Indiana Law Journal

Volume 5 | Issue 6 Article 2

3-1930

Covenants Running with the Land

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COVENANTS RUNNING WITH THE LAND†

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I

It is the purpose of this paper to inquire into the fundamental concepts involved in the law relating to covenants running with the land, and to suggest a test by which it will be possible to determine in any given case whether the covenant involved does, or does not run. It is submitted, first, that a re-examination of the legal principles and concepts involved results in the conclusion that these so-called covenants which run with the land have a two-fold aspect: they are contracts, but they are also (or at least operate as), either a conveyance or grant or as a reservation of title.[1] It is submitted, second, that a re-examination of the legal principles involved, and of the actual decisions results in the conclusion that the proper test in any given case as to whether or not a covenant runs is this: is the fact of the covenantor's and covenantee's interests in the land involved a necessary operative fact before the covenant constitutes a valid and/or lawfully performable contract (in fact)?

This rule is suggested to supplant the accepted test: does the covenant benefit the owner as owner, or the lessee as lessee?[2]

II

Either our minds are too weak, or they are too strong, to be able to perceive the reality which the older lawyers and judges attributed to covenants running with the land. We feel pretty confident today that they do not run with the land; at least pres-

† This article is published with the consent of the editors of the *Illinois Law Review*, having appeared originally in the current number of that periodical. (24 Ill. L. Rev. 786.)

* See p. 454 for biographical note.

1 "Title" as used here means "interests in land," as used in sec. 6, Restatement of The Law of Property, Tentative Draft No. 1, American Law Institute. "Conveyance" is used as defined by sec. 8 of the same Restatement, i. e., "An act by which it is intended to create one or more property interests."

2 See Best, J., in *Vernon v. Smith* (K. B. 1821) 5 B. & Ald. 1; *Vyvyan v. Arthur* (K. B. 1823) 1 B. & C. 410; and Bigelow, *The Content of Covenants in Leases* (1914) 12 Mich. Law Rev. 639.

ent day scholarship repudiates the philosophical reality involved in the original concept.[3]

We are now committed to the view that "rights in land" are only "rights in connection with land." That is, the law creates, or sanctions the creation of certain rights, privileges, powers, and immunities which constitute one's ownership of land. These exist as against individuals (and the state), and in respect to land, but they are at best only mental concepts.[4]

If this be the true situation it is impossible to have covenants running with the land in the older sense. If anything they run with the ownership of the land, which can only mean that they constitute rights, privileges, powers, and immunities one has in relation to certain land.[5]

It is likewise impossible to get any comfort, and little help, out of the old tests that a covenant ran with the land if it "touched or concerned the land,"[6] or if it "benefited the owner as owner, or the lessee as lessee."[7] Both tests beg the question. A covenant can only "touch and concern" the ownership of land and cannot "touch and concern" the land itself. It can only "touch and concern" the ownership of land when it deals with one or more of

[3] See, for example, Bigelow, *The Content of Covenants in Leases* (1914), 12 Mich. Law Rev. 639.

[4] "The law is never concerned with a physical object as such. The sole subject-matter of law is rights, and rights are in all cases relations between individuals. The relation may be purely between individuals, or it may be between individuals with respect to physical objects, such as chattels or land. But rights as such in every case are merely intellectual concepts.' Bigelow, *Introduction to the Law of Real Property* (1919), p. 36.

This is also the basis of the Restatement of the Law of Property, American Law Institute, Tentative Draft No. 1 (1929).

"All proceedings, like all rights, are really against persons." Holmes, C. J., in *Tyler v. Judges of the Court of Registration* (1900) 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

[5] They are essentially the same as any of the other rights incidental to the ownership of land. The ordinary and traditional rights we have thought of as being "transferred" by a conveyance, upon which the law operates—but after all they belong to the grantee because of the act of the parties plus a rule of law. The rights created by a covenant also belong to the covenantee because of an act of the parties plus a rule of law. Both are rights in relation to certain land, and are consequently "real property rights." The only essential difference is the manner in which the grantee or covenantee becomes the owner of them.

