[HOUSE OF LORDS.]

H. L. (E.) 1888 Dec. 18.

GEORGE JOHN SPICER . . . . . APPELLANT;

AND

GEORGE MARTIN . . . . . RESPONDENT.

Lessor and Lessee—Restrictive Covenant—Representations—Collateral Agreement.

S. purchased from Commissioners by several conveyances the fee simple of several houses forming one block of buildings upon a site laid out in accordance with a building scheme, each conveyance containing a covenant by S. not to carry on or permit to be carried on upon the premises conveyed any trade or business but to keep the house as a private dwelling-house only, and not to do or suffer to be done upon the premises conveyed anything which might grow to the annoyance of any person who might be or become the owner, tenant, or occupier of any part of the premises then or late belonging to the Commissioners. S. afterwards granted to the respondent a lease of one of the houses containing a restrictive covenant of the same nature and a block plan of the houses. During the negotiations for the lease statements were made by S.'s solicitors to the respondent whereby he became aware that similar restrictive covenants were contained in all the leases granted by S. of houses in that block and also became aware of the terms of the conveyances of the respondent's house from the Commissioners to S.:—

Held, affirming the decision of the Court of Appeal (34 Ch. D. 1) but on a different ground, that although the statements made to the respondent did not amount to a collateral contract with him as to the future management of the estate, the respondent was from the nature of the transaction entitled to an injunction restraining S. from authorizing any of the other houses in the block to be used for the purpose of trade.

The principles defined by Hall V.-C. in *Renals* v. *Cowlishaw* (9 Ch. D. 125, 129; affirmed on appeal 11 Ch. D. 866, 869) approved.

APPEAL from a decision of the Court of Appeal.

The facts are stated in the report of the decision of the Court of Appeal (1), and are referred to in some detail in the judgments of Lords FitzGerald and Macnaghten in this House. For the present purpose the following outline will suffice:—

By a conveyance dated the 25th of March 1867, reciting that it was in pursuance of prior building agreements between the Commissioners for the Exhibition of 1851 and John Spicer, the

(1) 34 Ch. D. 1.

Commissioners conveyed to John Spicer the fee simple of the house No. 2 Cromwell Gardens, subject to a covenant that he, his heirs and assigns, would not carry on or permit to be carried on upon the premises any trade or business, but would keep and use them as a private dwelling-house only, and would not wittingly or willingly do or suffer to be done on the premises any act or thing which might grow to the annoyance, damage, or disturbance of any person who might be or become the owner, tenant, or occupier of any part of the hereditaments and premises then or late belonging to the Commissioners. The conveyance contained a block plan of the seven houses in Cromwell Gardens. By six similar conveyances of the same date the Commissioners conveyed to John Spicer the houses Nos. 1, 3, 4, 5, 6 and 7 Cromwell Gardens, the whole seven forming one block of buildings, and each conveyance contained a similar restrictive covenant.

In 1874 the respondent took from John Spicer a short lease of No. 2 Cromwell Gardens containing a block plan of the seven houses in Cromwell Gardens and a covenant similar to that in the eighty years lease hereinafter referred to, and was informed by John Spicer's solicitors that there was a covenant to this effect in the conveyance of No. 2 to John Spicer and also in the leases of his other houses in Cromwell Gardens.

In 1880 John Spicer in consideration of a high premium granted to the respondent a lease of No. 2 for eighty years subject to a covenant that the lessee and his assigns would not use the premises or permit them to be used for any trade or business or for any purpose whatever other than as a private dwelling-house, nor do or permit or suffer any act, matter, or thing to be done therein which might be or grow to the annoyance, damage, or disturbance of the lessor, his heirs or assigns, or of his or their tenants or other the owners or occupiers of lands or houses adjoining, or of any person or persons who might be or become the owner, tenant, or occupier of any part of the hereditaments or premises at Kensington then or late belonging to the Commissioners. The lease contained a copy of the block plan on the lease of 1874.

