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Running Covenants: An Analytical Primer

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RUNNING COVENANTS: AN ANALYTICAL PRIMER

William B. Stoebuck*

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I. INTRODUCTION

A. Objectives

Save for the subject of perpetuities (and arguably even including it), there is no subject encountered by law students in their basic property courses that so baffles them as does running covenants. But there seems to be no concise writing that lays out the subject of running covenants in a nutshell. It is not that nothing has been written on the subject, for much has been published this century on it and continues to be. The problem is that the writings deal with smaller or greater portions of the overall field. There are articles on real covenants, on equitable restrictions, on covenants in leases, and on various aspects or problems of these subjects. There is a wearisome run of articles criticizing and defending the *Restatement of Property's* stand on real covenants. What law students need, however, is a succinct statement that is compendious and, above all, that imposes a rigorous framework of analysis on an area of law that is as shapeless as an amoeba. Not only do fledgling lawyers need such a statement, but, the cases cry out, so do their seniors of the bench and bar. Surely there is no area of American law in which judicial decisions are more confused—or wholly lacking—in analysis.

Analysis, then, will be the keynote here. The first and largest step will be to divide, for analysis purposes, the subject of running covenants into two major areas: real covenants and equitable restrictions. Even though the decisions increasingly fail to distinguish the two, as do many writings, they developed as separate doctrines and in separate courts. Each must be studied separately if one is to understand their close connection. Within these two major divisions, subdivisions will be built around the elements of real covenants and of equitable restrictions. Again, it is true that the decisions chronically fail to identify the elements in issue, but clear analysis requires it. A final division of the article will assess where the law of running covenants seems to be, and where it might profitably be, headed.

B. Definitions and Ground Rules

The word “covenant” sometimes signifies an agreement between two persons and sometimes a promise contained in such an agreement. As used here, “convenant” is taken to mean a promise by one

person to another to do or to refrain from doing something, which promise the covenantee may enforce at law against the covenantor. If we, who started out with the promise of studying real property, stopped here, we would find ourselves talking about contract law. We are saved by this peculiarity of the covenants we consider: they have the quality of "running" to persons who subsequently have certain connections with the same land or lands with which the covenantor or covenantee, or both, were connected. To be more precise, one should dwell for a moment on the fact that a covenant has two sides to it. The covenantor's side is a duty to do or to refrain as promised. In the law of running covenants this is usually spoken of as the "burden" side. On the covenantee's side is the right to have this duty performed, usually spoken of in the law of running covenants as the "benefit" side. While there has been judicial confusion on the matter, it ought to be possible for the burden side to be imposed as a duty upon, that is, "run to," persons who subsequently have the requisite connection with land with which the covenantor was connected, regardless of whether the benefit side runs to, or is capable of running to, anyone from the covenantee. Likewise, it ought to be possible for the benefit side to run to persons who acquire the requisite connection with the land with which the covenantee was connected, regardless of whether the burden side runs or is capable of running.

Our focus, then, will be not on the covenant *per se*, but on the question whether it has the quality of running. That question has from ancient times been treated as part of the law of real property.¹ The reason is that "runningness" is connected with the acquisition of some sort of interest in land; the benefit or burden is said to "run with" land or with an estate in land. In the law of contracts, rights or benefits may be assigned and duties or burdens delegated by the original parties. In the branch of property law dealing with running covenants, express assignment or delegation does not occur. Rather, remote persons are benefited or burdened because they acquire an interest in land that carries the benefit or burden along with it, provided certain other conditions required by law are met. It is our purpose to define and to understand all those elements that must be present for running to occur.

1. Bordwell, *The Running of Covenants—No Anomaly*, 36 IOWA L. REV. 1, 1-8 (1950).

Running Covenants

By convention and as a historical fact, running covenants are of two kinds. Covenants that run under doctrine developed in the English common law courts of Common Pleas and King's Bench are known as covenants running at law or, more generally, "real covenants." They will be assumed here to trace back to *Spencer's Case*² in 1583; we will not enter into the debate about more ancient antecedents. The second kind of covenant runs under doctrine originating in the English Chancery Court in the 1848 decision in *Tulk v. Moxhay*.³ They will be called by the neutral term "equitable restrictions" here, though the contemporary name is usually "equitable servitudes." We will discuss real covenants first, because for historical and analytical reasons it is best to unfold equitable restrictions by reference back to real covenants. At the end of the discussion of equitable restrictions we will explore modern judicial developments by which covenants, usually associated with residential subdivisions, are made to run under theories that sometimes appear to be extensions of the equity doctrine and sometimes appear inexplicable under any traditional doctrine.

