whether known to him or not; but our recording acts, which are designed to make all conveyances matters of record notice, put even legal conveyances on the footing of equities." Bird v. Smith, 8 Watts 434, 441, 34 Am. Dec. 483, 487 (Pa. 1839).

sweeping a generalization. As was previously described, it is only the unrecorded legal conveyance which is now subject to being defeated by subsequent purchasers without notice.[96] Thus, under a strict interpretation of the typical recording statute,[97] it would appear that a legal interest is subject to being defeated only if the interest is one required to be recorded, it is in fact not recorded, and the contest is between the owner of the interest and a subsequent purchaser without notice.

From the foregoing analysis it can be seen that it is misleading to treat a case involving an easement as strictly analogous to a case involving an equitable servitude. In the latter situation it is possible to argue that even if the instrument creating the restriction is recorded (as in the typical "deeds out" case), the interest can still be defeated by application of rules relating to bona fide purchasers, if a court finds that recording under such circumstances does not constitute constructive notice to the subsequent purchaser. If, however, the deed to grantee *A* purports to grant an easement (a legal interest) which burdens the retained land, it would appear to be irrelevant whether *B* had constructive notice of such an easement, as long as grantee *A* records. The distinction thus drawn between restrictive covenants and easements has been clearly recognized by a number of cases dealing with equitable servitudes,[98] and, despite an occasional dictum to the contrary, the author has not been able to find any easement cases (even in "non-deeds out" jurisdictions) where a court has squarely held for the owner of the servient tenement in such circumstances.[99]

96. See text accompanying notes 9-11 *supra.*

97. *E.g.*, MICH. COMP. LAWS § 565.29 (1948), a "race notice" statute: "Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded."

98. In rejecting the "deeds out" rule, the court in Glorieux v. Lighthipe, 88 N.J.L. 199, 203, 96 Atl. 94, 96 (1915) stated: "A purchaser may well be held bound to examine or neglect at his peril, the record of the conveyances under which he claims, but it would impose an intolerable burden to compel him to examine all conveyances made by every one in his chain of title. The case differs from the conveyance of an easement or any interest that lies in grant. A grant takes effect regardless of notice; an equitable servitude is the creature of equity alone and depends entirely on the existence of notice." See also Howland v. Andrus, 80 N.J. Eq. 276, 83 Atl. 982 (1912); Holt v. Fleischman, 75 App. Div. 593, 600, 78 N.Y. Supp. 647, 652 (1902) (concurring opinion); 5 TIFFANY, REAL PROPERTY § 1266 (3d ed. 1939).

99. Despite the clear distinction drawn in Glorieux v. Lighthipe, *supra* note 98, between easements and equitable servitudes, we see the distinction ignored in the dicta of subsequent New Jersey opinions. In National Silk Dyeing Co. v. Grobart, 117 N.J. Eq. 156, 175 Atl. 91 (1934), the court erroneously cited *Glorieux* for the proposition that "a purchaser of other land from a common grantor is not charged with notice of an easement granted by an earlier deed not in his chain of title . . . ." *Id.* at 163, 175 Atl. at 94. The court proceeded, however, to find "inquiry" notice by virtue of the fact that the common grantor had conveyed the remaining land to the

While it can be argued that it is anomalous and undesirable that the owner of an easement is afforded protection against subsequent purchasers where under identical circumstances the owner of an equitable servitude is not, it is submitted that the "mutually innocent party" context in which this situation typically arises justifies adherence to the traditional distinction. This is especially true when one considers the haphazard way in which so many of the equitable servitude cases appear to have been decided. It would be ironic if the analogy between equitable servitudes and easements—so often employed to give equitable servitudes a status traditionally enjoyed by legal interests—were now used to the detriment of owners of easements on the theory that if the equitable servitude is defeated, though recorded, an easement should likewise be defeated in similar circumstances.

B. *Easements by Implication*

Thus, one must beware of accepting without extensive qualifications the frequently quoted principle that "a bona fide purchaser of land without actual or constructive notice of the existence of an easement in such land takes title free and clear from the burden of the easement."[100] Not only must there be excepted from the operation of such a rule situations involving express easements; in many jurisdictions the rule is not even valid for cases involving various types of easements by implication.[101] Unless we are to regard such easements as creatures of equity, and therefore subject to the traditional BFP rule,[102] it would appear necessary to bring them within the

