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# RUNNING COVENANTS AND PUBLIC POLICY

*Olin L. Browder\**

When first encountering covenants running with the land, one may react against the very idea. Why should any person be able to enforce a promise not made to him or be bound by a promise he did not make? Modern contract law, particularly the rules about the assignment of contract rights and the rights of third-party beneficiaries, may answer the first question, but does not explain how anyone can be bound by a promise neither expressly nor impliedly made or consented to by him.

On the other hand, persons familiar with easements, liens, or mortgages understand that land ownership can be subject to and burdened by property interests in other persons, so that successive owners are subject to burdens they did not create. That a landowner's promise may be similarly binding is not startling. Technically, a mere promise does not create an easement or a lien; but we all know of cases in which promissory language was held to create an easement.

Under traditional concepts, a purely negative or restrictive promise is hardly distinguishable from a negative easement; both obligate a person not to do something. But an affirmative promise differs from an affirmative easement. An affirmative easement entitles its owner to do something to or on, or to make some limited use of, the servient owner's land, while an affirmative promise obligates the promisor to do something for the benefit of the promisee or his land. Yet unless it offends some policy, no reason exists why the concept of an easement could not be enlarged to include interests which stem technically from promises, as the courts occasionally have held.<sup>1</sup> The novelty of such an idea would not be thought today an objection unless an objection on the ground of novelty were merely a way of expressing some other less-easily defined policy. Whether there ever was such a policy or whether there should be now is one of the questions addressed by this Article.

To explain the running of covenants by likening them to easements, we must initially ask how any interest in or burden

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1. *E.g.*, *Hottell v. Farmers' Protective Assn.*, 25 Colo. 67, 53 P. 327 (1898).

upon land benefits or binds successors of the original parties. At least in respect to covenants, the basic requirements, which are now accepted as almost sacrosanct, were expressed long ago in *Spencer's Case*:<sup>2</sup> the covenanting parties must intend that the covenant run with the land,<sup>3</sup> and the covenant must "touch and concern" land. Whether these two requirements are or should be distinct, or merely demand the same thing in two ways, deserves attention in due course. If liens or mortgages rather than easements (or in addition to easements) are an analogy, why cannot the original parties to a covenant explicitly burden land in ways that would otherwise be purely personal? That is, can the parties cause burdens to touch and concern land merely by agreement?

For the present, one can assert that the idea of being bound by a promise one has not made, instead of producing an instinctive negative reaction, may in respect to promises that concern land in fact produce a reaction that takes such a result as a matter of course, if not of necessity. This idea, while not easily defined, may appear even to a layman as fundamental and not as merely technical or conceptual. It was expressed both in *Spencer's Case*,<sup>4</sup> involving relations between landlords and tenants, and much later in *Tulk v. Moxhay*,<sup>5</sup> where the running of restrictive burdens was decreed in equity. It expresses a revulsion against permitting a person to contract for a burden respecting his land, only to have that burden disappear the minute he transfers his land to someone else.

So far, we have been thinking about why covenants burdening land should run in any case, that is, what considerations impel the conclusion that at least some covenants ought to run with land? On the other hand, one can ask, assuming that the usual ingredients are present, what factors should impel the conclusion that some covenants, in some circumstances, should not run? This question, of course, introduces considerations of public policy. Rarely, however, is that question put so simply and directly. One gets the impression from much of the existing doctrine that vague, undefined policies underlie the courts' formulation or application of rules that are not asserted in policy terms. Al-

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2. 5 Co. 16a, 16a, 77 Eng. Rep. 72, 74 (Q.B. 1583).

3. In fact, the court did not declare a rule of intention as such, but questioned whether an assignee is bound merely by being designated, that is, by a covenant that purports to bind the covenantor and his assigns. The court resolved that the assignee will not be bound even where named unless the covenant pertains to a thing "*in esse*." 77 Eng. Rep. at 74.

4. 77 Eng. Rep. at 74.

5. 2 Phil. 774, 41 Eng. Rep. 1143, 1144 (Ch. 1848).

though at various times and places the running of benefits and of burdens have been treated identically, it now seems to be generally conceded that few policy considerations apply to the former. It is with the latter that this Article is primarily concerned.

In proceeding with this purpose, it seems desirable to examine both English and American case law in search of declared or implied policy forces, with special emphasis on whether certain rules, if indeed they are rules of public policy, really serve any policy, and to conclude with an assessment of where today's courts ought to stand on the limits to running covenants. It will be seen, if one reads further, that he will be going over old ground and hearing old drums of criticism. But I will not be beating dead horses, for these old horses are still alive. I hope to avoid belaboring such matters more than is necessary to serve my purpose, which is not to survey once more the law on covenants running with the land.

In further limitation, very little will be done with that part of the subject dealing with the relations between landlord and tenant, and only to a limited extent with that largest part of the modern law, the rules relating to equitable servitudes, where the courts have pretty well spun themselves free of old impediments. If you wonder whether anything is left worth talking about, the stated purpose of this Article is the only answer, which if you are willing to persevere, will be elaborated further.

#### THE ENGLISH LAW

A distinguished company of scholars has explored with impressive erudition and some disagreement the dim mists of medieval English law for the origin of the running of covenants.<sup>6</sup> There is no reason here to attempt to shed any more light on that subject. Some legal scholars believe that running covenants sprang from early warranties (expressed or implied).<sup>7</sup> It seems established that the early covenants long anteceded the modern elements of contract law; running covenants are in essence, therefore, a part of the law of property, not an adaptation or extension of contract principles to property law. Professor Bordwell asserted

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6. C. CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH THE LAND"* 92-143 (2d ed. 1947); O. HOLMES, *THE COMMON LAW* 371-409 (1881); H. SIMS, *COVENANTS WHICH RUN WITH LAND* 45-57 (1901); Bordwell, *The Running of Covenants—No Anomaly* (pts. 1-2), 36 *IOWA L. REV.* 1, 484 (1950-1951); Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute*, 30 *CORNELL L.Q.* 1 (1944).

7. O. HOLMES, *supra* note 6, at 371-409; H. SIMS, *supra* note 6, at 45-57.

that in contrast to the creation in equity of the "use," which was used at law in developing the doctrine of estates, "the idea that an obligation could be imposed on or follow the land did not originate with equity but was the very heart of the feudal system."<sup>8</sup> Bordwell put the question: "Was it [the running covenant] a real contribution of the Middle Ages to the law comparable to, but of much less importance than, the trust or the estate, or on the other hand, is it an outworn relic of feudalism to be kept within bounds?" His own reply: "The thesis of this article is that it was a real contribution and no anomaly."<sup>9</sup>

Both Bordwell and Judge Clark contended that the early requirement of "privity of estate" for the running of covenants meant what we now call "vertical privity," that is, the relation between the original parties to a covenant and their respective successors rather than the relation between the covenanting parties themselves.<sup>10</sup> In any case, most if not all scholars agree that prior to the nineteenth century the running of both benefits and burdens of covenants between owners in fee simple was taken for granted, if not judicially established. Any remaining doubt on the point probably results from the fact that the question of covenants regarding fee estates did not often arise, for the early law was mainly concerned with the running of covenants between landlords and tenants, as reflected in 32 Henry VIII c.34 and in *Spencer's Case*.<sup>11</sup>

Lord Kenyon's statement in *Webb v. Russell* is the source of modern concern with privity of estate: "It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be privity of estate between the covenanting parties."<sup>12</sup> Unfortunately, he did not say why this was so, nor explain what he meant by privity. In fact, Professor Bordwell pointed out that Lord Kenyon abandoned his proposition a year later and rested the rule of *Webb v. Russell* upon another ground.<sup>13</sup> It is therefore all the more remarkable that American courts have relied on Lord Kenyon's dictum more often than upon any of the later English cases that infused meaning into the privity requirement. This is, of course, the familiar judicial device of relying on an ambiguous requirement to support a court's own

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8. Bordwell, *supra* note 6, at 9.

9. *Id.* at 8.

10. *Id.* at 488; C. CLARK, *supra* note 6, at 111.

11. 5 Co. 16a, 77 Eng. Rep. 72 (Q. B. 1583).

12. 3 T.R. 393, 100 Eng. Rep. 639, 644 (K.B. 1789).

13. Bordwell, *supra* note 6, at 492 n.57.

meaning, although in this instance that is not the meaning later supplied by the English courts.

A policy requirement was at length imposed upon the running of covenants in *Keppell v. Bailey*.<sup>14</sup> The court stated that the required privity was satisfied only where a landlord-tenant relation existed between the covenanting parties. Alert to the English rule that only certain recognized appurtenant easements could be created, the court deplored the suggestion that landowners could burden their land in any imaginable way. The court could have specified certain permissible kinds of running covenants, as had been done with easements, but instead asserted its opposition to "incidents of a novel kind" as a reason to reject them all.

The court seemed primarily concerned, however, that purchasers should not be bound by a variety of covenants of which they had no knowledge. That policy produced the American recording statutes, which should make *Keppell's* rule irrelevant in this country. The virtual absence of similar statutes in England makes the *Keppell* court's concern at least understandable, but it seems very strange that the court asserted that policy in *Keppell*, where the parties had actual notice of the covenant. The court simply said that to permit the running of burdens in equity even against purchasers with notice would subvert the rule at law.

The last point could not endure, and of course it did not, for soon thereafter the court in *Tulk v. Moxhay*<sup>15</sup> announced the now universally accepted doctrine that restrictive burdens of covenants between owners in fee will be specifically enforced in equity against purchasers with notice of the restriction.<sup>16</sup> The court foreshadowed future difficulties, however, by the way it stated its holding. In dismissing as irrelevant any rule on running covenants at common law, the court gave the impression that it was announcing an entirely new doctrine in which purchase with notice was the basis for enforcement. Actually the court seems merely to have followed a familiar maneuver of a court of equity by mitigating the undue rigors of the common law. Thus the burden of a restrictive covenant runs in equity except against a purchaser *without* notice.<sup>17</sup> The court said nothing specific about the traditional requirements of intention and touching and concerning, but rarely does a restrictive covenant not touch and concern land

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14. 2 My. & K. 517, 39 Eng. Rep. 1042 (Ch. 1834).

15. 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).