II. REAL COVENANTS

A. Background

Everyone agrees that real covenants, those running covenants developed by the English common law courts, trace back at least to *Spencer's Case*⁴ in 1583.⁵ Spencer leased a house and land to *S* for 21 years. In the lease *S* covenanted for himself, "his executors and administrators" (note that he did not covenant for his "assigns"), to build a wall on the demised land. *S* assigned the leasehold to *J*, who as-

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

3. 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).

4. 5 Co. 16a, 77 Eng. Rep. 72 (Q.B. 1583).

5. Justice Holmes presented a theory that real covenants had their origin earlier in the form of so-called spurious easements, of which he saw evidence in the 1368 Year Book report of Pakenham's Case, Y.B. 42 Edw. III, f.3, pl. 14 (1368). Holmes' theory is spelled out at length in O. HOLMES, THE COMMON LAW 395-407 (1881), and more succinctly in his opinion in *Norcross v. James*, 140 Mass. 188, 2 N.E. 946 (1885).

Holmes' theory has not been accepted by those who have dealt with it. See, e.g., C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 122-24 (2d ed. 1947); Bordwell, *supra* note 1, at 1-8. Bordwell adopts a compromise position; he says *Spencer's Case* revived an ancient real property doctrine. At any rate, it is accurate for our purposes to begin with *Spencer's Case*, which is sufficiently important to be stated.

signed to the defendant Clark. Landlord Spencer brought an action of covenant against Clark for his refusal to build the wall. Queen's Bench denied the relief and in so doing mapped out most of the basic elements of real covenants. The ground for the decision was that, if a covenant to do something to a thing not "*in esse*" (e.g., to build a new wall) is to run to the covenantor's assignee, the covenant must expressly bind "assigns."⁶ As we shall see, this holding has been much watered down and has never been as important as the court's dicta. First, in dictum, the court stated the corollary of its holding, that a covenant respecting an existing thing (e.g., to repair an old wall) might run even though the word "assigns" was not used.⁷ But it was the second dictum that still reverberates with as much mystery and power as ever. No covenant, said the court, may be made to run by the most express words if it is "merely collateral to the land, and doth not touch or concern the thing demised in any sort."⁸

It is the "touch or concern" requirement (usually rendered "touch *and* concern" today) that gets to the heart of real covenants. No covenant will run with an interest in land unless a court concludes that its performance relates to the land or to the holding of the interest in such a way that it touches and concerns the land or the interest. The phrase has undergone a liberalizing metamorphosis in the decisions, but of all the elements of real covenants it continues to occupy center stage. A moment's reflection will show why this is so. If *T* covenants in his lease from *L* to paint the house on the demised land, there is some justification for requiring *T*'s assignee to paint the house. But if *T* covenants, in the lease or in a separate document, to paint *L*'s portrait, then we are repelled from the thought that the assignee of *T*'s leasehold should have to do the portrait.

Another fundamental aspect of real covenants ought to be emphasized here. Both the burden side and the benefit side of a real covenant should be thought of as running with *estates* in land.⁹ In the quaint language of an old simile, they ride along on estates "like a bird on a wagon."¹⁰ This is a principle the judicial opinions have not always kept straight, nor does popular parlance, for we often speak

6. 5 Co. at 16b, 77 Eng. Rep. at 74.

7. *Id.*

8. *Id.*

9. C. CLARK, *supra* note 5, at 93-94; Bordwell, *supra* note 1, at 3.

10. See note 53 *infra*.

imprecisely of covenants running with "the land." That term is fairly accurate for equitable restrictions, as we shall see, but for real covenants we should think of them as running with estates in land.

It will be convenient now, and more importantly will promote analysis, to organize the discussion of real covenants according to their elements. The outline that will be followed is a variant of that adopted by the leading writer on the subject, Judge Charles E. Clark, and often used by the courts:¹¹ (1) form of the covenant; (2) whether the covenanting parties intended the covenant to run; (3) whether the covenant touches and concerns; (4) whether there is privity between one or both of the covenanting parties and the remote party or parties sought to be benefited or burdened (called "vertical privity"); and (5) whether there is privity between the original covenanting parties (called "horizontal privity"). After these elements have been explored, certain questions relating generally to real covenants will be taken up.¹²

B. *Elements*

1. *Form of the covenant*

Obviously for a covenant to be enforceable by or against a remote party, it must have been enforceable between the covenanting parties. This is a question of contract law into which we will not venture, except to say the question seldom arises. A more important issue is whether a real covenant must be in such a form as will satisfy the Statute of Frauds regulating transfer of interests in land.¹³ Underneath this issue is the more fundamental question whether real covenants are interests in land or whether they are contract rights that are made to run by their connection with estates in land. If they are interests in land, then it should follow in theory that either they must be entered

11. C. CLARK, *supra* note 5, at 94.

12. A word of caution—modern recording statutes may operate to make the covenant unenforceable despite the presence of the five elements listed. See discussion accompanying notes 191–94 *infra*.