During the negotiations for this lease the respondent was informed by John Spicer's solicitors (as the fact was) that the leases

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of his other houses in Cromwell Gardens contained a similar restrictive covenant, and the abstract of John Spicer's title also disclosed to the respondent the conveyance of No. 2 from the Commissioners to John Spicer.

In 1885 one Brett, the promoter of an hotel company, arranged for the purchase of Nos. 3, 4, 5, 6 and 7 Cromwell Gardens,—as to some of them direct from G. J. Spicer (the devisee of John Spicer), and as to the others from persons on whom John Spicer's interest had devolved,—for the purpose of converting the houses into an hotel. Brett also, with G. J. Spicer's consent, negotiated with the Commissioners for a license to convert these houses into an hotel, which the Commissioners appeared willing to grant.

The respondent having brought an action for an injunction against G. J. Spicer, Brett, and the hotel company, the Court of Appeal (Cotton, Lindley and Lopes LJJ.) varying an order of Bacon V.-C. granted a perpetual injunction restraining the defendants from carrying on or authorizing to be carried on upon any part of the property known as Nos. 3, 4, 5, 6 and 7 Cromwell Gardens the trade or business of an hotel or any other trade or business, and from using the property or any part thereof or authorizing it to be used otherwise than as private dwelling-houses or a private dwelling-house (1).

Against this decision G. J. Spicer appealed.

1888. July 2, 9. *Rigby* Q.C. and *Edward Ford* for the appellant:—

There was no express contract between John Spicer and the respondent that future leases of houses in Cromwell Gardens should contain a restrictive covenant similar to that contained in the respondent's lease. Nor can any such contract be inferred from the communications between the parties either in 1874 or in 1880. If any such contract existed it would be found in the agreements or leases, which admittedly contain no such thing. Nor did John Spicer make any representation to the respondent to induce him to believe, or from which the respondent was entitled to infer, that such restrictive covenants would be required in future or would not be waived. The Exhibition Commis-

(1) 34 Ch. D. 1.

sioners were entitled to waive the restrictive covenants entered into with them by John Spicer, and if they were willing to do so there was nothing in law or equity to prevent the appellant from waiving the covenants. The Court of Appeal seem to have mainly rested their decision on the authority of *Piggott* v. *Stratton* (1), but that case is clearly distinguishable. There there was an express covenant in the lease of plots B and C that C should not be built on so as to obstruct the sea view of B. The underlessee was induced to take the underlease by a distinct representation that the sea view could not be interfered with and that the underlessee would have the benefit of this restriction. No such covenant or representation exists in the present case. The requirements made by the lessor as to the form of lease were made for the lessor's protection only and were merely part of the terms upon which alone the lessor agreed to grant a lease to the respondent. There being no collateral contract, nor any representations such as the Court of Appeal assume, the case rests upon the mere statement that the lessor's houses were subject to the restrictive covenant. There is no authority for the proposition that such a statement would entitle one of the lessees to the injunction granted by the Court of Appeal. Such an attempt has never been made on any of the great London estates.

Sir *H. Davey* Q.C. and *F. C. J. Millar* Q.C. (*A. R. Kirby* with them) for the respondent:—

The decision of the Court of Appeal may be supported on two grounds. First, the respondent was bound in his lease by a restrictive covenant and one of the inducements for entering into this lease was a representation that the lessees of the other houses were similarly bound. The negotiations in fact amounted to a collateral contract to this effect. *Piggott* v. *Stratton* (2) is an express authority as to the effect of such a representation.

Secondly, looking at all the circumstances and the nature of the transaction each occupier of one of these houses is subject to the burden and entitled to the benefit of the restrictive covenant contained in each lease. John Spicer was intended to be a

(1) John. 341; 1 D. F. & J. 33.
(2) John. 341, 355; 1 D. F. & J. 33, 48.