defendant, "excepting" the plaintiff's lot. In Camp Clearwater, Inc. v. Plock, 52 N.J. Super. 583, 146 A.2d 527 (1958), the dictum of *National Silk* was elevated to the status of a "legal rule": "It is true that in this state the provisions of the recording act . . . are deemed not to charge a purchaser of lands with constructive notice of easements or covenants affecting his land which appear in an earlier deed by his grantor, conveying property other than the property involved in the purchaser's chain of title." *Id.* at 598, 146 A.2d at 536. Again, however, the language is dictum, the case actually having been decided on the theory that the easement merged when the common grantor re-acquired the dominant estate. Many of the cases that are frequently cited as bearing on the question of the applicability of the "deeds out" rule to easements are actually decided on other grounds. See, *e.g.*, Johnston v. Harsh, 207 Ala. 524, 93 So. 451 (1922) (unrecorded easement); State v. Anderson, 241 Ind. 184, 170 N.E.2d 812 (1960) (unrecorded easement); Hammond v. Earls, 146 Ky. 162, 142 S.W. 379 (1912) (actual notice); Phillips v. Lawler, 259 Mich. 567, 224 N.E. 165 (1932); Missouri Power & Light Co. v. Thomas, 340 Mo. 1022, 102 S.W.2d 564 (1937) (actual notice); Parker v. Meredith, 59 S.W. 167 (Tenn. Ct. Ch. App. 1900) (unrecorded easement); Wichita Valley Ry. v. Marshall, 37 S.W.2d 765 (Tex. Civ. App. 1931) (negative easement treated as contract).

100. See, *e.g.*, 17A AM. JUR. *Easements* § 128 (1957).

101. Some authorities distinguish between easements by "necessity" and other types of easements by implication. *E.g.*, 3 POWELL, REAL PROPERTY §§ 410-11 (1952). Others treat the easement by necessity as simply one form of a general category of easements by implication. See, *e.g.*, RESTATEMENT, PROPERTY § 474 (1944). For an excellent collection of cases, see Annot., 174 A.L.R. 1241 (1948).

102. *But see* Ricenbaw v. Kraus, 157 Neb. 723, 61 N.W.2d 350 (1953), where the

scope of the recording system in order to make the notice principle applicable to them. In fact, the latter proposition has been applied in the class of cases involving so-called "quasi-easements," where an established use of a part of a single tract for the benefit of another part of the same tract is allowed to continue after severance, even though the deed is silent with respect to such use.[103] The New York court was persuaded in such a case that it would be illogical to protect a BFP against prior unrecorded deeds and not to afford the same protection in the case of "anything less than a deed in fee such as an agreement, expressed or implied, creating an easement."[104] One possible answer to such an argument is to treat the easement as being created by the recorded writing which conveys the quasi-dominant parcel, the easement being read into the conveyance by interpretation.[105]

Several of the courts which have refused to recognize the notice principle as relevant in cases of easements by implication have emphasized the hardship which recognition of the principle would impose on the owner of the dominant estate—the obligation to know when the original owner is negotiating for sale of the servient tenement, so as to be able to give notice of the easement by implication to the prospective purchaser.[106] However, a persuasive counter-argument would be that the owner of the dominant estate is in a better position to protect himself than is the owner of the servient estate, since the dominant owner can demand that the easement be expressly provided for in his deed.[107] Obviously, this discussion

court gave effect to an oral license of drainage on a theory of "equitable estoppel," even though the owner of the servient estate was a subsequent purchaser without notice.

103. See 17A AM. JUR. *Easements* § 33 (1957); 3 POWELL, REAL PROPERTY § 411 (1952).

104. Goldstein v. Hunter, 257 N.Y. 401, 178 N.E. 675 (1931). See also Tufts v. Byrne, 278 App. Div. 783, 103 N.Y.S.2d 917 (1951). In a number of cases, particularly those dealing with implied easements of light and air, the courts have tended to disregard the distinction between the requirement that the easement be "apparent" (as a prerequisite to implication between the original parties) and the requirement of notice under the recording systems, which relates to subsequent purchasers of the servient estate. See, *e.g.*, Robinson v. Clapp, 65 Conn. 365, 32 Atl. 939 (1895). See also Walek v. DiFeo, 60 N.J. Super. 324, 159 A.2d 127 (1960). The result in many such cases is probably attributable more to the antagonism of the courts to easements of light and air than to a well-reasoned interpretation of the effect of the recording system. *E.g.*, Roe v. Walsh, 76 Wash. 148, 135 Pac. 1031 (1913). *But see* McKeon v. Brammer, 238 Iowa 1113, 29 N.W.2d 518 (1947). "Whatever be the test with respect to apparency of the servitude when the question to be decided is whether there was an easement or not, it is clear that no such test should be applied when the existence of the easement is admitted or established and the question is whether it will be extinguished if not apparent to a purchaser of the servient estate." *Id.* at 1122, 29 N.W.2d at 523.

105. This is the usual theory by which it is argued that implied easements do not violate the Statute of Frauds. See 3 POWELL, REAL PROPERTY § 411 n.3 (1952).