[6] *Spencer's Case* (K. B. 1583) 5 Coke 16a.

[7] See citations supra, note 2.

the mental concepts as to property rights,[8] which the law creates or sanctions. If we are dealing with one of the traditional real property rights clearly this test is useless, for it presupposes its own solution. If we are dealing with a new situation we create the right and say it may run because we have created it as a so-called real property right. The test and the result are always co-extensive.

Likewise a covenant can only "benefit the owner as owner or lessee as lessee" after it has been decided what an owner or lessee is. Again if we are dealing with a new situation he is owner or lessee of this particular right because we say so, and it therefore benefits him as owner or lessee because we say so. The test and the result again are always co-extensive. After all a right benefits an owner as owner, or a lessee as lessee, as distinguished from a personal benefit, because we classify it as a right created by the law of property, and not as a right created by the law of personalty. When we get through we have only said: "This right is conferred on the covenantee by the law of property, and not the law of personalty." Obviously a further test is necessary to determine which it is, or more properly speaking, *which it may be.*

III

Some years ago Dean Bigelow pointed out that in the landlord and tenant cases a covenant running with the land was usually at most an agreement between the parties as to the re-arrangement, re-definition, or measurement of the rights, privileges, powers, and immunities which the law of property created as between landlord and tenant.[9] There has been no dissent from his analysis.[10] If the covenant deals with rights which the law of real property has traditionally dealt with it satisfies considerations of policy[11] and comes within the historical definitions of

[8] Here and subsequently "right" is used in its broad sense, and includes "right, privilege, power, and immunity."

[9] *Bigelow, supra,* note 3.

[10] It is approved by Dean Clark in *The Doctrine of Privity of Estate in Connection with Real Covenants* (1922), 32 Yale Law Jour. 123, 125, and also by Mr. Tiffany in 1 Tiffany *Real Property* (2d ed. 1920), p. 177, note 46a.

[11] The law of property, for example, as between landlord and tenant imposes certain duties of repair on the tenant. There is no reason in policy against parties shifting that duty to the landlord. It might as well, or about as well, have been put there in the first instance.

covenants running with the land, because there is presupposed an existing legal right with which the covenant is connected or deals.

The difficulty arises in those cases where the covenant deals with rights with which the law of real property has not traditionally dealt; where in the absence of a covenant the law of real property would be silent as to the rights and duties of the parties.

Emphasis is here laid on *"the law of real property."* Inevitably the law deals with human action, and in any given situation the law of personalty would probably give at least the privilege of freedom of action to one or the other, or both, of the parties. The function of the law of contracts is to rearrange, define, measure, and create such privileges and rights. As an original proposition it would, of course, be impossible to defend any so-called fundamental or inherent differences which would form a basis for a classification of the law into the law of property and the law of contracts. It would be perfectly possible to include them all within the law of property. That is, we might say that as every person necessarily must reside on real property, his rights and privileges of contract arise out of his possession of land; and are therefore real property rights and privileges. We could well look at them as being incidental to the possession of the homepiece of real estate. It would be possible, to, and undoubtedly better, to classify the real property rights under the law of personalty. (We should then have less trouble in changing them.)

When we talk, therefore, of the law of property as distinguished from the law of personalty in general, and the law of contracts in particular, we are talking about the distinctions which the law has traditionally and actually heretofore made. All classifications are mental, and are based only upon what appear to be differences. There can be no more stability to a legal classification than there was to the atomic theory.

IV

What has been the concept as to covenants running with the land? What is the trouble with it?

Judges, lawyers, and writers have apparently[12] conceived of a covenant running with the land as a right[13] which was created by

[12] "Apparently"—because the implications of the actual decisions we shall urge really point to a different result.