13. The question first becomes important in a context indirectly related to our subject, in determining whether running covenants are a form of "property" for which eminent domain compensation must be paid in certain situations. A majority of the courts that have considered that question have resolved it affirmatively. See Stoebuck, *Condemnation of Rights the Condemnee Holds in Lands of Another*, 56 IOWA L. REV. 293, 301–10 (1970).

into in a document that meets the requirements of the Statute of Frauds or the operation of the statute must be excused in some recognized way. Exactly the same issue and question arise in connection with equitable restrictions. The courts have usually made no distinction between legal and equitable restrictions in discussing the Statute of Frauds, though perhaps they have tended to excuse the statute more readily with equitable restrictions. In any event, it seems valid for purposes of the Statute of Frauds to discuss both legal and equitable restrictions collectively as "running covenants."

In deciding whether the real property Statute of Frauds applies to the creation of running covenants, the *Restatement of Property* and most writers on the subject agree that running covenants, as proprietary interests in land, must be created in conformity with the Statute of Frauds.¹⁴ The decisions are split, but apparently most courts also adopt the preceding position.¹⁵

A substantial minority, however, have held that the Statute of Frauds does not apply to running covenants because they are not interests in land. The majority stance coincides better with the concept that proprietary interests in land are the total bundle of rights that the holder enjoys. One who restricts his previously enjoyed rights by covenanting not to exercise some of them (for instance, by covenanting not to erect certain kinds of structures) has certainly diminished his quantum of ownership in his land.¹⁶

As a practical matter, the Statute of Frauds seldom proves an insurmountable obstacle to establishing a running covenant. In the first place, as Sims estimated, probably over ninety percent of the real

14. C. CLARK, *supra* note 5, at 94; R. POWELL & P. ROHAN, *REAL PROPERTY* ¶ 672 (abr. ed. 1968); *RESTATEMENT OF PROPERTY* § 522 (1944); Cross, *Interplay Between Property Law Change and Constitutional Barriers to Property Law Reform*, 35 N.Y.U.L. REV. 1317, 1322 (1960).

15. R. POWELL & P. ROHAN, *supra* note 14; *RESTATEMENT OF PROPERTY* § 522 (1944). However, writing in 1944, Sims counted nine states that had agreed that running covenants were property interests within the Statute of Frauds and 14 states that had determined they were not. Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute*, 30 CORNELL L.Q. 1, 27-30 (1944).

For the minority position, see *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920) and Sims, *supra* at 27-30. See Stoebuck, *supra* note 13, at 302-06, for the proposition that the decisions denying the proprietary nature of running covenants are probably a minority.

16. Without re-entering the argument about Holmes' historical theory, see note 5 *supra*, it may be observed that running covenants are similar in their nature and in their benefiting and burdening effects to easements, which clearly must be created in compliance with the Statute of Frauds.

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property covenants that are attempted are included in a writing which satisfies the Statute, such as a deed, easement agreement, or lease.¹⁷ Even if the formalities have not been observed, the covenant may be saved in several other ways.¹⁸ Thus in theory the statute applies but in practice it does not frequently bar the covenant.

2. *Touch and concern*

Whatever other attributes a covenant may have, unless its benefit "touches and concerns" some estate in land, the benefit cannot run to the covenantee's grantee. Similarly, unless the burden "touches and concerns" some estate in land, the burden cannot run. To emphasize the point, suppose that in a lease that both parties executed in compliance with the Statute of Frauds the tenant covenanted to paint the landlord's portrait. Suppose further the parties expressly agreed that "this covenant shall be a covenant running with the land, binding and benefiting the parties' grantees and assigns forever and ever." That covenant should be held not to bind the tenant's assignee, because painting a portrait has nothing to do with land or leasehold or with being a tenant. Nor would the benefit be enforceable by the landlord's grantee, who would have no interest unique to his owning the reversion in having the landlord's (or his own) portrait done.