16. The rule of *Tulk v. Moxhay* had been previously applied in *Whatman v. Gibson*, 9 Sim. 196, 59 Eng. Rep. 333 (Ch. 1838).

17. *London & S.W. Ry. v. Gomm*, 20 Ch. D. 562, 583 (1882).

in some way. The covenant in *Tulk* to maintain land in an open state obviously touches and concerns that land. At least those American courts that have followed *Tulk v. Moxhay* have not been fooled in this regard, and either assume, assert, or impose the touch and concern requirement. In short, mere notice surely does not bind one to every promise made by a predecessor in title.

On the other side of this coin, it has been asserted that a running covenant at common law will bind a subsequent purchaser even if he takes without notice. This proposition, if it was ever true, causes little difficulty in England because no burdening covenant will run at law in that country except in the landlord-tenant relation. It should certainly not be true in this country under any reasonable interpretation of the recording statutes.

The final question in the development of the English law on running covenants was whether the rule of *Tulk v. Moxhay* extended to affirmative burdens. We should note initially that some nominally affirmative covenants can be enforced negatively, that is, by injunction. So it was in *Tulk v. Moxhay*, where the covenant to "maintain" certain land in an open state without buildings was enforced by an injunction against erecting buildings. As to truly affirmative burdens, the medieval law, which scholars say did not prohibit the running of burdens at law with fee estates, did not distinguish between them and restrictive burdens. In fact, most of the very early covenants were affirmative, including but not limited to the so-called "spurious easements,"<sup>18</sup> such as a covenant to maintain fences. Even after *Tulk v. Moxhay*, the court in *Cooke v. Chilcott*<sup>19</sup> paid little heed to the distinction and enforced against a purchaser with notice a promise to provide spring water to houses on lands retained after a conveyance of the land to be burdened. In response to the defendant's contention that he was not bound to supply water to anyone, the court noted that houses which had been erected in reliance on the promise would otherwise be left without water, and then declared, "It would be perfectly monstrous that such a defense should be allowed."<sup>20</sup> This sounds very much like the reason given by the court in *Tulk v. Moxhay* why a purchaser with notice should not take free of a restrictive covenant. To avoid the difficulty of supervising a mandatory injunction, as would be necessary to enforce an affirmative covenant, the *Chilcott* court simply enjoined the defendant, under pain of contempt of court, against allowing

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18. R. MEGARRY & H. WADE, *THE LAW OF REAL PROPERTY* 875 (3d ed. 1966).

19. 3 Ch. D. 694 (1876).

20. 3 Ch. D. at 701.

conditions to exist that would interfere with the performance of the covenant.

Nevertheless, this solution did not survive even as long as *Keppell's* dictum against the enforcement of restrictive burdens in equity. The court in *Haywood v. Brunswick Building Society*<sup>21</sup> held that *Tulk* could not be extended to enforce a covenant to build and keep in repair. This holding was confirmed in *Austerberry v. Oldham*,<sup>22</sup> where one judge remarked that a covenant will not run, except between landlord and tenant, unless it amounts to the grant of an easement or a rent-charge.<sup>23</sup> In fact, one of the judges in *Haywood* had conceded the possibility that an equitable charge could attach to and run with land.<sup>24</sup> This concession is significant in the light of the *Haywood* judges' reasons for refusing to extend *Tulk v. Moxhay*. One judge claimed that extending *Tulk* would make a new equity, "which we cannot do,"<sup>25</sup> despite the fact that they had done exactly that in *Tulk v. Moxhay*. Although one judge admitted that the old rule against mandatory injunctions no longer applied,<sup>26</sup> another said, "The covenant to repair can only be enforced by making the owner put his hand into his pocket, and there is nothing which would justify us going to that length."<sup>27</sup> A third judge said "that only such a covenant as can be applied without expenditure of money will be enforced against the assignee on the ground of notice."<sup>28</sup> Notwithstanding the court's emphasis, *London & Southwest Railway v. Gomm*<sup>29</sup> subsequently made it clear that the *Haywood* prohibition extends to all affirmative burdens, not merely those requiring the expenditure of money.

So the English law, when considered all together, is clear enough. Essentially, affirmative burdens will not run either at law or in equity. That one cannot get damages for breach even of a restrictive covenant against anyone other than the promisor is of little significance, so long as one can by injunction specifically compel performance.

A search for the reasons for such a law, however, only leads one into the typical terse inscrutability of the English judges. The

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21. 8 Q.B.D. 403 (1881).

22. 29 Ch. D. 750 (C.A. 1885).

23. 29 Ch. D. at 781.

24. 8 Q.B.D. at 409.

25. 8 Q.B.D. at 408.

26. 8 Q.B.D. at 408.

27. 8 Q.B.D. at 409.

28. 8 Q.B.D. at 410.

29. 20 Ch. D. 562 (1882).



remarks of the judges about compelling persons to dig into their pockets or expend money may be a simple, offhand, almost trivial way of turning a phrase, and so sharpen the distinction in fact between an affirmative and restrictive covenant. But it is hardly an explanation.

It may not be irrelevant to mention the comment of Messrs. Megarry and Wade<sup>30</sup> that the rule against the running of the burden of any covenant at law can be evaded in two ways. First, if the conveyers insert the original covenant in each successive conveyance of the land of a covenantor, the effect is obviously the same as if the original covenant ran with the land. Second, the Law of Property Act of 1925 allows a long-term lease to be converted into a fee simple; when so converted, the estate is subject to all the covenants that existed under the lease.

What policy is really served by this law? Is it merely respect for and the authority of English judges, that once they firmly state a conclusion, even if with only offhand justifications, no one thereafter even considers inquiring further? If we in this country are left to speculate, do the English courts still worry about the administrative difficulties of enforcing affirmative duties? Or does the English law embody a general assessment that affirmative burdens are simply more onerous than restrictive burdens? It can certainly be denied that all affirmative burdens are greater than all restrictive ones. Even if they were, is there some reason why such greater burdens should not be borne? Do the English courts tacitly assume that the greater the burden the greater the restraint on alienation, and that somewhere a line must be drawn?

#### THE AMERICAN LAW

The early American cases, like the early English cases, assumed that the burden of covenants would run with estates in fee simple both at law and in equity.<sup>31</sup> Most of the early American cases, like the early English cases, involved affirmative covenants. In those days, the prevalent concern was not with the regulation of urban subdivisions, but with the building and repair of fences, bridges, and water power facilities. As more restrictive covenants appeared, at least one point became clear: the eventual

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30. R. MEGARRY & H. WADE, *supra* note 18, at 751.

31. *Dorsey v. St. Louis, A., & T.H. R.R.*, 58 Ill. 65 (1871); *Carr v. Lowry's Admr.*, 27 Pa. 257 (1856); *Kellogg v. Robinson*, 6 Vt. 276 (1834).

general acceptance of the doctrine of *Tulk v. Moxhay*.<sup>32</sup> In due course, the courts have managed reasonably well to adapt the doctrine of equitable servitudes to modern needs. The running of affirmative burdens in equity and the running of all kinds of burdens at law is another story.

When the later English law began to creep into this country, the American courts reacted in a fascinating but perplexing manner. We can never know whether the American courts misunderstood the English cases or deliberately distorted them, but we at least know that they found the total prohibition of the running of affirmative burdens unacceptable. At any rate, only a few American courts acknowledged that the English rule prohibited the running of affirmative burdens and applied that rule. New York set the most celebrated example in *Miller v. Clary* by announcing a rule against the running of affirmative burdens.<sup>33</sup> It is striking, however, that *Miller* was not decided until 1913, after the New York courts had allowed affirmative burdens to run throughout the nineteenth century. Prior contrary decisions were classified as exceptions, a foreshadowing that other exceptions might subsequently appear. In fact, more exceptions did appear, which led commentators to suggest that the court had so qualified its doctrine that it would eventually treat *Miller v. Clary* as an aberration and abandon it altogether. That *Miller* has not been abandoned deserves further attention in due course.

New Jersey rejected the running of affirmative burdens in early cases,<sup>34</sup> but its superior court has recently modified if not abandoned that course.<sup>35</sup> Ignoring the doctrine of *Tulk v. Moxhay*; an early Virginia case<sup>36</sup> applied the English common-law rule to deny an injunction against the violation of a restrictive covenant. The decision, however, also rested on the ground that the restriction was an unlawful restraint of trade. More recently, the West Virginia court<sup>37</sup> asserted the English rule to deny an heir of the covenantor the recovery of oil and gas royalties, but it also seemed to rely on the ground that the covenant did not touch and concern the land. Dictum in an early Rhode Island case declared

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32. See Sims, *supra* note 6, at 19-27.

33. 210 N.Y. 127, 103 N.E. 1114 (1913).

34. See cases cited in *Petersen v. Beekmere, Inc.*, 117 N.J. Super. 155, 160-61, 283 A.2d 911, 914 (Ch. Div. 1971).

35. *Petersen v. Beekmere, Inc.*, 117 N.J. Super. 155, 283 A.2d 911 (Ch. Div. 1971).

36. *Tardy v. Creasy*, 81 Va. 553, 562 (1886).

37. *McIntosh v. Vail*, 126 W.Va. 395, 28 S.E.2d 607 (1943); cf. *Cole v. Seamonds*, 87 W.Va. 19, 104 S.E. 747 (1920) (recognizing enforceability of equitable servitude against purchaser with notice).

that the English rule prevented the running of a covenant at law, but not in equity.<sup>38</sup>

#### THE PRIVITY PROBLEM

The English rule was first significantly modified at an early date in Massachusetts. Reasoning by analogy from the English common-law rule requiring privity of estate between the covenanting parties, which in England could only be satisfied by a landlord-tenant relation, the court declared that the existence in one of the parties of an easement in the land of the other party sufficed to create privity of estate.<sup>39</sup> This has been called "substituted privity."<sup>40</sup> Signs of this rule have appeared in several other states.<sup>41</sup> An early case in Wisconsin,<sup>42</sup> for example, held that the privity requirement was satisfied because the parties were tenants in common of mineral interests.