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trustee for each lessee of the benefit of the covenants entered into by the other lessees. The doctrine which entitles the respondent in the present case to have the benefit of the restrictive covenant is well stated by Hall V.C. in *Renals* v. *Cowlishaw* (1), with every word of whose judgment the Court of Appeal entirely concurred. As pointed out in the judgment of Hall V.C. the right is established whenever the Court is satisfied that it was the intention that each of the purchasers (or lessees) should be bound by and should as against the others have the benefit of the covenants entered into by each. And see *Child* v. *Douglas* (2); and *Western* v. *Macdermott* (3).

Rigby Q.C. in reply referred to *Child* v. *Douglas* (4) as ultimately decided by Wood V.C., and to *Keates* v. *Lyon* (5), and *Master* v. *Hansard* (6).

The House took time for consideration.

1888. Dec. 18. LORD FITZGERALD:—

My Lords, in dealing with the questions in this case your Lordships may look at the title of Mr. Spicer as disclosed on the conveyance before us and appearing on the abstract of title submitted to the solicitors who represented the respondent Martin in the negotiations with Mr. Spicer, and also at the occurrences of 1874 on the negotiations for the lease for fourteen years. That lease is directly connected with the lease for eighty years, which was made during the continuance of the lease for fourteen years. Both leases are between the same parties and negotiated between the same solicitors. The solicitors for Mr. Martin had apparently the same information and the same statements before them on both negotiations.

The fourteen years' lease of No. 2 to George Martin, the respondent, is preceded by an agreement which provides that the lease should, inter alia, contain "such other covenants as are usual and comprised in the lessor's lease." By "lessor's lease"

(1) 9 Ch. D. 125, 129; 11 Ch. D. 866.
(2) Kay, 560; 5 D. M. & G. 739.
(3) Law Rep. 2 Ch. 72.
(4) 2 Jur. (N.S.) 950, 952.
(5) Law Rep. 4 Ch. 218.
(6) 4 Ch. D. 718.

is meant the conveyance from the Commissioners to Spicer. It was in the course of the negotiations for that lease that the present appellant, then acting as solicitor for his late father, John Spicer, in sending the draft of the lease for fourteen years to George Martin for approval, writes on the 26th of February, 1874: "I may, perhaps, add that the draft is the form used for the other houses in Cromwell Gardens." That draft lease contains a covenant on the part of the lessee that the demised premises should not be used "for any purpose whatsoever other than as a private dwelling-house," with a marginal observation by the present appellant in these words: "There is a covenant to this effect in the conveyance of these premises to Mr. Spicer. G. J. S." That lease was executed in the terms of the draft.

In 1880 Mr. Martin, availing himself of a provision in the lease of 1874 (that is, the fourteen years lease), gave notice of his intention to surrender in 1881, but there never was a surrender, in fact, of that lease. Negotiations were entered on for the purchase of a lease for eighty years, which, when completed by the execution of the new lease, created a surrender by operation of law of the earlier lease. Your Lordships have not before you the earlier portion of these negotiations, but we may look at the position of the parties and the circumstances of the sale. The parties were the same, the solicitors were the same, and Martin was then still in possession under the lease of 1874.

There is a letter from Martin to John Spicer, relating apparently to the notice of surrender, in which he quotes and sends to him a letter from his solicitors in which they ask him to get Mr. Spicer's acknowledgment of the receipt of that notice—"and then we can put it with our papers." This passage seems to indicate that Ashurst & Co. retained the papers connected with the lease of 1874, and had before them the statement contained in the letter of the 26th of February 1874.

The terms of the new contract appear to have been substantially arranged before the 21st of September 1880, for on that day the present appellant writes to Ashurst & Co.: "I send you the draft contract for sale of No. 2 Cromwell Gardens." That draft agreement deserves the special attention which was given to it in argument and will be given to it in the judgment which

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my noble and learned friend (Lord Macnaghten) will deliver after me. I have already read his judgment, and I concur in the observations on it which will be made by my noble and learned friend, and in the inferences he will deduce. It will be seen that the agreement for the lease for eighty years was subsequently carried into effect by a lease prepared by the present appellant.