Touch and concern is a concept, and like all concepts has space and content that can be explored and felt better than it can be defined. The clearest example of a covenant that meets the requirement

17. Sims, *supra* note 15, at 28.

18. The well known doctrines of estoppel and part performance, by which informal conveyances may be taken out of the Statute of Frauds, apply. See 4 H. TIFFANY, REAL PROPERTY §§ 1235, 1236 (3d ed. 1939), for a discussion of the estoppel and part performance doctrines that analyzes both of them as forms of estoppel. Justice Cardozo's opinion in *Sleeth v. Sampson*, 237 N.Y. 69, 142 N.E. 355 (1923), gives a classic description of part performance as a doctrine independent of estoppel. There has been special relaxation of the Statute in connection with running covenants. A major example is the rule, generally followed, that when a deed contains a grantee's covenant, the grantee makes the covenant in due form by accepting the deed, though he does not sign it. C. CLARK, *supra* note 5, at 94. Courts commonly enforce grantees' covenants without discussing the nonsigning, where the grantee has not signed the deed. *E.g.*, *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925); *Vogeler v. Alwyn Improvement Corp.*, 247 N.Y. 131, 159 N.E. 886 (1928); *Rodruck v. Sand Point Maintenance Comm'n*, 48 Wn. 2d 565, 295 P.2d 714 (1956). In general, the courts seem to take a relaxed view of the Statute of Frauds in running covenant cases. Still, of course, the careful draftsman will always place the covenant in a document that complies with the statute. It would be well also to have grantees formally execute conveyances containing grantees' covenants.

is one calling for the doing of a physical thing to land. The tenant's covenant to build a wall in *Spencer's Case* was of this sort; so is a covenant to repair. Perhaps we may also say that covenants to refrain from doing a physical thing to land, such as covenants not to plow the soil, not to build a structure, or not to build multifamily dwellings, fit into this category too. At any rate the courts have no difficulty finding that these covenants touch and concern the land.¹⁹

If there ever was a rule that a running covenant had to touch and concern land in a physical sense, it has long since been abandoned in America.²⁰ The most that can be said concerning American doctrine is that the meaning of touch and concern tends to become less clear as physical contact becomes less direct. One problem area has been whether covenants to pay a sum of money touch and concern. For example, covenants to purchase insurance are, under the influence of the old case of *Masury v. Southworth*,²¹ in some doubt. *Masury* and decisions following it hold that a "bare" covenant to insure will not run;²² the insurance covenant will run only if it is coupled with a covenant to invest the insurance proceeds in restoring the damaged premises. Under this traditional view the investment of proceeds provides a kind of indirect physical connection between insurance and land. Clark, on the other hand, advocates that a "bare" covenant should run. While there may be a trend toward his position, case authority seems skimpy.²³ As to other forms of covenants to pay money, there is little doubt of their touching and concerning when the payment is for the use of land or to pay for improvements. A number of decisions so hold with respect to a landowner's promise to repay his neighbor for a

19. *Thruston v. Minke*, 32 Md. 487 (1870); C. CLARK, *supra* note 5, at 98-100. Restrictions against building have usually arisen in cases in which the theory appears to be equitable restrictions rather than real covenants, but those decisions seem pertinent here. See, e.g., *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925); *Booth v. Knipe*, 225 N.Y. 390, 122 N.E. 202 (1919); *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920); *Tulk v. Moxhay*, 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).

20. See *Masury v. Southworth*, 9 Ohio St. 340 (1859), an old case, an influential one, and not a liberal one, but a case in which the court certainly did not insist upon a physical touching.

21. *Id.*

22. E.g., *Spillane v. Yarmalowicz*, 252 Mass. 168, 147 N.E. 571 (1925); *Burton v. Chesapeake Box & Lumber Corp.*, 190 Va. 755, 57 S.E.2d 904 (1950).

23. See *St. Regis Restaurant, Inc. v. Powers*, 219 App. Div. 321, 219 N.Y.S. 684 (1927) (dictum); C. CLARK, *supra* note 5, at 98-100; Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639, 644 (1914). Note also the court's discussion in *Burton v. Chesapeake Box & Lumber Corp.*, 190 Va. 755, 57 S.E.2d 904 (1950).