The most perplexing American development was the appearance and growth of the notion of privity of estate as a requirement that for a covenant to run it must be accompanied by a conveyance of affected land from one of the covenanting parties to the other. This has been called "instantaneous privity."<sup>43</sup> It is unclear whether this idea was a drastic effort to reduce the rigors of the English law or was purely indigenous. At any rate, courts have sometimes supported it simply with the old dictum in *Webb v. Russell*,<sup>44</sup> though Lord Kenyon surely did not have this meaning in mind. In later cases it became the accepted meaning of the privity requirement, although I know of no case in which the court even intimated that it was declaring new law.

The rule appeared almost surreptitiously and spread very gradually. Mr. Sims suggested that it may have originated in the old implied covenants of title from which, it has been argued, modern covenants were derived.<sup>45</sup> It may also have grown from a misunderstanding of the Massachusetts notion of privity, which

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38. *Town of Middletown v. Newport Hosp.*, 16 R.I. 319, 332, 15 A. 800, 803 (1888).

39. *Morse v. Aldrich*, 36 Mass. 449, 454 (1837). See *Hurd v. Curtis*, 36 Mass. 459, 464 (1837). In an early case, the Massachusetts court did not impose any privity requirements in applying the rule of *Tulk v. Moxhay* to a restrictive covenant. *Parker v. Nightingale*, 88 Mass. 341 (1863).

40. C. CLARK, *supra* note 6, at 128.

41. *Id.* at 130 n.116.

42. *Crawford v. Witherbee*, 77 Wis. 419, 46 N.W. 545 (1890).

43. 2 AMERICAN LAW OF PROPERTY § 9.11 (A.J. Casner ed. 1952).

44. 3 T.R. 393, 100 Eng. Rep. 639, 644 (K.B. 1789).

45. H. SIMS, *supra* note 6, at 195.

permitted the creation of an easement by the same instrument that contained the covenant. In *Hurd v. Curtis*, the Massachusetts court said, "Their [the covenanting parties'] estates were several, and there was no grant of any interest in the real estate of either party, to which the covenants could be annexed."<sup>46</sup> This statement may have motivated a New York court's citation of *Hurd v. Curtis* for the proposition that "[t]he true distinction appears to be that if the covenant is made on the sale of property, in a case like the present, it runs with the land."<sup>47</sup>

It was surprising to me that the first clear declaration of the rule of instantaneous privity that I have seen was a dictum in an Arkansas<sup>48</sup> case involving the running of a covenant for title, though the dictum seems broadly enough stated to cover all covenants. Sixteen years later a Wisconsin court casually mentioned the privity rule as a ground for permitting the running of the burden of a covenant to share the expenses of repairing a dam.<sup>49</sup> After several more years, the privity requirement was imposed in Maine to prevent the running of the burden of another affirmative covenant.<sup>50</sup> One year later in another affirmative burden case, the New Hampshire court<sup>51</sup> cited the earlier Wisconsin case in recognition of the privity requirement. The most famous case cited to stand for instantaneous privity is *Wheeler v. Schad*,<sup>52</sup> although the opinion leaves some doubt whether the court asserted that rule or the Massachusetts rule.

In due course the rule requiring a grant between the covenanting parties was accepted in a substantial number of jurisdictions,<sup>53</sup> but I know of no court that has attempted to explain or justify the rule in terms of public policy. Three states passed statutes which were probably derived from the Field Code and which provide that "certain covenants, contained in grants of estates in real property, are appurtenant to such estates . . . . Such covenants are said to run with the land."<sup>54</sup> According to the

46. 36 Mass. 459, 464 (1837).

47. *Denman v. Prince*, 40 Barb. 213, 216 (N.Y. 1862).

48. *Ross v. Turner*, 7 Ark. 132, 145 (1846).

49. *Wooliscroft v. Norton*, 15 Wis. 198 (1862).

50. *Smith v. Kelley*, 56 Me. 64 (1868).

51. *Burbank v. Pillsbury*, 48 N.H. 475 (1869).

52. 7 Nev. 204 (1871).

53. 5 R. POWELL, *REAL PROPERTY* ¶ 674 at 176 (1949). Several recent cases recognize the rule: *Carlson v. Libby*, 137 Conn. 362, 77 A.2d 332 (1950); *Johnson v. Myers*, 226 Ga. 23, 172 S.E.2d 421 (1970); *Hall v. Risley*, 188 Or. 69, 213 P.2d 818 (1950); *Clear Lake Apts., Inc. v. Clear Lake Utils. Co.*, 537 S.W.2d 48 (Tex. Civ. App. 1976), *affd. sub nom. Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385 (Tex. 1977).

54. *MONT. REV. CODE* § 58-304 (1947); *N.D. CENT. CODE* § 47-04-24 (1960); *S.D. COMP.*

Montana court, that statute bars the running of any covenant not contained in the grant of the real property to be charged.<sup>55</sup> Presumably a similar provision once appeared in the California Civil Code. If so, it has been amended to provide the opposite,<sup>56</sup> that is, that landowners not otherwise associated can make a running covenant. In a few states this privity rule has been rejected or been ignored in cases where it would be applicable.<sup>57</sup> This leaves probably a majority of the states in which the need for some kind of horizontal privity has not been decided.

Even under the English rule, which requires privity by tenure, an affirmative burden can be cast in the form of a lien, thereby avoiding a privity problem. The New York court in the famous *Neponsit* case<sup>58</sup> did not allow its rule against the running of affirmative burdens to prevent the enforcement of a lien given to secure payment for services to property. Of course not every affirmative covenant will be construed as a lien, but in the Montana case<sup>59</sup> mentioned above the court did just that when it said that one who intends to bind his land or successors to such a burden in substance creates a lien. The Mississippi court rather recently held the same.<sup>60</sup> In addition, a court confused by the conceptual distinctions between easements and covenants may construe a promise to furnish water from a reservoir to the promisee's reservoir, pipeline, or ditch as an easement in the promisee. The court would thereby avoid any problem about privity.<sup>61</sup>

It is widely assumed that under the rule of *Tulk v. Moxhay* the instantaneous privity requirement does not bar the equitable enforcement of covenants against takers of the promisor's land with notice. This assumption follows naturally from the *Tulk* court's notion that the rule of its case had nothing to do with running covenants. That notion is conceptually supported by the

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LAWS § 43-12-1 (1967).

55. *Orchard Homes Ditch Co. v. Snavely*, 117 Mont. 484, 159 P.2d 521 (1945).

56. CAL. CIV. CODE § 1468 (West Supp. 1978).

57. *E.g.*, *Mueller v. Bankers Trust Co.*, 262 Mich. 53, 247 N.W. 103 (1933); *Bolles v. Pecos Irrig. Co.*, 23 N.M. 32, 167 P. 280 (1917); *Norfleet v. Cromwell*, 64 N.C. 1 (1870); *Horn v. Miller*, 136 Pa. 640, 20 A. 706 (1890).

58. *Neponsit Property Owners' Assn. v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938).

59. *Orchard Homes Ditch Co. v. Snavely*, 117 Mont. 484, 159 P.2d 521 (1945).

60. *Mendrop v. Harrell*, 233 Miss. 679, 103 So. 2d 418 (1958). *See also* *Burton-Jones Dev., Inc. v. Flake*, 368 Mich. 122, 117 N.W.2d 110 (1962); 2 AMERICAN LAW OF PROPERTY § 9.17 n.2 (A.J. Casner ed. 1952).

61. *Fitzstephens v. Watson*, 218 Or. 185, 344 P.2d 221 (1959); *cf.* *Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 40 Colo. 467, 92 P. 290 (1907) (covenants in lease for irrigation-ditch owner to supply water to surrounding landowners created easement).

theory that an equitable servitude, at least if restrictive, is an equitable easement created by a promise. Some cases expressly recognize the inapplicability in equity of any privity requirement,<sup>62</sup> and I know of no authority to the contrary. The question seldom arises, however, for equitable servitudes are usually created by conveyances of one or more parcels of land. A suit for a declaratory judgment, however, can cloud any substantive issue, including this one, and a recent Georgia court, without any recognition of the possibility of equitable enforcement, declared a restrictive promise of one landowner to his neighbor null and void for want of privity of estate.<sup>63</sup>

Except in New York and possibly New Jersey, the American rules governing the running of covenants at law have been applied indiscriminately to both negative and affirmative covenants, as would be expected where "privity" means something very different from the English rule that no burden can run at law except between landlord and tenant. Only rather recently has the question been raised whether affirmative burdens also run in equity against purchasers with notice. We have seen that the English authority is well established against such an extension of *Tulk v. Moxhay*.<sup>64</sup> The prevalent notion of the American courts that English law concerned only privity, and not the running of affirmative burdens, made it easy for them to ignore the full import of the English cases. Yet as recently as the appearance of his famous book,<sup>65</sup> Judge Clark cautiously admonished that "it would seem desirable to consider these interests [equitable servitudes] as restricted to easements, to uphold them only as negative restrictions, and to allow the affirmative running encumbrances to wait upon the development of a more enlightened policy towards the covenant running with the land." Judge Clark must have had in mind the conceptual difficulty of treating an affirmative burden as an easement. Nevertheless, the American courts have virtually ignored the English rule in this regard, and over a considerable time have extended the *Tulk* doctrine to affirmative burdens,<sup>66</sup>

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62. *Lincoln Sav. & Loan Assn. v. Riviera Estates Assn.*, 7 Cal. App. 3d 449, 344 P.2d 221, 87 Cal. Rptr. 150 (1970); *Fitzstephens v. Watson*, 218 Or. 185, 344 P.2d 221 (1959); *Clear Lake Apts., Inc. v. Clear Lake Utils. Co.*, 537 S.W.2d 48 (Tex. Civ. App. 1976), *affd. sub nom. Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385 (Tex. 1977).

63. *Johnson v. Myers*, 226 Ga. 23, 172 S.E.2d 421 (1970).

64. *Haywood v. Brunswick Bldg. Socy.*, 8 Q.B.D. 403 (1881).