My Lords, it seems to me that these two transactions run into each other and are not to be separated, and that each was subject to and brought about by the same statement that the whole of this property of the seven dwelling-houses was on the part of both the landlord and his lessees subject to the same restriction, that the houses were to be used as dwelling-houses only, and for no other purpose, and that the purchaser, Martin, was to be subject to and to have the benefit and protection of that restriction. I cannot doubt that both parties so intended in honesty and good faith. The transaction of 1880 was really this, that Martin purchased the larger term of eighty years, commencing from a date then three years past, at a lesser rent, but for which he paid a premium of £11,000. It was but the extension of the same relation of lessor and lessee for a longer term and at a reduced rent, and the statements which affected the first were, as it appears to me, equally applicable to the second lease.

There is, my Lords, every ingredient in this case from which we may reasonably infer an intention that the lessees or purchasers were to be protected by and have the benefit of the restrictive covenant as between Spicer and the Commissioners and to be bound by a similar obligation entered into by each on his own behalf.

It can make no difference that Spicer's obligation to the Commissioners was split up by the adoption of a separate conveyance in fee of each of the seven building lots. The restrictive obligation was applicable to each and every of the seven houses, and Mr. Spicer has himself, whilst giving notice to his lessees and assigns of the obligation he had undertaken, stipulated that they severally should enter into a similar covenant as to his own holding.

My Lords, I cannot entertain any reasonable doubt that, as between the appellant and the respondent, the latter was,

according to right and justice, entitled to the full benefit and protection of the restrictive covenant which the vendor had entered into with the Commissioners. The appellant Spicer alone contests the respondent's claim. The lessees or purchasers of two other of the seven houses were made defendants, but offered no opposition, and the other defendants, Brett and the intended hotel company, have vanished.

My Lords, in my opinion the decision of the Court of Appeal should be affirmed, and so affirmed on the ground and for the reasons which I have given, namely, that the lessee, whilst he was on the one hand subject to the obligation of the restrictive covenant contained in his lease, was also, on the other hand, entitled to the benefit of the covenant entered into by Spicer with the Commissioners to the same effect. The decision of the Court of Appeal proceeded on a question somewhat different, being one of mixed fact and law, which may be thus expressed, viz. whether the representations alleged to have been made by or on behalf of Spicer were so made and were such as that the Court ought to deduce from those representations a collateral contractual obligation on his part with Mr. Martin that the tenants of the other six dwelling-houses should be severally bound to use the houses as and for private dwelling-houses only, and not otherwise; and that he, Mr. Spicer, would not permit his property to be used save in accordance with that obligation. The houses Nos. 3, 4, 5 and 7 had been dealt with by John Spicer prior to 1874, and the leases each contained that restrictive covenant. In 1876 Hammersley acquired No. 6, but subject to the same restriction. The same observation applies to the dealing with Shafto as to No. 3 in 1876.

In the view which I have expressed as to the proper ratio decidendi, it is not now necessary to express an opinion on the difficult question on which the Court of Appeal acted. I desire to say, however, that if I had been called on now to express an opinion on it, the inclination of my mind would be in favour of the view on which the judgment of the Court of Appeal rested. The temptation of a large price was unfortunately sufficient to induce the appellant to become active in assisting to defeat the arrangement he had so entered into.

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It is not necessary here to examine in detail the action of the appellant. He was not only active in promoting the design of Mr. Reginald Brett, but he has maintained at the bar here his right to do so.

It makes no difference that the actual project has come to an end since the institution of the suit, and possibly because of its institution. The suit became necessary because of the action of the appellant, and the respondent is entitled to an injunction in the modified form adopted by the Court of Appeal.