[13] In its broad and general sense.

a contract and which was enforceable against and in favor of subsequent owners of interest in the land, but which remained in its essence a contract right.[14] But it was only like a contract right because an assignee was not bound as if he assumed a contract obligation; he was liable only while he was the owner of the estate against which the covenant ran, for his continuing liability ended with his further assignment.[15]

The trouble with that is that it was therefore *like* a property right. All of the implications in truth are to the effect that it *was* a property right. Subsequent parties were liable, or were benefited, because of "privity of estate," which meant and could only mean that their liabilities and their rights were a part of the "estate" in the land.

What happens when A leases Blackacre to B for ten years? The conception probably was that A delivered over to B certain rights in the land. There was involved the idea that B by a philosophical reality got what A had had although admittedly what A had were only intangibles. Present day scholarship repudiates any such transaction. The Restatement of the Law of Property[16] defines a "conveyance" as "An act by which it is intended to create one or more property interests, irrespective of whether the act is effective to create such interests." It defines "transfer" as "The extinguishment of such interests (in land) existing in one person and the creation of such interests in another person."[17]

The result is that by a conveyance of a leasehold interest for ten years from A to B, A does not hand over anything (even symbolically), but he creates in B the rights, privileges, immunities, and powers which the law of real property recognizes as incident to such an estate. These include the right to possession, the privilege of use or non-use, the power of alienation, and numerous others.

Suppose now that B covenants that he will allow fifteen acres to lie fallow each year. (1) Did A give (or better, "create in")

[14] See, for example, Clark *The Doctrine of Privity of Estate in Connection with Real Covenants* (1922), 32 Yale Law Jour. 123, 140. "The case (*Pakenham's* case) seems clear authority that a grant between the parties is not essential to the enforcement of a covenant, and it is supported by other cases of the time."

[15] *Brett v. Cumberland* (K. B. 1619), 2 Rolle, 63.

[16] *Supra*, note 1, sec. 8.

[17] Sec. 9.

B the privilege of use, while B agreed not to exercise the privilege; or (2) did A retain the privilege of use to that extent? Under the older view as to (1), if B assigns to C and C is bound, it is because B's agreement is binding upon him as something resembling a contract obligation on C's part, but arising simply out of his subsequent ownership of the leasehold. But under (2), could it not only be that if B assigns to C, the latter is bound because B could transfer no more than he had, and never having received from A this particular privilege he cannot now transfer it to C? The first objection would be that this would be giving to a covenant by B the effect of a so-called reservation of title by A.

There are two answers to this objection. The first is that even law ought to look at substance and not form. Substantially that is exactly what has happened. If one looks at the entire transaction, together with its results, the least that can be said is that it is *as if* A had made a reservation of title. If we can disregard the form there is no difficulty in so holding. The second answer is that there is abundant authority for such a result. There is no essential difference between a covenant running with the land, and a covenant creating an easement. Both deal only with rights, privileges, and immunities in connection with the ownership of land. There is apparently no dissent from the proposition that a covenant as to an easement can operate either as a reservation or grant. "What is in form a covenant merely —that is, an agreement under seal—may operate as the grant of an easement, when this clearly the intention of the parties."[18] "As words of covenant may operate as a grant of an easement, they may operate as a reservation."[19]

On the face of it this does not necessarily take care of the double aspect of such a covenant. For clearly the covenant is also given effect as creating a continuing contract obligation. Which is the anomaly—the covenant operating as a continuing contract obligation and also as if it were a grant or reservation, or the covenant operating as a grant or reservation and also as if it were a continuing contract obligation? As things stand at present one might well choose either, although the authorities have clearly set the stamp of approval on the first.

It is submitted here that under the older conceptions of conveyancing, it is better to say that the so-called covenant running

[18] 2 Tiffany *Real Property* (2d ed. 1920), p. 1258.
[19] Ibid. p. 1270.

with the land was in fact a contract creating a property right, and that it operated as a conveyance, grant, or reservation of title.