65. C. CLARK, *supra* note 6, at 180.

66. *Kell v. Bella Vista Village Property Owners Assn.*, 258 Ark. 757, 528 S.W.2d 651 (1975); *Coulter v. Sausalito Bay Water Co.*, 122 Cal. App. 480, 10 P.2d 780 (1932); *Hottell*

although an occasional failure to meet the touching and concerning requirement bars the result.<sup>67</sup>

Those who have surveyed the American developments this far will be struck by the absurdity of the American privity requirements. Noting the dearth of explanations by the courts of those rules in policy terms, what policy do they serve? Were these developments merely efforts to liberalize the English strictures as much as possible without denying altogether that as fetters on alienability running covenants ought to be discouraged? If so, how significant is a doctrine that does not apply to most cases even at law, and that neighboring landowners in most jurisdictions can evade by "strawman" conveyances? And if affirmative burdens do run in equity, have not the privity rules virtually become a dead letter?

The thought occurred to me that courts might have unconsciously supported the instantaneous privity rule on the ground that the recording of the covenanting parties' conveyance assures that the covenantor's successors will receive adequate notice of the covenant.<sup>68</sup> This of course assumes that a mere agreement between landowners without a conveyance will not be recorded or indeed may not be entitled to record. It further assumes that an unrecorded covenant binds a successor without notice. This notion about recording implies that a covenant at law creates no property interest and so is not a conveyance. The answer is not to circumscribe reasonable arrangements between neighboring landowners by a so-called privity requirement. Many courts will consider covenants respecting land recordable as

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v. Farmers' Protective Assn., 25 Colo. 67, 53 P. 327 (1898); *Everett Factories & Terminal Corp. v. Oldetyme Distillers Corp.*, 300 Mass. 499, 15 N.E.2d 829 (1938); *Greenspan v. Rehberg*, 57 Mich. App. 310, 224 N.W.2d 67 (1974); *Mendrop v. Harrell*, 233 Miss. 679, 103 So. 2d 418 (1958); *Fitzstephens v. Watson*, 218 Or. 185, 344 P.2d 221 (1959); *Ball v. Rio Grande Canal Co.*, 256 S.W. 678 (Tex. Civ. App. 1923); *West Va. Transp. Co. v. Ohio River Pipe Line Co.*, 22 W.Va. 600 (1883); see *Murphy v. Kerr*, 5 F.2d 908, 911 (8th Cir. 1925); *Pittsburg, C. & St. L. Ry. v. Bosworth*, 46 Ohio St. 81, 86, 18 N.E. 533, 535 (1888). In *Fitzstephens v. Watson* the court spoke in general terms about the running of affirmative covenants in equity, but in fact the covenant was enforced negatively, by injunction, as in *Tulk v. Moxhay*. Other cases could be cited in which courts spoke as though they were enforcing affirmative burdens, but in which enforcement was decreed by injunction.

67. *Clear Lake Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385 (Tex. 1977); *Cole v. Seamonds*, 87 W.Va. 19 (1920).

68. In *Sjoblom v. Mark*, 103 Minn. 193, 202-03, 114 N.W. 746, 750 (1908), the court held that a covenant between neighboring landowners not to sell liquor, if recorded, could not give notice because it created no interest in land. If the covenant were otherwise enforceable in equity, such a view is objectionable and probably does not now prevail; but the court added that its view would be otherwise if the covenant were embraced in a deed.

transactions "affecting" title to land.<sup>69</sup> In jurisdictions with recording laws that require a "conveyance," due regard for the spirit and purpose of recording laws should permit a sufficiently liberal construction of the word. If not, the recording statutes could be amended. The *Restatement* has taken this position.<sup>70</sup>

In view of the American developments outlined above, it is striking that the *Restatement* declared a rule of privity in the alternative: that satisfaction of either the Massachusetts or the instantaneous variety suffices as privity at law.<sup>71</sup> The *Restatement's* rule was greeted by the indignant outcries of commentators, most notably the polemics of Judge Clark.<sup>72</sup> As long as the American Law Institute felt free to take liberties with the law in declaring alternative rules, why did it declare any privity requirement at all? It is hardly a sufficient rationale to say that a rejection of the English requirement of a landlord-tenant relation requires a substitution of some other community of interest between the covenanting parties.

It has not been my purpose here merely to belabor once more the old controversies about privity of estate. I have been searching for some relevant, defensible considerations of public policy. The English rule, for some unstated reason, seems to find affirmative burdens objectionable. In its generality that notion has been rejected in this country. So far, no other has been found.

#### THE RUNNING OF AFFIRMATIVE BURDENS

After a considerable period of silence following the New York court's declaration against the running of affirmative burdens (presumably both at law and in equity) in *Miller v. Clary*,<sup>73</sup> the court in *Neponsit*<sup>74</sup> upheld the running of a subdivision lot-owner's promise to contribute to the cost of maintaining facilities for the benefit of all the lot owners. The court made no attempt

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69. *Malicke v. Milan*, 320 Mich. 65, 30 N.W.2d 440 (1948), *revd., reh. den., per curiam*, 320 Mich. 65, 32 N.W.2d 353 (1948); *Cook v. Tide Water Associated Oil Co.*, 281 S.W.2d 415 (Mo. App. 1955); *Loeb v. Watkins*, 428 Pa. 480, 240 A.2d 513 (1968); Annot., 4 A.L.R.2d 1419 (1949). *But see Sjoblom v. Mark*, 103 Minn. 193, 114 N.W. 746 (1908).

70. RESTATEMENT OF PROPERTY § 533 (1944); *cf.* UNIFORM SIMPLIFICATION OF LAND TRANSFERS ACT § 2-301 (would abolish all restrictions on eligibility for recording of document except ability to be processed by equipment in recording office).

71. RESTATEMENT OF PROPERTY § 534 (1944).

72. C. CLARK, *supra* note 6, at 137, 206.

73. 210 N.Y. 127, 103 N.E. 1114 (1913).

74. *Neponsit Property Owners' Assn. v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938).



to square this with *Miller v. Clary* on its facts, but simply emphasized the proper application of the touching and concerning requirement. It was suspected that the court had overruled *Miller v. Clary*, or at least was preparing to do so. After twenty more years, in *Nicholson v. 300 Broadway Realty Corp.*,<sup>75</sup> the court permitted the running of a promise to supply heat from the building on one parcel of land to the promisee's building on other land. After relying on *Neponsit* and reiterating its emphasis not only that the promise touch and concern the land, but that that requirement be decided by the covenant's effect rather than by technical distinctions, the court added one enlightening sentence: "The fear expressed that the covenant imposes an undue restriction on alienation or an onerous burden in perpetuity is dispelled by the fact that by its terms it may run with the land only as long as both buildings are standing and in use."<sup>76</sup>

The New York court recently spoke further on this matter in *Eagle Enterprises v. Gross*,<sup>77</sup> where a corporate subdivider who conveyed a subdivision lot promised to supply water from May 1 to October 1 of each year from a well on its land, and the grantee promised to receive it and pay a \$35 annual fee. Recovery was denied when a successor to the grantor sued a successor to the grantee to collect the fee. We may recall that in *Chilcott v. Cooke*,<sup>78</sup> the later-repudiated English case involving a similar covenant, the court said that it would be "perfectly monstrous" to allow one who promised to supply water to terminate the obligation simply by conveying his land. In *Eagle*, however, it was the grantee's successor who balked at taking and paying for the water. The court decided in part on a narrow construction of the touching and concerning requirement, since the obligation was only seasonal and the defendant as well as other lot owners similarly situated were not actually dependent on the plaintiff's supply of water. *Neponsit* was distinguished on the ground that the promisor there had received an easement to "utilize public areas in the subdivision," to which the obligation to pay was related.<sup>79</sup> The court also noted the affirmative nature of the covenant and cited *Nicholson* for the proposition that covenants are "disfavored" because of the fear that they impose "an undue restriction on alienation or an onerous burden in perpetuity." Noting

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75. 7 N.Y.2d 240, 164 N.E.2d 832 (1959).

76. 7 N.Y.2d at 246, 164 N.E.2d at 835.

77. 39 N.Y.2d 505, 349 N.E.2d 816 (1976).

78. 3 Ch. D. 694, 701 (1876).

79. 39 N.Y.2d at 509, 349 N.E.2d at 819.

the unlimited duration of this covenant, the court said, "Thus, the covenant falls prey to the criticism that it creates a burden in perpetuity, and purports to bind all future owners, regardless of the use to which the land is put."<sup>80</sup> On this ground also the covenant was not excepted from the rule against the running of affirmative covenants.

New Jersey's *Petersen v. Beekmere, Inc.*<sup>81</sup> was a *Neponsit*-type case in which a corporate subdivision developer conveyed to the Beekmere Corporation an easement of access to a lake within the subdivision and inserted in deeds to residential lots a promise by lot owners to purchase one share of common stock in the corporation for not more than \$100 and to comply with the corporation's constitution and bylaws. In a class action to construe the covenant, the court faced early cases that seemed to support the English rule against the running of all burdens with fee estates at law and in favor of confining the equitable rule of *Tulk v. Moxhay* to restrictive covenants. Acknowledging the New York developments concerning affirmative burdens, especially *Neponsit* and *Nicholson*, as well as the general acceptance of the running of affirmative burdens elsewhere, the court concluded that, whatever the New Jersey rule was at law, affirmative burdens should be allowed to run in equity. That conclusion is striking, for if some policy condemns the running of affirmative burdens, such a policy would seem to be more offended by specific enforcement than by the recovery of damages for breach.

The court, however, gave two reasons for refusing to enforce this covenant. First, the subdivision lacked a proper "neighborhood scheme,"<sup>82</sup> a uniformity of obligation, since the common grantor had released a substantial number of the lots from the covenant. Second, the covenant involved a "vagueness of terms and consequent restraint on alienation."<sup>83</sup> The court mentioned several reasons for this second conclusion. Since the covenant obligated lot owners to conform to the corporation's bylaws, which contained nothing pertinent to the matter, no formula existed to calculate future assessments and thus no safeguard existed against inequitable assessments. Also, the corporation was not required to devote the assessed funds to the development of the subdivision. Further, the lot-owners' shares were neither transferable nor otherwise redeemable. Finally, no specific

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80. 39 N.Y.2d at 510, 349 N.E.2d at 820.

81. 117 N.J. Super. 155, 283 A.2d 911 (Ch. Div. 1971).

82. 117 N.J. Super. at 171, 283 A.2d at 919.