I move your Lordships therefore that the decision of the Court of Appeal be affirmed and the appeal dismissed with costs.

LORD MACNAGHTEN :—

My Lords, the learned counsel for the respondent put their case in two ways.

Adopting the arguments which seem to have found most favour with the Court of Appeal, they contended that the communications addressed to Mr. Martin and his solicitors by Mr. Spicer's solicitor involved representations which amounted to a collateral contract by Mr. Spicer as to the future management of the estate on which Mr. Martin was induced to purchase a residence.

They also contended that, under the circumstances of the case, having regard to the nature of the transaction which resulted in that purchase, Mr. Martin was entitled to the benefit of the restrictive covenant which the Commissioners for the Exhibition of 1851 imposed on Mr. Spicer, and through Mr. Spicer on all persons deriving title from him to any portion of the estate.

Certainly the communications which passed between the parties are not to be disregarded. They form part of the transaction. They serve to record some facts which otherwise might have been left to inference or conjecture. But still, if the true view were that "this case really turns on the correspondence," to use the language of one of the learned judges, or "really depends upon the construction of the letters which passed between the plaintiff and the defendant Spicer," as another member of the Court sums up the question, I should have had a difficulty in advising your Lordships to affirm the decision under appeal.

Mr. Martin's connection with the estate began in 1874. On

that occasion no correspondence of any sort or kind appears to have passed between the parties until Mr. Martin had entered into a binding agreement to take a lease of No. 2 Cromwell Gardens. The lease was to be for a term of fourteen years, determinable by the lessee at the end of the first seven years. One of the conditions of the agreement was, that the lease should contain "such covenants as are usual and comprised in" the conveyance to the lessor. Shortly afterwards a draft lease on a lithographed form, with some alterations in writing, was sent to Mr. Martin. It contained a covenant in the terms of the covenant now in question. It was accompanied by a letter, which stated that the draft was "the form used for other houses in Cromwell Gardens, and, in fact, for all the houses on Mr. Spicer's estates." In the margin of the draft, opposite to a written addition extending the benefit of the covenant to the owners, tenants and occupiers of any part of the estate then or lately belonging to the Exhibition Commissioners, there was a note in these words: "There is a covenant to this effect in the conveyance of these premises to Mr. Spicer."

In due course the draft was approved, and the lease was executed in May 1874. In the margin of the lease there was a block plan of Cromwell Gardens shewing Mr. Martin's house by a distinguishing colour.

In 1880 notice was given to terminate this lease at the end of the first seven years. Then there were negotiations for a new lease of the same premises for a long term of years, at a premium of £11,000. A draft agreement was sent by Mr. Spicer's solicitor to the solicitors who acted for Mr. Martin, which originally contained this clause: "The said lease shall contain such covenants, conditions, and agreements, on the part of the purchaser or lessee, as are usually contained in leases granted by the said vendor of his other houses in Cromwell Gardens." Mr. Martin's solicitors asked for "a copy of the form of lease referred to in the draft agreement as in use on the estate." They said they could not settle the draft without it. They also suggested that the shortest plan would be for Mr. Spicer's solicitor to prepare and send to them the draft lease, which might then be annexed to the agreement. A form of lease was accordingly sent, which

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apparently was a copy of a lease actually granted to a tenant of one of the other houses in Cromwell Gardens. Accompanying this document, which again contained the restrictive covenant, there was a letter in these words, "As promised, I beg to forward draft of proposed lease herein." The draft was approved, and scheduled to the agreement, which was altered in the clause I have quoted, so as to make it refer to the draft lease as the form of lease to be granted in pursuance of the agreement. The lease itself was executed on the 24th of December 1880. The plan upon it was a copy of that on the former lease.

I have now stated the whole of the communications which passed between the parties from the very beginning to the end of the transaction, so far as they are relevant to the present question.