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portion of the cost of a party wall if, in the future, the landowner erects a building that uses the wall.²⁴ However, when the promise is to pay a portion for a wall being built regardless of future use, the covenant has usually been held not to run, though the reason appears more to be that the parties did not intend it to run than that it does not touch and concern.²⁵ Controversy has existed over whether covenants to pay real estate taxes and assessments touch and concern, but the better view and probably the trend is that they do.²⁶ Leading cases on the subject are split over whether a landlord's covenant to repay the tenant's security deposit touches and concerns.²⁷

As a final example of money covenants, we should note that the covenant to pay rent touches and concerns; about this there is no argument.²⁸ Because the payment of rent is not even indirectly connected to the land, this judicial solidarity is somewhat remarkable.²⁹ To say that rent touches the leasehold estate because it is necessary to preserve that estate to the tenant is bootstrapping. It is odd that United States courts, which have no trouble with the running of rent, should disagree over the running of a covenant to insure. Occasionally one sees the argument that a certain questionable tenant's covenant touches and concerns because, being bargained for and having value,

24. *Mackin v. Haven*, 187 Ill. 480, 58 N.E. 448 (1900); *Conduitt v. Ross*, 102 Ind. 166, 26 N.E. 198 (1885); *Bennett v. Sheinwald*, 252 Mass. 23, 147 N.E. 28 (1925).

25. *Gibson v. Holden*, 115 Ill. 199, 3 N.E. 282 (1885); *Sebald v. Mulholland*, 155 N.Y. 455, 50 N.E. 260 (1898); *Meado-Lawn Homes, Inc. v. Westchester Lighting Co.*, 171 Misc. 669, 13 N.Y.S.2d 709 (Sup. Ct. 1939), *aff'd*, 259 App. Div. 810, 20 N.Y.S.2d 396, *aff'd*, 284 N.Y. 667, 30 N.E.2d 608 (1940). *But see King v. Wight*, 155 Mass. 444, 29 N.E. 644 (1891).

26. *Security System Co. v. S.S. Pierce Co.*, 258 Mass. 4, 154 N.E. 190 (1926) (dictum); *Maher v. Cleveland Union Stockyards Co.*, 55 Ohio App. 412, 9 N.E.2d 995 (1936); C. CLARK, *supra* note 5, at 98-100.

27. *Compare Moskin v. Goldstein*, 225 Mich. 389, 196 N.W. 415 (1923) (covenant touches and concerns), *with Richards v. Browning*, 214 App. Div. 665, 212 N.Y. Supp. 738 (1925) (covenant does not touch and concern). *See C. CLARK, supra* note 5, at 98-100.

28. *See, e.g., Abbott v. Bob's U-Drive*, 222 Or. 147, 352 P.2d 598 (1960); 2 AMERICAN LAW OF PROPERTY § 9.4, at 351 n.55 (A.J. Casner ed. 1952); 1 H. TIFFANY, REAL PROPERTY § 126, at 207 (3d ed. 1939); Annot., 41 A.L.R. 1363, 1370 (1926); Annot., 102 A.L.R. 781, 784 (1936).

29. It might be argued that covenants to pay rent run under the English Statute, 32 Hen. 8, c. 34 (1540), assuming it has become part of American common law. On its face, the statute does seem to say that all the tenant's lease covenants bind his assignees. However, *Spencer's Case*, 5 Co. 16a, 77 Eng. Rep. 72 (Q.B. 1583), in effect glosses the statute by allowing lease covenants to run only if they touch and concern. In historical perspective, that is the role of *Spencer's Case*. We are thus thrown back upon the question whether payment of rent touches and concerns.

the covenant is "additional rent."³⁰ This argument says too much. It means that every one of the tenant's covenants will run, even the symbolic covenant to paint the landlord's portrait. Furthermore, the "additional rent" theory does not hold for the landlord's covenants; thus, it produces an undesirably asymmetrical result.

Covenants restricting business activity on a described parcel of land have been a fruitful source of controversy. Massachusetts follows Holmes' decision, in *Norcross v. James*,³¹ that such covenants do not touch and concern because they regulate the personal conduct of business only.³² But Massachusetts itself has acknowledged³³ that other covenants restricting the conduct of business on specified land touch and concern and may run.³⁴ Typically, such a covenant, if properly drafted, will read that a parcel will not be used for a particular business. This type of covenant should be distinguished from promises that the covenantor, as an individual, will not engage in such and such a business; the latter covenants do not touch and concern because they do not relate to specific land.³⁵ When the covenant refers to identifiable land it is hard to escape the conclusion that it touches and concerns, because it certainly restricts the use of that land.

