A TREATISE ON COVENANTS WHICH RUN WITH LAND: OTHER THAN COVENANTS FOR TITLE

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BY

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TO

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THIS ESSAY IS DEDICATED, WITH HIS CONSENT, IN GRATEFUL RECOGNITION OF HIS EFFORTS IN AIDING THE AUTHOR AND HIS FELLOW STUDENTS TO AN UNDERSTANDING OF THE LAW OF REAL PROPERTY

PREFACE.

For a long while there was a general impression in this country that the power to charge real property with the burden of agreements affecting its use would be very unfortunate, as it must hamper the transmission of land, and operate as an impediment to commerce. And where such agreements are incautiously made, there is much to support the opinion that they are dangerous. But in recent years, it has become evident that the free changing of property and the shifting of titles, which it was formerly so plausibly desired to advance, has worked in some instances more hardship than where its exchange is rendered more difficult. As cities increased in number and size, and land and building came to involve great sums of money, it began to appear that the continued use of property in a particular locality for the same purpose was a very important element in the value and desirability of an investment. It became important as well to the public in making outlays in local improvements, as to the individuals who expended their money upon the confidence that their buildings could have a permanent use for the purpose for which they were built. Thus later in the building of new towns of great promise, and in the building of great houses in old towns, it became desirable to have some guaranty that the uses to which localities were assigned should be permanent.

The importance of these matters was recognized long ago in old countries, and their laws grew into a shape pretty well calculated to effect justice. But in America nearly all localities were so new, and land was so plentiful, that there was

little appreciation of the importance of permanency in real property values until irreparable damage was suffered.

It is apparent that our legal profession has been too little mindful of the relation between the principles upon which the law of real property rests and the principles governing the agreements which may be entered into by property-holders to affect their possessions. But with a former commercial antipathy to the existence of any connection between agreements and the use of property, lawyers and judges have not had much occasion to inform themselves upon the questions involved; and their overlooking them is not surprising. Moreover, the law has been very difficult to study, as early American precedents were rare, and the early English law was in great confusion owing to the various interpretations put upon yet older English authorities.

While there were several means through which the old law affected the use of property by agreement of the parties,—sometimes by stipulations or conditions, sometimes by the reservation or granting of easements, sometimes by formal agreements called covenants,—all but covenants were by nature so limited in their scope that they were of little service to carry out what the parties often desired. Covenants, therefore, for more than a hundred years have been used in English law to express the purposes of the parties; and at once the question became very important how far these covenants could attach to the land so as to bind those who were successors in title to the property-holders who made the agreements.

The law upon covenants that run with land in all recent times has been acknowledged to be in a very chaotic state; and it is with a view to seeing what it was historically, that this work has suggested itself. The author has come to believe that covenants are properly used to affect property in the hands of successors to the titles of covenanting parties, as well where the land is burdened as where the land is bene-

fited; and that the modern English doctrine supported by some American courts, greatly curtailing the running of the burdens of covenants, is probably based upon a misinterpretation of the Common Law.

It is therefore desired to convince the reader that covenants should run more broadly with the land than was conceived by the learned editors of Smith's Leading Cases in their notes to Spencer's Case; and after showing that the American law generally sustains a broader running of covenants, to add some historical reasons for the soundness of the American decisions.

It is not pretended that these chapters shall present exhaustive research into the depths of the law. Such a labor the reader will hardly think necessary. Nor would he be warranted in giving time to the following of such a pursuit except in the wake of great scholars. It would seem necessary, however, to examine the law ourselves through the decisions in the Year Books, as this seems never to have been done for us. But for the early law that brought about these decisions, it is enough to rely upon the conclusions gathered by such writers of the early day as Bracton, or better, those gathered by such students of the present day as Sir Frederick Pollock, Mr. Maitland, or Mr. Justice Holmes. Indeed the collateral work of such scholars can hardly be overvalued even in the study of later decisions; for one should be ever mindful that the decisions as we have them from the time of King Edward the First are mere summarized statements which are to be compared rather by their general drift than by their line of reasoning. They are more useful than our own decisions because they are of a time nearer the rise of the principles, and so likely to contain them; but the judges who made those decisions were often more ignorant of the sources of the law than we are to-day. Even the great Bracton, writing about the middle of the thirteenth century, came long enough after the law had