83. 117 N.J. Super. at 171, 283 A.2d at 920.

time limited the covenant's duration. The court did not say, however, that the covenant was unenforceable even against the original lot purchasers. Indeed, the reference to the covenant as a restraint on alienation and the fact that these plaintiffs were successors to original purchasers justifies the inference that the court meant merely that the covenant could not bind successors.

We might wonder why, given its concern about vagueness, the court could not have indulged in a more liberal interpretation of such a covenant. Could the court not have found in the covenant's obvious purpose an implicit requirement that both the amount of the assessment and the use of the funds be limited to necessary or reasonable improvements for the benefit of all the residents?

One might consider these developments in New York and New Jersey as significant only as further definitions of the process of relaxing earlier opposition to the running of affirmative burdens. That is, one might assume that these developments are not relevant in jurisdictions that never had any rule against the running of affirmative burdens. It is of special interest, therefore, that these same ideas have recently appeared in other jurisdictions. In *Kell v. Bella Vista Village Property Owners Association*,<sup>84</sup> the Arkansas court distinguished *Beekmere* on the ground that sufficiently definite terms governed the promise in question to compute an assessment and determine the use of the proceeds. A Washington court reached a similar result in *Rodruck v. Sand Point Maintenance Commission*.<sup>85</sup> We might also note in *Rodruck* that membership in the corporate body charged with managing the facilities and levying the assessments would, by the terms of the bylaws, run to the successor of the member's lot, to which his membership was appurtenant. In *Japanese Gardens Mobile Estates, Inc. v. Hunt*,<sup>86</sup> a Florida case, mobile-home lot owners were subject to a stated monthly assessment and to any increased assessments approved by a majority of the lot owners. The case did not question the running of these promises or even whether they were valid and binding on original purchasers. Rather, the validity of a particular increased assessment was disputed and the court remanded the case to ascertain whether the assessment was made arbitrarily or for a proper purpose.

In respect to the duration of affirmative covenants, two courts have recently reached the obvious conclusion that cove-

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84. 258 Ark. 757, 764, 528 S.W.2d 651, 655 (1975).

85. 48 Wash. 2d 565, 295 P.2d 714 (1956).

86. 261 So. 2d 193 (Fla. Dist. Ct. App. 1972).

nants similar to those in *Beekmere* cannot violate the Rule Against Perpetuities because the interests involved are vested.<sup>87</sup> A Florida Court of Appeals, however, has responded to this question somewhat differently. In *Henthorn v. Tripair Land Development Corp.*,<sup>88</sup> annual subdivision charges were to continue until January 1, 2000, and automatically for ten-year periods thereafter unless repealed by a majority vote of the owners. The court saw no difficulty with the initial term, but held the extension provisions invalid for the same policy reasons that invalidate interests under the Rule Against Perpetuities. Apparently the court was not actually applying that rule, but only borrowing its policy. Nor did the court borrow the perpetuity period, which the covenant's initial period exceeded. The ruling is not clear, however, for the court cited Gray's famous perpetuity treatise at the point where Gray states that the Rule Against Perpetuities does not apply to contracts generally, but does apply to option contracts because they are held to create equitable future interests in property.<sup>89</sup> Does the court contend that these covenants were valid during the initial period because the property interests, if any, were vested, but that they were void thereafter because they created contingent future interests in property? If so, we could raise the technical objection that such future interests were defeasible, not contingent, since future action by the lot owners was necessary, not to continue, but only to terminate the agreement. The court further confused the matter by relying on an earlier case which had startlingly concluded that lot-assessment provisions can be terminated by either party at will upon reasonable notice if their duration cannot be ascertained from their terms.<sup>90</sup> The court in that earlier case said further that such provisions expressly made perpetual are unenforceable in equity, because they would impose upon a court an endless and inappropriate duty of supervision.

Judicial attacks upon the duration of restrictive covenants might seem surprising. We have lived a long time without any explicit law on the matter. If these burdens are not wholly analogous to perpetual easements, or rather easements in fee, the equitable defense of "changed conditions"<sup>91</sup> may preclude the ques-

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87. *Kell v. Bella Vista Village Property Owners Assn.*, 258 Ark. 757, 528 S.W.2d 651 (1975); *Lowry v. Norris Lake Shores Dev. Corp.*, 231 Ga. 549, 203 S.E.2d 171 (1974).

88. 221 So.2d 465 (Fla. Dist. Ct. App. 1969).

89. J. GRAY, *THE RULE AGAINST PERPETUITIES* §§ 329-330.3 (4th ed. 1942).

90. *Collins v. Pic-Town Water Works, Inc.*, 166 So. 2d 760 (Fla. Dist. Ct. App. 1964).

91. 2 AMERICAN LAW OF PROPERTY § 9.39 (A.J. Casner ed. 1952).

tion from arising, at least in the most common situation of equitable servitudes upon subdivision ownership. The Texas court, however, though it found nothing in the terms of a simple restriction of property to residential use to limit its duration, dismissed a policy argument against the restriction by saying simply that it was not "unreasonable at this time."<sup>92</sup> Similarly, a Florida court granted a petition to remove a restrictive covenant that allegedly clouded title because of changed conditions, but added that where such a covenant's duration has not been expressly limited, a reasonable limitation should be implied as a matter of construction. That is, the restriction should not endure longer than circumstances and its purpose indicate is reasonable.<sup>93</sup>

In certain circumstances the changed conditions defense, as usually interpreted, may not be relevant. A Missouri court faced with a covenant not to operate a gasoline station refused to release the promisor's successor from the restriction.<sup>94</sup> The court denied that the restriction's indefinite duration was unreasonable for, as stated in the Texas case noted above,<sup>95</sup> the owner of the burdened property can challenge the restriction should it later become unreasonable. A California court agreed to enjoin the operation of a grocery store in violation of a covenant. The covenant was not perpetual, the court said, but valid only so long as the promisee remains in the grocery business.<sup>96</sup>

In respect to a matter more obviously related to direct restraints on alienation, one court has recently held that a condominium trailer park developer-grantor who reserved the exclusive right to rent the condominium units did not unreasonably restrain alienation.<sup>97</sup> The court emphasized that the unit owners were unrestricted in the sale of their units. On the other hand, a different court held that a restriction against the sale of subdivision lots to anyone "who would be disapproved for membership in the beach club" established for lot owners was an unreasonable restraint on alienation.<sup>98</sup>

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92. *Moore v. Smith*, 443 S.W.2d 552, 556 (Tex. 1969).

93. *Barton v. Moline Properties, Inc.*, 121 Fla. 683, 164 So. 551 (1935). *See also* *Crissman v. Dedakis*, 330 So. 2d 103 (Fla. Dist. Ct. App. 1976).

94. *Hall v. American Oil Co.*, 504 S.W.2d 313 (Mo. App. 1973).

95. *Moore v. Smith*, 443 S.W.2d 552 (Tex. 1969), *discussed in text at note 92 supra*.

96. *Doo v. Packwood*, 265 Cal. App. 2d 752, 71 Cal. Rptr. 477 (1968).

97. *Holiday Out in America at St. Lucie, Inc. v. Bowes*, 285 So. 2d 63 (Fla. Dist. Ct. App. 1973).

98. *Tuckerton Beach Club v. Bender*, 91 N.J. Super. 167, 169, 219 A.2d 529, 530 (App. Div. 1966).

## THE SEARCH FOR PUBLIC POLICY

In addition to the traditional requirements of contract law, it is clear that a covenant respecting land, like conditions or limitations in dispositive instruments, may for a variety of reasons violate public policy, even as between the original parties.<sup>99</sup> My concern, however, is more limited. I wish to discover what policies, if any, are relevant not to the validity of covenants as between the original parties, but to the running of a covenant's burden to a successor of the promisor. This problem may also embrace incidentally cases in which the validity of a covenant between the original parties relates to its duration and to that extent affects its enforceability against successors of the promisor.

My purpose in this Article is twofold. I first sought to clear the air, or cleanse the stables, to discover which of the old, technical impediments to the running of burdens really disguise unstated or poorly conceived policy concerns. The English law may reflect the notion that affirmative burdens are more onerous than restrictive ones and therefore restrain alienation unreasonably, but that policy sweeps far too broadly. At any rate, it has not been accepted in this country. The search for policy in the American privity-of-estate doctrine has been equally frustrating. It is not even certain that courts apply the doctrine with any specific policy in mind. Whatever their policies may be, the courts have so

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99. The most obvious are those that violate the constitutional doctrine against racial restrictions. *Shelley v. Kraemer*, 334 U.S. 1 (1948). For another recent example, a land developer covenanted with a city to limit the private use of roadways within a subdivision, the covenant entitling him to declare these restrictions void if any suit were brought to enjoin his use of the private roadway. When the plaintiffs sought a declaration of their rights under the covenant, presumably suing as third-party beneficiaries, the court held that the right reserved by the covenantor was void because it violated the public policy against contracts that deny access to courts or attempt to deprive courts of their inherent jurisdiction. This provision was especially vulnerable since it affected the rights of persons who were not parties to the agreement. *Fugazzoto v. Brookwood One*, 295 Ala. 169, 325 So. 2d 161 (1976).

The validity of a provision to amend a restrictive covenant by a proper vote of lot owners has been challenged. One court recently decided that such a provision and an amendment made pursuant to it were valid if not unreasonable or prohibited by law. *Harrison v. Air Park Estates Zoning Comm.*, 533 S.W.2d 108 (Tex. Civ. App. 1976). "Discretionary servitudes" pose the related problem of building plans that must be approved by a developer-grantor, a committee appointed by him, or a majority of lot owners. Most of the recent cases have approved such provisions where their enforcement is sought reasonably, in good faith, and in furtherance of a development scheme. *Rhue v. Cheyenne Homes, Inc.*, 168 Colo. 6, 449 P.2d 361 (1969); Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 291-300 (1976); Annot., 19 A.L.R. 2d 1274 (1951). Apart from questions of vagueness or of touching and concerning, it is not clear what public policies these decisions involve.

worked through and around the privity doctrine to leave it a barren and useless impediment.