Examples of other, miscellaneous covenants which have been held to touch and concern as real covenants will help impart the flavor of the concept. Purchase options in a lease, while there may have been some doubt about them formerly, may be expected to touch and concern.³⁶ A tenant's covenant to indemnify his landlord has been controversial in this respect.³⁷ One comparatively recent and liberal decision holds that a lease covenant to arbitrate differences arising under the

30. *E.g.*, *St. Regis Restaurant, Inc. v. Powers*, 219 App. Div. 321, 219 N.Y.S. 684 (1927).

31. 140 Mass. 188, 2 N.E. 946 (1885).

32. *Shell Oil Co. v. Henry Ouellette & Sons*, 352 Mass. 725, 227 N.E.2d 509 (1967); *Shade v. M. O'Keeffe, Inc.*, 260 Mass. 180, 156 N.E. 867 (1927).

33. *Shell Oil Co. v. Henry Ouellette & Sons*, 352 Mass. 725, 227 N.E.2d 509 (1967).

34. *E.g.*, *Dick v. Sears-Roebuck & Co.*, 115 Conn. 122, 160 A. 432 (1932); *Natural Prods. Co. v. Dolese & Shepard Co.*, 309 Ill. 230, 140 N.E. 840 (1923).

35. *Savings, Inc., v. City of Blytheville*, 240 Ark. 558, 401 S.W.2d 26 (1966); *Hebert v. Dupaty*, 42 La. Ann. 343, 7 So. 580 (1890).

36. *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 A. 138 (1919); *Keogh v. Peck*, 316 Ill. 318, 147 N.E. 266 (1925); C. CLARK, *supra* note 5, at 98-100.

37. *Compare Atwood v. Chicago, M. & St. P. Ry.*, 313 Ill. 59, 144 N.E. 351 (1924) (does not touch and concern), *with Northern Pac. Ry. v. McClure*, 9 N.D. 73, 81 N.W. 52 (1899) (does touch and concern).

lease touches and concerns.³⁸ Surely a covenant restricting the use of land to certain purposes or to certain kinds of buildings touches and concerns as a real covenant, though historically it has been dealt with as an equitable restriction.³⁹

Because New York has had trouble with covenants to do an affirmative act, writers have felt obliged to discuss them.⁴⁰ In 1913, the New York Court of Appeals held, in *Miller v. Clary*,⁴¹ that a covenant to provide power to neighboring land via a turning shaft did not run because affirmative covenants, with specified exceptions, could not touch and concern. For some years, the New York courts weakened the case by chipping away at it.⁴² Finally, in 1959, *Miller v. Clary* was destroyed for all practical purposes by being limited so disingenuously as to leave no room for its rule to operate.⁴³ Other American courts hold that both affirmative and negative covenants run,⁴⁴ so that there is no longer disagreement on the point. Indeed, many of the covenants described previously as touching and concerning, including all those for the payment of money, are affirmative.

To sum up on the touch and concern element, the trend in American courts has been and is to move away from any requirement of physical touching. Two very influential tests which probably express the current attitude of the courts were advanced by Dean Harry Bigelow and by Judge Charles E. Clark. Bigelow, in an article on lease covenants, advocated that the burden side should run if the covenant

38. *Abbott v. Bob's U-Drive*, 222 Or. 147, 352 P.2d 598 (1960).

39. See *Tulk v. Moxhay*, 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848). Note also the leading American decisions of *Van Sant v. Rose*, 260 Ill. 401, 103 N.E. 194 (1913); *Snow v. Van Dam*, 291 Mass. 477, 197 N.E. 224 (1935); *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925); *Booth v. Knipe*, 225 N.Y. 390, 122 N.E. 202 (1919); and *Finley v. Glenn*, 303 Pa. 131, 154 A. 299 (1931).

40. 2 AMERICAN LAW OF PROPERTY § 916 (A.J. Casner ed. 1952); C. CLARK, *supra* note 5, at 100 n.22; R. POWELL & P. ROHAN, *supra* note 14, ¶ 677; 3 H. TIFFANY, REAL PROPERTY § 854 (3d ed. 1939).

41. 210 N.Y. 127, 103 N.E. 1114 (1913).

42. *E.g.*, *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938); *Greenfarb v. R.S.K. Realty Corp.*, 256 N.Y. 130, 175 N.E. 649 (1931).