Whatever construction may be placed upon the communications which passed in 1874, I much doubt whether they are so connected with the transaction that took place seven years afterwards as to entitle Mr. Martin to rely upon them as a representation inducing the contract of 1880. But, however that may be, I must confess that I am unable to see any difference as regards the question now before your Lordships, between the communications which took place in 1874 and those which took place in 1880. On the first occasion the information was furnished in fulfilment of an antecedent obligation contained in the agreement for a lease. On the second occasion the information was supplied in compliance with a request by Mr. Martin's solicitors who wanted it in order to enable them to settle the draft then before them. In each case the representation which was made was nothing more than a simple statement as to the terms of the restrictive covenant which, for himself and his sequels in right, Mr. Spicer had contracted to observe. In itself the statement was admittedly accurate. It was not in my judgment designed or calculated to put Mr. Martin off his guard. It was not intended or apparently understood to convey any assurance as to the continuance of the existing state of things.

In this respect the present case is altogether different from the case of *Piggott* v. *Stratton* (1), on which the judgment of the Court of Appeal seems to be founded.

(1) John. 341; 1 D. F. & J. 33.

In *Piggott* v. *Stratton* (1) one Stratton had taken a building lease of two plots of ground in the Isle of Wight. There was a restrictive covenant in respect of plot C, with the object of preserving an uninterrupted view of the sea for the benefit of houses to be erected on plot B. Stratton granted an underlease of plot B. During the negotiations for the underlease he had told the underlessee that he was prevented by the terms of his lease from building so as to obstruct the sea view. On this assurance the underlease was taken, and villas were built which were afterwards acquired by Piggott. Stratton then went to the lessor and surrendered his lease for the purpose of getting rid of the restrictive covenant. But it was held that the obligation of the covenant still remained. What was actually said by Stratton may have been nothing more than a representation, accurate in itself, of an existing fact. But it was intended to be understood, and was in fact understood, as an assurance that he had no power to obstruct the sea view during the currency of the lease, and that so long as the underlease lasted, the underlessee would be safe from the apprehended obstruction. That was a case of bad faith, and the Lord Chancellor denounced Stratton's conduct in terms which would be absurdly extravagant if applied to the conduct of the Commissioners, or to the conduct of the appellant. There is no room for any charge of bad faith in the present case. Strange as it may seem, I have no doubt that both the Commissioners and the appellant honestly thought that they were not even acting unreasonably or unfairly to Mr. Martin.

Although the correspondence of itself would not, as I venture to think, give the respondent a right to the interposition of the Court, the question still remains whether Mr. Martin was not, under the circumstances, entitled to the benefit of the restrictive covenant.

On this branch of the case Lord Justice Cotton apparently would have been in favour of the respondent. But the point did not form the ground of his decision.

The law on the subject has never been stated more clearly than it was by Vice-Chancellor Hall in *Renals* v. *Cowlishaw* (2). The opinion of that learned judge on any question relating to conveyancing and real property law, owing to his great experience

(1) John. 341; 1 D. F. & J. 33. (2) 9 Ch. D. 125, 129.

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as a conveyancer, would of itself carry the utmost weight. In this instance his opinion was emphatically confirmed in the Court of Appeal (1), where Lord Justice James expressly concurred in every word of the Vice-Chancellor's judgment. It has also, I may observe, been approved and followed in the Queen's Bench Division: *Nottingham Patent Brick and Tile Company* v. *Butler* (2).

"It may I think," observes the Vice-Chancellor, "be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building plots, where the Court is satisfied that it was the intention that each one of the several purchasers should be bound by and should as against the others have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is, the benefit of the covenant, enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase."

I should be disposed to hesitate if I were invited to extend the principles recognised in *Renals* v. *Cowlishaw* (3). But those principles, as defined by the Vice-Chancellor, are I think perfectly sound, consistent with the authorities, and consistent with good sense. I think they apply to the present case, and I think they must govern it.