I have not concluded, however, that no policy factors govern the running of covenants. Rather, in asserting my second purpose I am now certain that the courts must make a straightforward approach to the policy question stripped of its distracting and outworn technical garb. That requires a tentative effort to identify the types of issues or problems that invoke policy considerations. Such an inquiry is difficult because it casts us adrift without the benefit of much judicial analysis or assessment, since courts seldom approach the question in these terms. Since we are searching for policies that affect the running of the burden of covenants rather than a covenant's initial validity, we will primarily inspect the relationship between the running of covenants and the policy against fetters on alienability.

If the courts have given us little help in our pursuit of public policy, the *Restatement* at least offers a rationale against covenants burdening land, although it says little about alienability as such.<sup>100</sup> The *Restatement* seeks to protect "the social interest in the utilization of land" from the potential "disadvantageous effect upon its use and improvement" imposed by the burdens of covenants respecting land. As to the running of the burdens in equity,<sup>101</sup> the *Restatement* says that "a promise respecting the use of land may be invalid because it unreasonably restricts the use of land." It explains further that the restriction's harm may be "so disproportionate to the benefit produced by the performance of the promise that the promise ought not to be enforced." The *Restatement* concedes that its rule is necessarily vague and that determining proportions of harm and benefit will involve a variety of factors. The comment mentions several relevant factors, including the covenant's duration. Only in respect to duration does the *Restatement's* policy specifically relate to the running of a covenant as distinguished from its initial validity.

In support of its much-criticized rule that the burden of a covenant will not run unless its performance will physically benefit either the promisee's or the promisor's land,<sup>102</sup> the *Restatement* rationale implies that any covenant that limits land use offends public policy in some degree, and that no covenant will run unless some social advantage compensates for the disadvantage caused by the burden. The deterrent of a burden on land to a prospective

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100. RESTATEMENT OF PROPERTY § 537, Comment a (1944).

101. *Id.* § 539, Comments e, f.

102. *Id.* § 537, Comment a.

purchaser, that is, the restraint on alienation, is stated as one consequence of a burden that restricts land use. More will be said about this section of the *Restatement* when referring to the touching and concerning requirement. At this point, I suggest merely that there is no more reason to say that all covenants affecting land use are in some degree offensive than to conclude the same about easements. On the other hand, good reason does exist to find a burden on use unreasonable in some circumstances and to say that a burden's duration may be relevant to its unreasonableness. If we say no more than this, it makes little difference whether we characterize the policy to be against unreasonable restrictions on land use or against restrictions on land use that constitute unreasonable restraints upon alienation.

If we begin our pursuit of the policy reasons for protecting alienability of property by looking at the several doctrines or varying policies that profess to preserve alienability, we may discover why we seem to be lost at sea in identifying the policy factors that concern the running of covenants. The Rule Against Perpetuities, the rules against direct restraints on alienation, and the rules governing the duration of trusts and the accumulation of income, have all been thought to be related in policy terms. But the policy supporting even the most clearly defined of these doctrines, the Rule Against Perpetuities, is not clear. Does the Rule express a concern about the economic consequences of indirectly fettered alienability or about the social consequences of too much dead-hand control of property?<sup>103</sup> In any event, the Rule rarely applies to running covenants, with the notable exception of its application to options in gross to purchase land,<sup>104</sup> which may indeed be covenants running with the land. It has long been argued that such application is conceptually and functionally improper.<sup>105</sup> New legislation has passed that exempts options from the Rule but limits their duration to a period of years.<sup>106</sup>

The rule against so-called direct restraints on alienation applies simply and clearly enough to one kind of restraint. Explicit prohibitions against the alienation of land conveyed in fee simple, including prohibitions in the form of conditions that demand forfeiture on breach, as well as those in the form of contracts, are illegal and void.<sup>107</sup> A limited doctrine allows valid partial re-

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103. L. SIMES, PUBLIC POLICY AND THE DEAD HAND 32 (1955).

104. 6 AMERICAN LAW OF PROPERTY § 24.56 (A.J. Casner ed. 1952).

105. *Id.*; Berg, *Long-Term Options and the Rule Against Perpetuities* (pts. 1-3), 37 CALIF. L. REV. 1, 235, 236, 419, 447 (1949).

106. ILL. REV. STAT. ch. 30, § 194(7) (1973); P.A. 76-1428, § 4, eff. Sept. 22, 1969.

107. 6 AMERICAN LAW OF PROPERTY § 26.15 (A.J. Casner ed. 1952).



straints to deny alienation to certain persons or classes, provided of course that the classification is not racial.<sup>108</sup> Generally, however, a restraint is illegal without regard to its duration.<sup>109</sup> In response to the severity of this dogma, a minority of courts have accepted a doctrine of "reasonable restraints" which tolerates restraints limited to certain specific periods of time.<sup>110</sup>

The perplexing part of this law is encountered when one turns from explicit prohibitions or restrictions upon alienation to a variety of restrictions upon conduct (most commonly restrictions on land use) that may in effect discourage or inhibit alienability. The main difficulty here derives from certain types of encumbrances that are incontestably valid whatever their possible effect on alienability. Most flagrant are those traditional future interests reserved by conveyors: the possibility of reverter and the right of entry for condition broken. Outside the panoply of estates, easements, and related servitudes are the most common incorporeal interests in property. Not all easements inhibit alienation, but surely some do; yet I do not recall any case that held an easement to be an unlawful restraint on alienation.

This does not mean that only explicit restrictions on alienation are unlawful. Courts have expressed concern, for instance, that the running of options in gross to purchase land, including preemptive options or the so-called rights of first refusal, will inhibit alienability. As stated above,<sup>111</sup> regular options have usually been subjected to the Rule Against Perpetuities and perhaps for this reason have escaped the charge that they might unlawfully restrain alienation apart from their duration. One might explain this by saying that an option which does in fact inhibit alienation is a reasonable restraint if it does not last too long. It seems odd in contrast, therefore, that most courts have not only subjected preemptive options to the Rule Against Perpetuities,<sup>112</sup> but have declared that they may also constitute unreasonable restraints on alienation regardless of their duration.<sup>113</sup> Several factors are relevant to the unreasonableness of the restraint, the most common mark of an unreasonable restraint being the right to buy at a fixed price rather than at the price offered by a third person. Clearly, however, a court that under-

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108. *Id.* §§ 26.31-.34.

109. *Id.* § 26.19.

110. *Id.* §§ 26.22, .23.

111. See text at note 104 *supra*.

112. See Browder, *Restraints on the Alienation of Condominium Units*, 1970 U. ILL. L.F. 231, 248.

113. *Id.* at 240, 240-43.

takes to decide whether such a device unreasonably restrains alienation does not thereby commit itself to the minority view that tolerates some explicit restraints on alienation.

Although it is sensible to distinguish direct from indirect restraints on alienation, prevalent terminology has produced some analytical confusion. Since the Rule Against Perpetuities is usually designated as the rule against indirect restraints on alienation, what do we call unlawful restraints on alienation that do not violate the Rule but that also do not purport explicitly to restrain alienation? The term "practical restraints"<sup>114</sup> has been used, or "restraints in substance."<sup>115</sup> Obviously not every contractual or dispositive provision that imposes some practical restraint on alienability is unlawful. Either by its nature, or because the benefit derived outweighs the practical harm, a practical restraint is unlawful only if the relevant circumstances reveal that it restrains alienability unreasonably. It follows that certain practical restraints, although not subject to the Rule Against Perpetuities, may still be unreasonable by virtue of their duration. In other words, the Rule Against Perpetuities need not be the only rule limiting the duration of an indirect impediment to alienability. This is the real meaning of the recent New York<sup>116</sup> and New Jersey<sup>117</sup> developments concerning the duration of affirmative covenants.

This is not the place for a general exploration of the vague dimensions or the underlying meaning of any policy or doctrine governing restraints on alienation. At the least, it seems clear that the courts have always been willing to consider carefully whether certain arrangements affecting property constitute undue practical restraints upon alienation or offend some other identifiable public policy.<sup>118</sup> It is also now evident that the courts deem that question relevant to the problem of running covenants and that the main impediment to our understanding that problem has been the masquerading of public policy in forms that

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114. Berg, *supra* note 105, at 10 (emphasis omitted).

115. 6 AMERICAN LAW OF PROPERTY §§ 26.63-.80 (A.J. Casner ed. 1952).

116. See text at note 75 *supra*.

117. See text at note 81 *supra*.

118. Courts frequently declare in effect that covenants affecting land use are valid if they do not violate public policy. See, e.g., *Lake View Memorial Hosp. v. County of Vermilion*, 23 Ill. App. 3d 413, 419, 318 N.E.2d 752, 756 (1974); *Le Vielle v. Seay*, 412 S.W.2d 587, 593 (Ky. 1967); *Gulf Oil Corp. v. Fall River Hous. Auth.*, 364 Mass. 492, 500, 306 N.E.2d 257, 263 (1974) (quoting statute); *Boiling Spring Lakes Div. of Reeves Telecom Corp. v. Coastal Serv. Corp.*, 27 N.C. App. 191, 218 S.E.2d 476, 478 (1975); *Loeb v. Watkins*, 428 Pa. 480, 484, 240 A.2d 513, 516 (1968); *Vickery v. Powell*, 267 S.C. 23, 28, 225 S.E.2d 856, 858 (1976).

either hide their policy basis or distract attention from it.

A search for policy limitations on the running of covenants is bound to concentrate on the running of affirmative burdens. It will also embrace whatever policy is found to support the old touching and concerning doctrine. If one rejects the English condemnation of the running of all affirmative burdens, the fact remains that most affirmative burdens are more burdensome than most restrictive ones.<sup>119</sup> That a variety of covenants restrict a subdivision in order to preserve a residential neighborhood may often not seem a burden at all. On the other hand, obligations to perform certain acts, including the payment of money, may be felt as physically or financially objectionable. Affirmative burdens, however, do not necessarily impose more objectionable fetters on alienability than restrictive ones, though they have peculiar intricacies not yet fully fathomed in policy terms nor carefully differentiated for policy purposes.