43. *Nicholson v. 300 Broadway Realty Corp.*, 7 N.Y.2d 240, 164 N.E.2d 832 (1959). The *Nicholson* court, which allowed the running of a covenant to supply steam heat to neighboring land, said affirmative covenants would run provided (1) the covenanting parties intended it, (2) there was privity of estate between the covenantor and the third person sought to be bound, and (3) the covenant touched and concerned (which was the very question the court set out to answer). These are simply the accepted elements for the running of any real covenant.

44. Annot., 41 A.L.R. 1363 (1926); Annot., 102 A.L.R. 781 (1936). *Accord*, 2 AMERICAN LAW OF PROPERTY § 9.16 (A.J. Casner ed. 1952).

limited the covenantor's rights, privileges, or powers as a tenant or landowner, and that the benefit should run if the covenant made the rights, privileges, or powers of the covenantee's leasehold or reversion more valuable or if he were relieved of all or part of his duties.⁴⁵ Clark, endorsing the Bigelow test, restated it thus:

If the promisor's legal relations in respect to the land in question are lessened—his legal interest as owner rendered less valuable by the promise—the burden of the covenant touches or concerns that land; if the promisee's legal relations in respect to that land are increased—his legal interest as owner rendered more valuable by the promise—the benefit of the covenant touches or concerns that land.⁴⁶

Observe two things in particular about the Bigelow-Clark formula: (1) it relates benefit and burden to the estates instead of to physical land, and (2) it measures benefit and burden by economic impact. The Bigelow and Clark tests, or their combination, have been accepted by a number of courts and writers.⁴⁷ If the Bigelow-Clark test is vague, it is still more successful than other formulas in defining a concept as intangible as touch and concern.

3. *Intent to bind successors*

The main issue in *Spencer's Case*⁴⁸ was whether a covenantor's successors could be bound by the covenant unless the covenanting parties agreed that the covenant should bind "assigns," using that precise word. Holding that the word "assigns" had to be used if the covenant related to a thing not *in esse*, the court said in dictum that the word did not have to be used if the covenant concerned a thing already existing. All this learning has largely been lost in the American cases. No American decision has been found that makes anything of the distinction between things that are or are not *in esse*. Also, there seems to be

45. Bigelow, *supra* note 23, at 645.

46. C. CLARK, *supra* note 5, at 97.

47. *E.g.*, *Abbott v. Bob's U-Drive*, 222 Or. 147, 352 P.2d 598 (1960); *City of Reno v. Matley*, 79 Nev. 49, 378 P.2d 256 (1963); *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938); R. POWELL & P. ROHAN, *supra* note 14, ¶ 675; Williams, *Restrictions on the Use of Land: Covenants Running with the Land at Law*, 27 TEX. L. REV. 419, 429-30 (1949).

48. 5 Co. 16a, 77 Eng. Rep. 72 (Q.B. 1583).

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no extant requirement that the express word "assigns" ever be used. Instead, American courts look for the covenanting parties' "intent" that the covenant shall run.⁴⁹

Intent is to be found from all the circumstances surrounding the covenant. Obviously the use of the word "assigns" is highly persuasive of an intent to bind successors. The thorough draftsman will use language to the effect that "this covenant is intended to be a running covenant, burdening and benefiting the parties' successors and assigns." Few recent decisions contain much discussion of the intent element; rather, the courts seem to conclude that it is or is not present from the nature of the covenant. A covenant that is found to be of a "personal" kind, such as one owner's promise to pay his neighbor for something the neighbor has already done, will be said not to be intended to run.⁵⁰ Conversely, when the covenanted performance is not merely personal but is connected with land, then the courts seem to imply or assume that the parties intended it to run.⁵¹ This comes very close to saying that a covenant that touches and concerns will impliedly be intended to run. Perhaps no authority has put it quite so bluntly, but that is very nearly what has happened. In most cases, where the parties have not stated an express intent, covenants that touch and concern have been assumed to be intended to run. The logical conclusion of that process is to make intent disappear as a discrete element, though it is probably premature to suppose that this has in fact occurred.

We should also observe that the burden side of a covenant may be intended to run and the benefit side not so intended or vice versa. A common example occurs when the covenantor makes a promise that clearly burdens his land, e.g., a building restriction, but the covenantee owns only land situated so far away as not to be benefited by the restriction. One analysis is that the covenant's benefit does not

49. Masury v. Southworth, 9 Ohio St. 340 (1859); C. CLARK, *supra* note 5, at 95-96; Williams, *supra* note 47, at 419, 423-24; 28 ORE. L. REV. 180, 180-84 (1949). England has expressly abolished the rule in *Spencer's Case* about the word "assigns," first by decision and then by statute. See Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 79 (1925); 28 ORE. L. REV., *supra*.

