RESTRICTIVE COVENANTS AFTER THE DISSEISIN OF THE COVENANTOR. — When a disseisor enters on land bound by a negative restrictive covenant, may the covenantee force him to observe the restriction? Since the covenant is enforceable against assignees of the covenantor only in equity, and does not attach inseparably to the land like a legal easement or rent charge, and since there is no privity between the covenantor and disseisor, it has been argued that the disseisor cannot be held to his disseisee's obligation. This theory would leave the covenantee without remedy if the disseisor should do the acts forbidden by the covenant; for the courts would hardly adopt the expedient of allowing the covenantee to compel re-entry, by an unwilling disseisee, who has never legally bound himself to do any such thing. There seems to be no adequate reason why the disseisor should not, on the simple ground of justice to the covenantee, be enjoined to respect the covenant, — he cannot complain if an estate coming to him as the gratuity of another's negligence is restricted in its use. Such a course would be no anomaly. Though a covenantor has agreed for himself alone, yet on the ground of necessity in working out justice to the covenantees where unjust enrichment would otherwise result, a donee or purchaser with notice from the covenantor is held to take subject to the covenant.[1]

The same principle appears in the analogous case of a trust, where it is the privilege of the *cestui* to protect the trust estate if the trustee is incapacitated.[2] There are many examples of this. The *cestui* of a mortgage held in trust is allowed to bring a bill to foreclose when the trustee is out of the country,[3] a result which the court bases on the ground of "substantial necessity." So also, where a sheriff wrongfully disseised the trustee of certain lands, and the trustee resigned, the *cestui* has been allowed to bring a bill to restrain an execution sale of the land.[4]

That the right of the injured party to sue may exist though the person who should have protected him has no action, is shown by the case of the donee or purchaser with notice from a covenantor, where the covenantor himself has no right of action. As the statute cannot run against an unbroken negative covenant, it would seem, further, that, as a recent English case holds, the disseisor's obligation to respect the covenantee's right should not terminate when the disseisee's rights are barred by the statute. *Re Nesbitt and Potts' Contract,* 53 W. R. 297 (Ch. D.).

SUSPENSION OF EASEMENTS BECAUSE OF MISUSER. — The law affords immediate redress for an excessive user of an easement, because such user may be at once an injury to the servient tenement and the basis of a new prescriptive right. The owner of the servient tenement may protect himself, in the case of affirmative easements, by bringing trespass for the excess,[1] by physically obstructing the encroachment,[2] or, where the legal

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[1] *Cf.* De Mattos *v.* Gibson, 4 De G. & J. 276.
[2] Beach, Trusts & Trustees § 698.
[3] Ettlinger *v.* Persian, etc., Co., 142 N. Y. 189.
[4] Zimmerman *v.* Makepeace, 152 Ind. 199.

[1] Davenport *v.* Lamson, 21 Pick. (Mass.) 72.
[2] French *v.* Marstin, 32 N. H. 316.

remedy is inadequate, by obtaining an injunction.[3] But there are cases where the authorized and unauthorized user are so intertwined that the obstruction of one is impossible without interference with the other. Moreover in such cases a court would find it difficult, if not impossible, to award damages in trespass, or to determine, for the purpose of enforcing an injunction against the wrongful user only, when the right had been exceeded. The only remedy is to stop all user. Since it seems hardly advisable to allow total obstruction of the way without the court's authority, resort must be had to some form of injunction. This necessity arose in a recent case in the New York Appellate Division. *McCullough* v. *Broad Exchange Co.*, 92 N. Y. Supp. 533. The owner of land to which a general right of way was appurtenant had erected an office building partly upon the dominant tenement and partly upon premises adjoining. Tenants and employees from the entire building could and did use the way. Over it, also, coal was brought for the boilers situated on the dominant estate but heating all parts of the building. The contention in this case that there should be a permanent injunction was properly refused. An easement is a valuable property right, and as such merits protection. It may be acquired, as may other interests in realty, by grant or prescription. It may be lost, also, by these and certain other well-defined means.[4] Some text-writers have intimated that one means of extinguishment, where the rightful and wrongful user are inseparable, is forfeiture by abuse.[5] This conclusion they appear to derive mainly from the early English cases dealing with the easement of light. Naturally no suit at law or in equity lay for an increased number of windows in a tenement possessed of ancient lights. If the servient owner could obstruct the new lights only, he might do so. Where that was not possible he might formerly obstruct all if necessary, at least until the lights were restored to their ancient condition.[6] These early cases, however, are of little value as precedents, for the modern law, far from extinguishing the easement, permits no obstruction whatever of the ancient lights, even though encroachment cannot otherwise be prevented.[7] The only reason for compelling forfeiture as the result of excessive user can be the protection of the servient owner. Where the rightful user is separable he already has sufficient protection, and the courts have so held.[8] In the principal case, also, where the user was inseparable, the injunction given forbade only the dominant owner's using the easement or furnishing occasion or extending invitation to others to use it, until the building should be so altered as to permit the proper user only. This conditional form of injunction seems an entirely adequate remedy here and in all such cases, so that it is difficult to imagine any in which actual forfeiture of the easement should be required.[9]

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[3] Louisville, etc., Ry. Co. *v.* Malott, 135 Ind. 113. See Greene *v.* Canny, 137 Mass. 64.

[4] See Jones, Easements § 834 *et seq.*

[5] Washburn, Easements, 4th ed., 704; Reeves, Real Property § 195; Gale, Easements 506.

[6] Renshaw *v.* Bean, 18 Q. B. 112; Hutchinson *v.* Copestake, 8 C. B. (N. S.) 101. See Garritt *v.* Sharp, 3 Ad & E. 325.

[7] Tapling *v.* Jones, 13 C. B. (N. S.) 876; Aynsley *v.* Glover, L. R. 10 Ch. 283.

[8] Mendell *v.* Delano, 7 Met. (Mass.) 176; Walker *v.* Gerhard, 9 Phila. (Pa.) 116. See White's Bank *v.* Nichols, 64 N. Y. 65; Proprietors, etc., *v.* Nashua, etc., R. R. Co., 104 Mass. 1.

[9] See Masonic Temple Ass'n *v.* Harris, 79 Me. 250.