Consider first the most common and simple type of covenant, like that in *Neponsit*,<sup>120</sup> to pay for the maintenance of facilities that benefit subdivision lot owners. Covenants to pay money have always been suspect under the touching and concerning requirement, especially in the landlord-tenant relation, despite the fact that a covenant to pay rent has always run with a leasehold estate. Similarly, subdivision assessments are now generally conceded to touch and concern the promisor's lot, for the benefit acquired with the payments clearly enhances the enjoyment and value of his land and often relieves the promisor from maintaining his own property in certain ways. The question has seldom arisen whether the benefit of his promise concerns land of the promisee. The promisee or the beneficiary of the promise will likely be a corporation organized to manage the provision of services. As in *Neponsit*, one can consider the corporate enforcement agency merely a representative of the lot owners themselves or an intermediary between one lot owner and all others, so that in substance the benefit of the covenant touches and concerns the land of all other lot owners. In this case, it hardly seems necessary that the intermediate agency, corporate or otherwise, own land

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119. In Lloyd, *Enforcement of Affirmative Agreements Respecting the Use of Land*, 14 VA. L. REV. 419, 431 (1928), the author concludes with this statement:

But such agreements if a perpetual clog on the title are more conspicuously objectionable than those purely restrictive and call even more for a fixed limit to their duration. So limited, affirmative restrictions would seem to differ from negative in social advantage and disadvantage less in kind than in degree.

120. *Neponsit Property Owners' Assn. v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938), discussed in text at note 74 *supra*.

within the subdivision with which the benefit of the covenant will run.

Public policy in this situation concerns either the covenant's duration or its vagueness. Does the equitable defense of changed conditions resolve the duration problem? Although available to an original purchaser-promisor, this defense obviously affects the running of a covenant as well. Is it a rule of policy? Courts never speak of it as such; they merely say that a covenant can no longer be enforced when circumstances frustrate the purposes of the restriction.<sup>121</sup> At most, courts label enforcement in such circumstances inequitable. One might infer, as a rule of construction, that the parties intended the obligation to continue only so long as its evident purpose could be achieved. In any case, the rule can be justified as one of policy, so that upon changes of certain conditions, the obligation may become an unreasonable burden on land use, and in fact an unreasonable restraint on alienation.

In policy terms, no reason exists to limit that rule to the traditional kinds of changed conditions that courts have invoked as a defense to the enforcement of equitable servitudes. It ought to apply, for example, to cases not involving the complexities of a subdivision scheme. Indeed there is no limit to the kinds of conceivable circumstances relevant to this problem. Similarly, although the defense of changed conditions is usually raised respecting restrictive covenants, I see no reason against applying it to affirmative burdens also. If changed conditions invalidated subdivision restrictions, however, it does not necessarily follow that affirmative promises respecting subdivision services also become unenforceable, for the two are not necessarily related.

Confining the changed conditions rule to equitable proceedings creates an anomaly if, without regard to changed conditions, a covenant can be enforced at law and remain a cloud on title.<sup>122</sup> It is not unprecedented to extend equitable defenses to actions at law. In any event, the termination of a covenant under proper changed conditions can be declared a requirement of public policy both at law and in equity. In other words, where the defense of changed conditions, on the basis of precedent, is not applicable, it would remain open to a court, in respect to restrictive as well as affirmative covenants, and both at law and in equity, to declare that the burden of a covenant is extinguished where under particular circumstances it has become unreasonable.

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121. 2 AMERICAN LAW OF PROPERTY § 9.39 at 445 (A.J. Casner ed. 1952).

122. *Id.*

As previously mentioned, public policy in the subdivision situation also questions the vagueness of a promise concerning subdivision management, as in *Beekmere*.<sup>123</sup> Construction may solve this problem; courts can infer that the amount of an assessment and the use of acquired funds are limited to providing proper maintenance or recognized services. Where that cannot be implied, the covenant's vagueness may indeed unreasonably fetter alienability, and so not run with the units of land even where contract principles would not void the covenant on that ground as between the original parties.

Consider a variant of the typical subdivision-assessment covenant: a covenant to furnish a service or other benefit to the land of the promisee. This is the *Nicholson*<sup>124</sup> type of case. The promisor in that case covenanted to supply heat from his building to the promisee's building. Both the burden and the benefit of the promise clearly touched and concerned the land of the respective parties. The *Nicholson* court resolved the most obvious policy problem, the obligation's duration, by recognizing an inherent time limitation: the life of the two buildings. It may seem preferable to handle the problem as suggested above in regard to the changed-conditions rule.<sup>125</sup> In any event, courts should not void the covenant solely because it may last too long. The covenant should be valid unless and until changed conditions render it an unreasonable restraint on the alienation of the burdened land.

It may merely be borrowing trouble to mention certain unlikely variants of this type of case, but one cannot shy from the margins of normal practices and expectations when testing the requirements of public policy. Landlords or tenants occasionally promise to pay the taxes on leased land or for utilities.<sup>126</sup> Suppose instead that a grantee of land in fee simple promised to pay for improvements or taxes on land of the grantor or for the grantor's utilities. The benefit of that promise touches and concerns the grantor's land, but by traditional standards the burden is in gross. Can the parties nevertheless bind the successors of the promisor by an explicit provision in the deed? This raises a fundamental question about the policy basis of the touching and concerning requirement: Is that requirement more than a rule of

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123. *Petersen v. Beekmere, Inc.*, 117 N.J. Super. 155, 283 A.2d 911 (Ch. Div. 1971), discussed in text at note 81 *supra*.

124. *Nicholson v. 300 Broadway Realty Corp.*, 7 N.Y.2d 240, 164 N.E.2d 832 (1959), discussed in text at note 75 *supra*.

125. See text at note 121 *supra*.

126. 2 AMERICAN LAW OF PROPERTY § 9.4 at 347 (A.J. Casner ed. 1952).

construction, that is, a means of inferring the intention of the parties? The parties can clearly make the burden of a simple promise to pay money a lien upon the promisor's land. Even the English rule against the running of all affirmative burdens does not reach cases involving rent-charges or perhaps even liens. If the promise is to make a lump-sum payment for all or part of some improvement to the land of the promisee, the analogy to a mortgage seems obvious, except that a mortgage lien binds the land of the mortgagee without imposing a running personal obligation. Where the parties clearly intended to bind the promisor's successors, however, courts have been known to construe such a promise as in effect the creation of a lien. Does the creation of a lien require explicit technical language? Even if it does, is the difference between an explicit lien and an explicit imposition on the promisor's successor of a promise to pay money really important as a matter of public policy? The burden of a promise to pay a lump sum restrains alienation no more than a lien or a mortgage; it will simply be accounted for in fixing the purchase price of the burdened land. To this limited extent, at least, cannot the original parties, by their own fiat, make the burden of the promise touch and concern the land of the promisor?<sup>127</sup> To reach such a conclusion it is not necessary to construe every promise to pay money as creating a lien binding the property itself rather than personally binding a successor of the promisor.

The duration of such a lump-sum promise presents no problem either. Normally the parties will contemplate that the improvement to be paid for will be made within a reasonable time. Even if they do not, the continuing burden will simply reduce the value of the promisor's land by a calculable amount that can be reflected in a later sale. If, however, the parties leave the extent of the improvement, and so the burden of the obligation to pay for it, so indefinite as not to be calculable within reasonable limits, it may then indeed become an unreasonable fetter on alienability. As in the cases mentioned above that involved vague property assessments,<sup>128</sup> the burden should not run.

Suppose, however, that the promise cannot be discharged with a lump-sum payment. For instance, a covenant to maintain or repair a fence, bridge, or other structure requires the promisor

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127. Cf. Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 231 (1970) (purchaser seeing promise to pay for existing improvements in prior deed of land ought to realize that promise bound predecessor as owner of the land and burden ought to run).

128. See text at note 81 *supra*.

to pay recurrent charges. By analogy to the above analysis concerning liens and mortgages, a recurrent obligation between owners in fee simple amounts to something like a "ground rent" or a "quit rent." Ground rents are not generally recognized in this country,<sup>129</sup> however, because history and the doctrine of estates deny that owners in fee simple share the tenure relationship requisite to charging rent. But is so conceptual a response really a persuasive policy argument against the running of this type of promise? Arguably it is not, since the reasonableness of the restraint on alienation turns on the particular circumstances of the case. In any case, we may argue that the touching and concerning requirement is not an invariable rule of public policy. Even where it is not satisfied in the traditional sense, as in this example where the burden is in gross, the running of a burden should be denied only if that will unreasonably restrain alienation.

As in *Eagle Enterprises*,<sup>130</sup> two kinds of affirmative covenants can be combined. The grantor, his grantee, or one of two neighboring landowners, could promise either to furnish a service or other benefit, or to accept and pay for the services of the other. The considerations discussed above as to either kind of promise separately seem applicable.

Consider now the least plausible kind of case in order to test further the touching and concerning requirement as a rule of policy. Suppose an eccentric grantor wishes to induce certain conduct by his grantee and his successors that has nothing to do with any land. His attempt to bind successors to a covenant requiring that conduct would very likely impose a severe restraint on alienation; if so, the covenant should be void whether the conduct is affirmative or restrictive. In fact, I cannot now think of a restrictive covenant that would not be void if it fails to satisfy a reasonable application of the touching and concerning requirement. Clearly, therefore, the touching and concerning requirement, when applied to restrictive covenants and to affirmative covenants not requiring the payment of money, does contain a policy ingredient.

Conceding that public policy supports the touching and concerning requirement to a considerable extent is no excuse for taking a narrow view of that requirement. No reason exists for applying a more restrictive standard than that declared by Judge

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129. See 2 AMERICAN LAW OF PROPERTY § 9.41 (A.J. Casner ed. 1952).

130. *Eagle Enterprises v. Gross*, 39 N.Y.2d 505, 349 N.E.2d 816 (1976), discussed in text at note 77 *supra*.

Clark<sup>131</sup> in terms of the ordinary layman's expectation and assumptions. The main issue in this regard relates to covenants that affect land economically but not physically, most obviously covenants governing business competition. The view that covenants must physically touch and concern the land can be supported only by the notion that running burdens inherently prejudice the public interest and so must be kept within the narrowest possible bounds. Assuming that competition covenants do not violate the policy against restraints on trade, the current trend of the cases<sup>132</sup> no longer supports the narrow view of such covenants<sup>133</sup> first declared in Massachusetts<sup>134</sup> and supported by the *Restatement*.<sup>135</sup> Even Massachusetts has now questioned that view in principle.<sup>136</sup>

Apart from the competition problem, suppose a promise does in fact touch and concern the land of the promisor but the benefit is in gross. That burden will clearly not run in equity in England,<sup>137</sup> and substantial but divided authority to the same effect exists in this country.<sup>138</sup> At least in the *Restatement's* view,<sup>139</sup> that rule is one of public policy, based on the assumption mentioned above that all land-use restrictions are objectionable and can be justified only if a benefit to the land of either the promisor or the promisee accompanies the burden. But no one requires such a

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131. C. CLARK, *supra* note 6, at 99. Judge Clark's statement was made in reference to covenants between landlord and tenant. There is no reason to believe that he intended anything different for covenants between owners in fee simple.