106. See, *e.g.*, Wiesel v. Smira, 49 R.I. 246, 142 Atl. 148 (1928).

107. "The simplest rule, and that best suited to a country like ours, in which

assumes that an easement so created would itself be effective against subsequent purchasers.[108]

C. *Easements by Prescription and Necessity*

In the case of easements acquired by prescription, of course, there is ordinarily no way that the owner of the dominant estate can bring himself within the protection of the recording system, and there is virtually unanimous agreement that the notice principle does not apply to such situations.[109] However, a case involving an easement by necessity is not so easily resolved.[110] If such an easement is regarded as arising by operation of law (in order to prevent land from remaining unusable), then it should logically be treated as analogous to an easement by prescription and hence exempt from the operation of the recording system. Conversely, if such an easement is regarded as arising out of the implied terms of the grant, it is more logical to favor the purchaser without notice—at least in those jurisdictions which do so in the case of other types of easements by implication. In practice, however, the divergent case law is not attributable to any such dichotomy of analysis, nor does it appear to recognize the existence of the recurring theme of this paper: that these problems involve a choice between conflicting social policies and conflicting claims of mutually innocent parties.[111]

changes are continually taking place in the ownership and use of lands, is that no right of this character can be acquired without express grant of an interest in, or covenant relating to, the land over which the right is claimed." Roe v. Walsh, 76 Wash. 148, 155, 135 Pac. 1031, 1034 (1913), quoting from Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80 (1874).

108. See note 99 *supra* and accompanying text.

109. "In such a situation there are two innocent parties. On the one hand we have the innocent purchaser, in the sense that he purchased the servient estate without notice of an easement that was not apparent. On the other hand we have the owner of the dominant estate in full possession of an easement that is not apparent, which he has gained by prescription or one which the law will imply upon a severance. He has no instrument to record, that will give constructive notice to prospective purchasers of the servient estate. . . . Until the easements so created are in some manner brought within the recording acts . . . the owner of the dominant estate and consequently the owner of the easement is not in default or in any manner estopped from asserting his easement right as against any owner of the servient estate." McKeon v. Brammer, 238 Iowa 1113, 1120, 1126, 29 N.W.2d 518, 522, 525 (1947), quoting from Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80 (1874). See also Annot., 174 A.L.R. 1244-46 (1948).

110. See generally 3 POWELL, REAL PROPERTY § 410 (1952).

111. In the leading case of Backhausen v. Mayer, 204 Wis. 286, 234 N.W. 904 (1931), for instance, the court justified its holding in favor of the subsequent purchaser by the theory that the owner of the dominant estate was "negligent" in failing to extract an express covenant from his grantor. Some courts have held for the subsequent purchaser of the servient estate on the basis of a general policy against implied grants of interests in land, including easements by necessity. *E.g.*, Howley v. McCabe, 117 Conn. 558, 169 Atl. 192 (1933). Others have gone to great lengths in order to find the notice they apparently assume is necessary. See, *e.g.*, Keen v. Paragan Jewel Coal

V. Conclusion

In situations involving equitable servitudes, we have seen the confusion generated by the attempt to apply the notice principle to differing fact patterns and divergent theories of enforcement. Often it is a defect in the recording system which causes the difficulty. In the case of easements, the situation is similar and makes generalization equally difficult. In the case of easements created by express grant, as was the case with express restrictive covenants, one can deplore the fact that a flaw (essentially mechanical) in the recording system has prevented the subsequent purchaser from ascertaining that he is purchasing a servient estate. Because of the historical limitations on the BFP rule as it relates to easements, the owner of the dominant estate will probably fare better than he would in an analogous situation involving equitable servitudes,[112] but this makes it no less imperative that the recording system be overhauled so as to protect the owners of both the dominant and servient estates.[113]

In the case of easements created by means other than express grant, the problem is similar to that presented by the implied restrictive covenant; there are divergent and often conflicting theories to explain how such interests can be created, and the applicability of the notice principle to such a situation differs accordingly. One must understand the policies reflected in the "easement by necessity" or "easement by prescription" doctrines before the recording system, or indeed the notice principle, can be intelligently evaluated in such a context. One might conclude, for example, that public policy requires the protection of an easement by necessity, regardless of whether the recording system can give the owner of the servient estate notice that such an interest exists.[114] In short, the situations we have been considering demonstrate that accurate functional generalization is not always possible. Does a "deed out" give notice of easements or covenants affecting the servient estate? The best answer, alas, is that it depends . . . .

Co., 203 Va. 175, 122 S.E. 543 (1961), where the court held that the owner of the servient estate was charged with notice from the recorded title that defendant's land was surrounded on all sides by the lands of strangers. See also Annot., 41 A.L.R. 1442 (1926).

112. See note 98 *supra* and accompanying text.

113. The same arguments, pro and con, that applied to the suggested solutions to the notice problem in the area of express restrictive covenants would appear equally applicable to the easement situation. See notes 59, 70, 73-75 *supra* and accompanying text.

114. The argument in support of such a conclusion would be that the interest of society in preserving the usability of land is more important than the objective of protecting subsequent purchasers.