But the truth is that there is no anomaly involved. The trouble arises only if and when we adhere to the old notion that a conveyance operated as a physical transfer of intangible rights from A to B, or B to A. If properly speaking a conveyance operates to create rights in B similar to those previously owned by A, there is nothing impossible about creating real property rights in B or A by covenant. The truth is that now a conveyance is more like the conception of the creation of contract rights than it is like the old conception of conveyancing. There should be no more objection to creating so-called property rights in B by a contract than in creating them by a conveyance.

Under either view why should A or B remain liable on the contract after he has transferred his property rights to X? Simply because the parties so intended, either expressly or by implication.[20] There is no reason why parties cannot create two rights by one act. In truth, of course, that is what has always happened when there was involved a covenant which ran with the land. The point here is that we should cease calling it a contract right plus an anomalous contract right which nevertheless affected subsequent owners because of their ownership of the land; we should recognize that after all the latter is in reality a property right created by contract, but no different from a property right created by conveyance. Both are created by act of the parties; the language used may differ, but not necessarily so.[21]

The second objection to all of this is that the rights of subsequent owners were enforced by the action of covenant; that if the covenant created an actual real property right it should have been protected by a tort action.[22] At most this can only prove what is admitted, that is, that the covenant running with the land has been treated as an anomaly. But the objection probably is not well taken as a matter of law. Mr. Justice Holmes says: "It is ancient law that an action of covenant may be maintained upon an instrument of grant."[23]

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[20] It ought to be impossible to have a covenant by implication of law running with the land.

[21] For example, again, a covenant may be construed to "grant" or "reserve" an easement.

[22] See *supra*, note 14. Under the older law, of course, this is not well taken. Originally a covenant was not a contractual obligation; it was to

A covenant running with the land is then, when it deals with rights and privileges which the law has traditionally dealt with as property rights and privileges, actually a conveyance, grant, reservation, or exception of title as those terms heretofore have been employed. The law permitted the parties to deal with those traditional rights and privileges by a conveyance; it also permitted them to deal with them by a covenant. The latter no longer appears to be a concession or anomaly but an application of a better mental concept as to the "transfer" and creation of legal rights. If we adhere to the old idea of a conveyance we make a concession to a philosophical reality, which today ought to be out of place.

We have had little difficulty in allowing such covenants to run,[24] and we should no longer have difficulty in explaining why they do run. The difficulty should arise in explaining why they should not run. The parties by contract create a contract right, and also a property right or interest, which is no different from any other of the rights or interests which go to make up the title to any estate in land. A right to possession is no different from a right to repair: the first may be created by a conveyance or demise and the second by a contract. Subsequent owners become the owners of the second in the same manner and for the same reason that they become the owners of the first.[24a]

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all intents and purposes a present grant of a future right. The concept was quite identical with the concept as to a debt arising out of certain situations. In either case the right was wholly independent of any promise. The covenant was enforced, not because the covenantor had broken his promise to perform, but because in effect (and in law) he had conveyed or granted to the covenantee a certain right. It was the original right granted by the covenant which was recognized by the courts. The law, of course, was that one could not sue on a covenant in assumpsit, but only in debt or covenant. *McManus v. Cassidy* (1871) 66 P. St. 260.

[23] Holmes *The Common Law* (1881), p. 394.

[24] Where they deal with traditional property rights and privileges.

[24a] Since this paper was written there has been published the decision of the New York Court of Appeals in the case of *Bristol v. Woodward* (1929), 251 N. Y. 275, 167 N. E. 441. The case involved the questions of the existence and the validity of parol "equitable servitudes," and therefore, whether such "equitable servitudes" were "title" or "contracts." The opinion is by Cardozo, C. J., and contains the following language (which, although, on a different phase of the subject, is clearly applicable to the present inquiry, and is high authority for the result reached in this first portion of this paper): "One view of these restrictions treats them as contracts concerning or relating to the enjoyment of the land, to be specifically