132. *Doo v. Packwood*, 265 Cal. App. 2d 752, 71 Cal. Rptr. 477 (1968); *Hall v. American Oil Co.*, 504 S.W.2d 313 (Mo. App. 1973); *Alexander's Dept. Stores, Inc. v. Arnold Constable Corp.*, 105 N.J. Super. 14, 250 A.2d 792 (Ch. Div. 1969); *Quadro Stations, Inc. v. Gilley*, 7 N.C. App. 237, 172 S.E.2d 237 (1970); *Gillen-Crow Pharmacies, Inc. v. Mandzak*, 5 Ohio St. 2d 201, 215 N.E.2d 377 (1966). *Contra*, *Savings, Inc. v. City of Blytheville*, 240 Ark. 558, 401 S.W.2d 26 (1966) (also found covenant not intended to run); *Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385 (Tex. 1977).

133. 2 AMERICAN LAW OF PROPERTY § 9.13, n.35 (A.J. Casner ed. 1952).

134. *Norcross v. James*, 140 Mass. 188, 2 N.E. 946 (1885).

135. RESTATEMENT OF PROPERTY § 537, Comment f (1944), takes the position that the benefit of such a promise will run, but that the burden will not, under the proposition that a burden will not run where the benefit does not physically touch and concern land.

136. *Shell Oil Co. v. Henry Ouellette & Sons Co.*, 352 Mass. 725, 227 N.E.2d 509 (1967); *cf.* *Gulf Oil Corp. v. Fall River Hous. Auth.*, 364 Mass. 492, 306 N.E.2d 257 (1974), where *Norcross v. James*, 140 Mass. 188, 2 N.E. 946 (1885), was distinguished on the ground that here the purpose of the covenant was not to limit competition but to assure the orderly and mutually beneficial development of the area.

137. *London County Council v. Allen*, [1914] 3 K.B. 642.

138. 2 AMERICAN LAW OF PROPERTY § 9.32, nn.5-7 (A.J. Casner ed. 1952).

139. RESTATEMENT OF PROPERTY § 537 (1944). This section applies only to the running of burdens at law. Apparently the rule does not apply to the running of burdens in equity. *Id.* § 539, Comment k. As in the case of horizontal privity, one may wonder about the force of a rule of policy that applies at law but not in equity.



justification of easements in gross.<sup>140</sup> In any event, the rule is quite mechanical since no effort is prescribed to weigh benefits in relation to burdens, which vary greatly in their weight or degree. It may seem preferable to defeat the running of burdens where the benefit is in gross only if in all the circumstances the covenant unreasonably restrains alienation.

Why cannot a grantor convey land with a restrictive promise that the land be used only for a wildlife sanctuary or some other environmentally beneficial purpose? If this can be done by a condition or limitation, breach of which may produce forfeiture, why cannot it also be done by a covenant? Granted that the benefit probably is in gross and that the restriction obviously fetters alienation, if such a restriction on land use nonetheless serves the public interest, no reason exists why it should be held an unreasonable restraint on alienation. As a practical matter there are of course better ways of obtaining such an objective than by the use of conditions, limitations, or covenants.

The rule against the running of burdens where the benefit is in gross has usually been applied to restrictive covenants. Affirmative burdens of this sort are certainly not common, but the kind of case mentioned in the preceding paragraph could involve affirmative promises in support of the environmentally beneficial purposes. If so, the same analysis should produce the same result.

The duration of such an arrangement, whether affirmative or negative, seems not to raise problems except as changed conditions may render the burden no longer reasonable. However, one other aspect of the problem of the running of burdens with benefits in gross is more troublesome. In *Atchison v. City of Englewood*,<sup>141</sup> the court decided that a pre-emptive option to purchase land (a right of first refusal) held by a married couple and their successors, and unlimited in time, violated the Rule Against Perpetuities. A majority of the courts that have ruled on the question support that result with the technical analysis that an option creates a contingent future interest in land.<sup>142</sup> The court in *Atchison*, however, gave a special reason for its decision. Such an option, unlike an option appendant to property of the optionee, would seriously impair the alienability of the land subject to the option, for the owner of that land might have considerable difficulty tracing the ownership of the option and the location of

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140. RESTATEMENT OF PROPERTY §§ 454, 490-91 (1944). The latter two sections deal with the alienability of easements in gross.

141. 170 Colo. 295, 463 P.2d 297 (1969).

142. See Browder, *supra* note 112, at 248.

successive owners. The same sort of argument has been made against the assignment of easements in gross. This difficulty exists to some degree with the alienability of rights of entry and of possibilities of reverter, but has never bothered the courts.

I know of no other case in which the court analyzed an option in gross in that manner. However sound the decision may be respecting options, it does not seem applicable to the usual covenants respecting land use, which will rarely be framed so as to be subject to the Rule Against Perpetuities. The real problem of course is whether a covenant constitutes an unreasonable restraint on alienation. The *Atchison* court conceded that, but applied the Rule Against Perpetuities nevertheless because that seemed the only way to control the duration of an option. But the doctrine of changed conditions and a decree terminating the covenant can control the duration of covenants respecting land use. Surely established procedures exist for raising that question even if the identity or location of the promisee is unknown. The difficulty in finding the promisee seems to impede alienability on this score only where a successor to the promisor wishes to negotiate a release. It is at least arguable that that difficulty alone does not make the running of the burden of a covenant where the benefit is in gross an unreasonable restraint on alienation.

#### IN CONCLUSION

Property lawyers and teachers are accustomed to jibes from their colleagues about how outworn relics of the past still govern the law of property. In fact, when dealing with property problems the courts as well as legislatures are generally proving themselves to be as responsive to current needs and are keeping that law as "relevant" as in any other field. But otherwise discredited epithets still have some justification in the law on covenants running with the land. One of my purposes in this Article was to emphasize in some detail why and to what extent this is so.

Modern English courts did adapt or avoid old notions to fashion a simple though highly restrictive doctrine on running covenants; but that doctrine is not a relic of the past, unless in the light of currently developing English conditions a nineteenth-century doctrine can be so described. However, little explanation has ever appeared for making that doctrine so restrictive.

As the need to develop an American doctrine emerged in the nineteenth century, the American courts were understandably confused about what the old law really required, as well as about

what the English courts were really doing in concurrently evolving the doctrine of equitable servitudes. As a result, a horizontal privity of estates requirement that bears little resemblance to anything in England has survived and evolved. The only sensible thing that can be said for it is that it represented an effort to liberalize an English rule felt to be too harsh for American conditions.

The oldest relic of all is the touching and concerning requirement. It is now seen to be more than a relic, to have current vitality and relevance, but where courts have only vague, unstated feelings or fears that running covenants may offend public policy, they may impose the requirement with too restrictive a meaning.

Most current cases in the field escape these problems. They usually determine whether a purchaser of burdened land purchased with or without notice of the burden in light of the American recording system; or they question who can enforce a subdivision restriction among a number of neighbors who may or may not be similarly situated. The latter problem has its own special intricacies but it would extend this Article unduly to pursue them. I have the impression that for the most part courts handle these questions satisfactorily and without dogmatic impediments. Apart from these matters courts continue to stumble over privity or other too restrictive notions.

In my effort to seek solid public policy bases for any restrictions upon running covenants, I have refused to assume or assert that there are none. One can never predict all the kinds of covenants people may want to make that seem to offend the public interest, although the most obvious and likely offense is the running of a covenant in circumstances that violate the policy against restraints on alienation. Unfortunately, the essence of that policy and the conditions to which it is relevant remain undefined when invoked in this and other fields. The duration of a covenant, especially of one imposing an affirmative burden, presents the most likely source of contention. I have suggested the desirability of reserving a judgment against validity on this ground until circumstances reveal that the covenant has become unreasonable. There is no place in that judgment to declare by analogy to perpetuities that a covenant is void because it may last too long.

The touching and concerning requirement can continue to serve best as a rule of construction on the question of parties' intent that a covenant run. Cases will occasionally appear where the parties' expressly declared intention that the covenant run is

defeated because the covenant's failure to concern land leaves it to operate as an unreasonable fetter on alienation. Some further thought may be desirable, for instance, on the peculiar nature of affirmative covenants to pay money, but I have suggested that here the touching and concerning requirement may disappear as a rule of policy, for the original parties may be taken to have tied the covenant to land by their own expression of intent.

Finally, the American recording statutes should be clarified or modified by construction or amendment where necessary to provide that any properly executed promise that either benefits or burdens land shall be recordable and consequently affect the law regarding notice and bona fide purchase.

My main plea is that courts face the policy question head-on. They have not been embarrassed or reluctant to do so in other areas when the question is presented openly and directly. The question will be presented in that manner if the courts free themselves from rules or attitudes that exemplify vague notions of public policy in disguise.

A law review note written forty years ago primarily about the running of affirmative burdens ends by proposing that until the effects of affirmative covenants upon alienability are empirically analyzed, the "controlling considerations should be the doctrines of intent and notice," presumably with respect to both affirmative and restrictive covenants.<sup>143</sup> My view is not far from this. No factual analyses regarding alienability have been forthcoming, however, nor can they be expected in view of the nature and variety of alienability problems. In their absence, courts must deal with the policies concerning alienability as they have in other areas—on the basis of unproved inferences and assessments. This problem does not yet permit the enumeration of any organized, specific doctrine. Courts may well proceed primarily with the doctrine of intent and notice, provided they remain alert to perceive the effects of running covenants upon the alienability of land. I have sought here to offer assessments of several existing or anticipated problems in that regard.

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143. Note, 47 *YALE L. J.* 821, 827 (1938).