If the site of the houses now known as Cromwell Gardens had been put up for sale by auction in building lots, according to a plan corresponding with that on Mr. Martin's lease, and if the conditions of sale had prescribed that houses should be built such as those which have actually been erected, and that every

(1) 11 Ch. D. 866.
(2) 15 Q. B. D. 261, 269; S. C., on appeal, 16 Q. B. D. 778.
(3) 9 Ch. D. 125.

purchaser should bind himself by a covenant, in the terms of the restrictive covenant now in question, no one, I think, could have doubted that each purchaser would, as against the vendor, and as against every co-purchaser, have had a right to the benefit of the covenant, although there might have been no direct stipulation to that effect, and no express provision for mutual covenants by the purchasers inter se. What difference is there in substance between the case I have supposed and the case which has occurred? The site was laid out in accordance with a building scheme. The houses were to be built as private houses, and to be used for no other purpose: a covenant to that effect was imposed on the builder who bought the ground, and intended to parcel it out and sell it, or let it again. The houses were actually built as private houses, and offered to the public as such. Their character was unmistakeable; and every person who took one of the houses was required to enter into the same restrictive covenant. All this in one way or another was brought to Mr. Martin's knowledge. Every lessee in ordinary course must have had the same information as Mr. Martin had. Every lessee must have known that every other lessee was bound to use his house as a private residence only. This restriction was obviously for the benefit of all the lessees on the estate; they all had a common interest in maintaining the restriction. This community of interest necessarily, I think, requires and imports reciprocity of obligation.

As regards the appellant, the case, I think, is doubly clear. It seems to me that when Mr. Spicer put his houses in Cromwell Gardens on the market he invited the public to come in and take a portion of an estate which was bound by one general law—a law perfectly well understood, and one calculated and intended to add to the security of the lessees, and consequently to increase the price of the houses. The benefit of that increase, whatever it was, Mr. Spicer got. Can he or his representative be permitted to destroy the value of the thing he sold by authorizing the use of part of the estate for a purpose inconsistent with the law by which he professed to bind the whole?

For these reasons I think the judgment of the Court of Appeal ought to be affirmed, and the appeal dismissed with costs.

H. L. (E.) LORD WATSON:—

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My Lords, in this case I have had the advantage of considering in print the judgment which has just been delivered by my noble and learned friend (Lord Macnaghten), and finding there all that I could desire to say myself, I shall simply express my concurrence.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 18th December 1888.

Solicitors for the appellant: *Foster & Spicer.*
Solicitors for the respondent: *Ashurst, Morris, Crisp & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1889 *March* 18.

CHARLES RODNEY HUXLEY (PAUPER) . APPELLANT;

AND

THE WEST LONDON EXTENSION RAILWAY COMPANY . . . . . } RESPONDENTS.

Practice—Costs—Trial with Jury—Jurisdiction of Judge to deprive Plaintiff of Costs—"Good Cause"—Discretion—Appeal as to "Good Cause"—Judicature Act 1873 (36 & 37 *Vict. c.* 66) *s.* 49—*Rules of the Supreme Court* 1883 *Order* LXV. *r.* 1.

In an action against a railway company for damages caused by their negligence tried by a judge with a jury the plaintiff recovered £50. The defendants having thereupon applied that the plaintiff should be deprived of costs under Order LXV. r. 1 of the Rules of the Supreme Court 1883, the judge refused to exercise his discretion, but after some weeks heard both sides and made an order depriving the plaintiff of costs on the ground that he had supported an extravagant and extortionate claim by fraudulent statements and dishonest acts and by evidence which the jury disbelieved:—

Held, affirming the decision of the Court of Appeal, that the judge was not functus officio when he refused to exercise his discretion at the trial, that he had jurisdiction to make the order, and that the ground on which it was made constituted "good cause" within the meaning of Order LXV. r. 1.

By Lords Watson, Bramwell, and Herschell:—The concluding words of Order LXV. r. 1 of the Rules of the Supreme Court 1883 which give