The case of *Thruston v. Minke*[25] is in reality an application of the foregoing results. In that case P owned a hotel on lot 1. He leased the adjoining lot 2 to D who covenanted not to build above the second story of the hotel building. P sold the reversion in lot 2 to X, and later sought to enforce the covenant against D. D urged that the covenant ran with the land and that X alone could enforce it. The court, however, allowed P to enforce the covenant, because it was made for the benefit of P as owner of lot 1 and not for his benefit as owner of lot 2. It amounted to the grant of an easement of light and air, and was such in fact. That is, the creation of a property right by contract is of necessity an intentional act; the intention here was to create a property right as a part of P's ownership of lot 1, and not lot 2, and it was given that effect. The parties could have done this by a grant in the formal words of a grant; there was no reason why they could not also do it by covenant.

V

The important question is, how far shall we permit parties to go in creating *new* property rights? As we have seen, where the parties deal with and shift about, modify, define, or measure the traditional property rights there is no valid objection in logic or policy to allowing such contracts to create property rights.[26] For the most part those traditional rights and privileges dealt with the possession and use of the land. The obvious exception is the right to rent. It can only be justified on a capitalistic con-

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enforced against the promisee or against a purchaser with notice, but inoperative as a conveyance of any interest in the land itself. . . . The other view treats the restrictions, though equitable in origin, as creating interests in the land itself, like easements at common law. . . . We do not need to choose now between these conflicting methods of approach. (The court held that no covenants were in fact proved.) . . . 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, a title to the land itself. What has thus developed into an interest may retain such traces and reminiscenses of its contractual history that for the purpose of the statute of frauds, its quality will be determined according to its origin."

[25] (1870) 32 Md. 487.

[26] This is subject of course to the rule against perpetuities, the rule against restraints on alienation, or any other adverse policy.

ception as to the sanctity of private property. It is a result of capitalistic theory and not legal theory. Traditionally, however, it "issues" out of the land and is a well-established real property right. These we shall name group number one.

The balance of the situations divide into second and third groups: second, where the covenant deals with an act which can only lawfully be performed in fact on the land; third, those where the covenant deals with an act which is not to be performed on the land. The second group really deals with a use of the land, and unless, in an unusual case, there is strong reason in policy against it there should be no objection to allowing the creation by contract of new property rights of this character. The third group deals with situations foreign to the physical use or well-being of the land, and the law may well hesitate to permit too wide a use of the parties' creative powers over property rights. (There may, too, be combinations of any of the three.)

As suggested heretofore, the proper test in all of these situations is the following: Are the parties' interests in the real estate one of the operative facts necessary to give validity or lawful performability[27] to the contract? That is in fact the line which the courts have drawn. They have said (in effect) that you may create new property rights in those cases where without your interests in this property you could not contract at all, but you may not make any contract right a property right. Or, in other words, you may not transform all contract rights into property rights at your pleasure; you can only create property rights by contract when there is some rational connection between the subject matter of the contract and the already recognized interests in the real estate to which this newly created interest is to be added. The necessity of that connection is satisfied if, by the substantive law of contracts, the relationship of the parties to the land in question is a necessary operative fact to the validity of the contract, as a legal contract, and/or it is satisfied if the lawful performability (in fact) of the contract depends on the relationship of the parties to the land in question.

It is conceded that as to the first group above (that is, the traditional property rights), no other test than those heretofore

[27] This means objective performability in fact—as that phrase is used in the law of contracts and it is not always the antonym of "impossibility of performance" in law.

laid down is really necessary (except that it is doubtless helpful to look at them as conveyances, grants, reservations, and exceptions rather than anomalous contractual relationships). Here also, however, the suggested test works. The traditional rights dealt with the possession and physical well being of the property. A contract concerning them was only performable in fact on the land; without the interests of the contracting parties in connection with the land the covenantor would be a trespasser, and the contract would not be lawfully performable in fact as between the parties. The covenant to pay rent presents difficulties. One must say here that the contract is to pay rent and not to pay money as rent, which can only be defended on the historical view of rent. So looked at, however, it satisfies the test. One cannot pay rent, as rent, except he be lessee; and there is not performability in fact, without the relationship of landlord and tenant. If we were able to decide the matter as an original proposition a covenant to pay rent ought not to run.

The negative covenant (providing for non-action) appears at first blush to present difficulties. Suppose B as lessee covenants with A to allow fifteen acres to lie fallow each year. Is that performable in the absence of the relationship of landlord and tenant? It is in fancy, but not in fact. A has a right that B allow fifteen acres of certain described land to lie fallow. As strangers to the land such right is only fanciful and is meaningless. B's non-action is likewise fanciful and is meaningless; his non-action is non-action in fact only if he be lessee. Such a covenant is performable in fact only because of the interests of the parties in the land. The relationship of landlord and tenant here is also in all likelihood one of the operative facts necessary to a valid contract. That is, without it there is an objective impossibility of performance which renders the supposed contract void. "An agreement is void if the performance of it is impossible in itself. (On this rule) there is little or no direct authority, for the plain reason that such agreements do not occur in practice; but it is always assumed to be so."[28]

[28] Williston's Wald's *Pollock on Contracts* (3d ed. 1906), p. 520. Cf. 3 Williston on *Contracts* (1920), sec. 1933. "It is sometimes said that if the agreement is impossible in itself, it is void. This, however, does not seem necessarily true." The learned author then cites the cases as to mistake, where reformation is, or ought to be allowed. That does not detract from the present use of the rule; there the contract as expressed is not the real contract and in the end there is no objective impossibility in fact.

VII

When there is an attempt to create new rights the suggested test reaches the result reached by those cases which are generally accepted as correctly decided. Let us consider it first in connection with the landlord and tenant cases.

A covenant to build a wall,[29] a covenant to reside on the land,[30] a covenant not to assign without the consent of the lessor,[31] a covenant by the lessor to supply water to the lessee,[32] is each a covenant which is only lawfully performable in fact because of the present interests of the parties in the land in question.[33]

It must be emphasized again that we are talking about an objective impossibility of performance in fact, and not impossibility of performance in law. Such agreements might be valid contracts, because the parties contemplated the securing of the assent of the owner of the land to the act to be performed on the land in question. We are here dealing only with objective impossibility of performance in fact, as between the parties themselves.

The case of *Mayor, etc., of Congleton v. Pattison*[34] is thus incorrectly decided. The covenant there was to employ only such persons on the demised premises as had a legal settlement in the plaintiff town. The holding was that the assignee of the leasehold was not bound by the covenant. The agreement was lawfully performable in fact only because of the lessee's interests in the land, and the result reached is erroneous.[35]

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[29] Spencer's Case (K. B. 1583), 5 Coke 16a.

[30] *Tatem v. Chaplin* (1793), 2 H. Bl. 133.

[31] *Williams v. Earle* (1868), L. R. 3 Q. B. 739. This is a negative covenant, but as shown above it is only performable in fact because of the relationship of landlord and tenant, and it is also probably only valid because of that relationship.

[32] *Jourdain v. Wilson* (1821), 4 B. & Ald. 266. It is in this type of case that the test as to whether or not the covenant benefits the lessee as lessee is of little benefit. Is the right conferred on him under the law of property or the law of contracts? Does the covenant deal with his rights and privileges as lessee, or his rights and privileges as an individual apart from his situation as lessee? It is only one or the other as one decides it is or can be a property right or must be something else.

[33] To these could be added the covenants to repair and to fertilize, and numerous others where necessarily there is to be an act performed on the land, and which would otherwise amount to a trespass.

[34] (K. B. 1808) 10 East 130.

[35] Dean Bigelow has criticized the decision. See 12 Mich. Law Rev. 639 at 653, note 71.

By the same test the case of *Clegg v. Hands*[36] is correctly decided, while the case of *Thomas v. Hayward*[37] is incorrectly decided. In the first case there was a covenant by the lessee to sell on the demised premises only liquors purchased from the lessor, who was a brewer. It was held that an assignee of the lessor could enforce the covenant. It was performable in fact only on the demised premises, and the decision is clearly correct. In the second case the lessor agreed not to operate an ale-house within half-a-mile of the demised premises, and it was held that an assignee of the leasehold could not enforce the covenant. It was performable in fact regardless of the parties' interests in the demised premises; but one of the operative facts necessary to such a contract (not to compete) was the relationship of landlord and tenant, so that the covenant should have created a valid property right.[38]

The covenant to insure is performable in fact regardless of the relationship of landlord and tenant, but its validity, as a matter of insurance law, depends on the lessee's interest in the property.[39] Such a covenant, therefore, runs.[40]

An option to purchase is performable in fact without the relationship of landlord and tenant (that is, the covenantor could as well give it to a stranger, as to a lessee), and its validity does not depend on that relationship. It, therefore, does not run.[41] The covenant to renew the lease has been regarded as an anomaly,[42] but it is well settled that such a covenant may run.[43] Literally interpreted (as apparently it has been) such a covenant ought to run. A lease can only be renewed because of the existence of the original lease; the covenant is performable in fact

[36] (1890) L. R. 44 Ch. Div. 503.

[37] (1869) L. R. 4 Exch. 311.

[38] 3 Williston on *Contracts* (1920), sec. 1642. The principal case is questioned by Dean Bigelow (12 Mich. Law Rev. 639 at 651) and the case of *Norman v. Wells* (1837), 17 Wend. (N. Y.) 136 is contrary.

[39] Vance *Insurance* (1904), p. 109 et seq.

[40] *Vernon v. Smith* (K. B. 1821), 5 B. & Ald. 1.

[41] *Woodall v. Clifton* (1905), 2 Ch. 257. The American authorities, however, are for the most part contra. See 1 Tiffany *Landlord and Tenant* (1912), p. 887, note 106.

[42] "The fact that a covenant to renew should be held to run with the land has by many been considered as an anomaly, which it is too late now to question, though it is difficult to justify," per Romer, L. J., in *Woodall v. Clifton*, supra, note 41.

[43] 1 Tiffany *Landlord and Tenant* (1912), p. 887, note 97.

only because of the present relationship of landlord and tenant. If, however, the covenant be interpreted to be only an option for a future lease, then it is not different from an option to purchase.

A covenant to pay for improvements made by the lessee has apparently been considered to be of a similar character. Under a literal interpretation of the covenant it is only possible of performance in fact because of the relationship of landlord and tenant. It has been held to run.[44]

The case of *Dewar v. Goodman*[45] has caused considerable difficulty, because the covenant in question apparently benefited the lessee as lessee (in fact), but was still held not to run (and, therefore, it did not benefit him as lessee, in law). In that case X was lessee of A and subleased a part to Y who assigned to the plaintiff. The headlease provided that X was to repair, and X covenanted with Y that he would perform the covenants in the headlease. X assigned the headlease to the defendant; the plaintiff was ejected by A because of the lack of repair on other property than that covered by the plaintiff's sublease. The plaintiff sued for damages due to the defendant's failure to perform the covenant to take care of the repairs provided for in the headlease, and it was held that the covenant did not run. The purpose of the covenant was to protect the covenantee in his possession under the sublease, and therefore in fact benefited him as lessee. Its validity did not depend on the relationship of the parties. Was it lawfully performable in fact without the relationship of the parties? Clearly it was, and the case is correctly decided. The result is that the parties cannot by contract create a property right in connection with tract A, which presupposes an act on tract B.[46]

VIII

Let us consider next the cases where the covenant is not as between landlord and tenant.

We have here three doctrines which limit the power of property owners to create rights by covenant. The first is more or less a formal requirement, that of privity of estate. As has been

[44] Ibid., p. 888, note 107.

[45] (1908) K. B. 94.

[46] In accord with this principle are: *Gower v. Postmaster General* (1887), 57 L. T. R. (N. S.) 524 (to pay taxes on other land); *Smith v. Arnold* (1689), 3 Salk. 4 (to build on other land); *Dolph v. White* (1855), 12 N. Y. 296 (to pay the debts of the lessor).

pointed out by Dean Clark there is little if any substance to this requirement.[47] The second is the policy against the creation of easements and profits in gross.[48] The third is the policy against the running of a burden.[49] Subject to those doctrines (and also, of course, the rules against perpetuities and restraints on alienation), the rule here laid down forms a test again as to how far parties may go in creating property rights by contract.

The traditional rights which could be created here, either by grant or reservation, were those which necessarily had to do with the possession or use of the land, or some of its appurtenances.[50] There was, and certainly now can be, no objection to creating similar rights by contract.[51] The test in question is satisfied, because there is involved some use of the land, and there is not lawful performability in fact in the absence of the property interests of the parties.

Therefore, the case of *National Union Bank v. Segur*[52] is correctly decided. In that case D sold lot 1 to X and agreed not to engage in the banking business in that town. X conveyed to P, who was allowed to enforce the covenant. It was performable in fact regardless of the ownership of lot 1 but one of the operative facts necessary to give validity to a contract not to compete is the relationship of grantor and grantee.[53] The case of *Wiggins Ferry Company v. Ohio & M. Railway*[54] is likewise correctly decided. In that case A granted a right of way to B Railway Company which covenanted to use A's ferry across the Mississippi River. A sold to P and the B Railway Company sold to D Railway Company. It was held that the latter was not bound. There was lawful performability in fact and validity in law regardless of the ownership of the land in question. For the same reason an agreement by the user of water to pay a proportionate part

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[47] Clark, *The Doctrine of Privity of Estate in Connection with Real Covenants* (1922), 32 Yale Law Jour.

[48] 2 Tiffany, *Real Property* (2d ed. 1920), p. 1223, et seq.

[49] Ibid., p. 1405 et seq.

[50] Ibid., pp. 1198-1257.

[51] This is true even although the covenant calls for an affirmative service by the covenantor, so long as it is to be performed only on the land. *Pakenham's Case* (C. P. 1368), Y. B. 42 Edw. III, 3, pl. 14.

[52] (1877) 39 N. J. L. 173.

[53] 3 Williston, *Contracts* (1920), sec. 1642.

[54] (1879) 94 Ill. 83.

of the expense of repairs on ditches on other land ought not to run.[55]

As to whether or not the benefit of a covenant to pay for a party wall runs ought not to depend exclusively on the intention of the parties,[56] because under the test here suggested it should not run. This would doubtless be in accord with the intention of the parties in most instance; the intention being to create a property right against the land of the covenantor, but not one in favor of the land of the covenantee. If there was an expressed or implied intention that the benefit be a property right attached to the ownership of the land of the covenantee, it ought not to be effective.[57]

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[55] Accord: *Farmers & M. Irrig. Co. v. Hill* (1912), 90 Nebr. 847, 134 N. W. 929, 39 L. R. A. (N. S.) 798, Ann. Cas. 1913 B 524; contra: *Woliscroft v. Norton* (1862), 15 Wis. 198

[56] See *Gibson v. Holden* (1885), 115 Ill. 199, 3 N. E. 282; *Conduitt v. Ross* (1885), 102 Ind. 166, 26 N. E. 198; 2 Tiffany, *Real Property* (2d ed.) (1920), p. 1416 et seq.

[57] Contra: *Southworth v. Perring* (1905), 71 Kan. 755, 81 Pac. 481, 82 Pac. 785, 2 L. R. A. (N. S.) 87, 114 A. S. R. 527; *Savage v. Mason* (1849), 3 Cush. (Mass.) 500.