50. Gibson v. Holden, 115 Ill. 199, 3 N.E. 282 (1885); Suttle v. Bailey, 68 N.M. 283, 361 P.2d 325 (1961); Sebald v. Mulholland, 155 N.Y. 455, 50 N.E. 260 (1898); Meado-Lawn Homes, Inc. v. Westchester Lighting Co., 171 Misc. 669, 13 N.Y.S.2d 709 (Sup. Ct. 1939), *aff'd*, 259 App. Div. 810, 20 N.Y.S.2d 396, *aff'd*, 284 N.Y. 667, 30 N.E.2d 608 (1940).

51. See Keogh v. Peck, 316 Ill. 318, 147 N.E. 266 (1925); King v. Wight, 155 Mass. 444, 29 N.E. 644 (1892).

touch and concern, and therefore does not run with, the covenantee's distant parcel. Another analysis leading to the same end is that the parties would not, in the absence of express words, be presumed to intend the benefit to run. Of course, even if they did use express words, the benefit could not run if it did not also touch and concern; so, perhaps this element should be said to be the ultimate factor in the example given.

4. *Vertical privity (a bird on a wagon)*

When discussing real covenants, to be distinguished from equitable restrictions particularly in this respect, one should emphasize that they run with *estates* in land. That is, the burden passes with a transfer of the estate which the covenantor held in the burdened land, and the benefit passes with a transfer of the estate which the covenantee held in the benefited land. It is, therefore, more precise to say that the respective *estates*, and not "lands," are benefited and burdened.⁵² As the quaint phrase puts it, real covenants run along with estates as a bird rides on a wagon.⁵³

The most obvious implication of this principle is that the burden of a real covenant may be enforced against remote parties only when they have succeeded to the covenantor's estate in land. Such parties stand in privity of estate with the covenantor. Likewise, the benefit may be enforced by remote parties only when they have succeeded to the covenantee's estate. They are in privity of estate with the covenantee. In either case, of course, the estate succeeded to must be one touched and concerned by the burden or benefit. An exception of sorts to the basic rule has been worked out in some cases in which homeowners' associations have been allowed to enforce subdivision

52. *Amco Trust, Inc. v. Naylor*, 159 Tex. 146, 317 S.W.2d 47 (1958); C. CLARK, *supra* note 5, at 93-94; Bordwell, *supra* note 1, at 3. The *Restatement of Property* takes the position that the burden side of a covenant may run only with the covenantor's estate, but that the requirement is relaxed for the benefit side, so that it may run with any interest in the benefited land. RESTATEMENT OF PROPERTY §§ 535, 547 (1944). Under Holmes' peculiar history of real covenants, benefit and burden would be attached to land rather than to estates. O. HOLMES, THE COMMON LAW 395-407 (1881).

53. Powell uses the phrase "bird on a wagon," but does not attribute the source. 5 R. POWELL, REAL PROPERTY § 671 (P. Rohan rev. ed. 1977). It must, from the sound of it, have been coined by some old English judge.

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restrictive covenants on behalf of landowners who were successors to the benefited estates.⁵⁴ The theory of these cases seems to be that an association which is expressly designated as having power to enforce the covenant acts as agent for the benefited landowners.

Because estates and not land are benefited and burdened, it is possible to have both the benefited and burdened estates in the same land, as well as to have them in separate parcels. A most common example of the former arrangement occurs when the covenant is made between landlord and tenant. Running covenants in a lease usually run with the leasehold and the reversion in the demised parcel, though it is possible to have either side of the covenant relate to an estate in other land.⁵⁵ When covenants are made between persons whose estates are in different parcels, then of course benefited and burdened estates will not be in the same land.

5. *Horizontal privity*

Let us be very careful to distinguish the two types of privity. The preceding section has discussed privity of estate as a succession of ownership between covenantor and a remote person to be bound by the covenant and between covenantee and a remote person to have the covenant's benefit. This is commonly (though not universally) termed "vertical privity," because the remote party usually appears beneath the covenantor or covenantee in a diagram of the transaction such as a law teacher might draw on the blackboard. "Horizontal privity"⁵⁶ refers to a relationship between the original parties, cove-

54. *Merrionette Manor Homes Improvement Ass'n v. Heda*, 11 Ill. App. 2d 186, 136 N.E.2d 556 (1956); *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938).

55. See *Thruston v. Minke*, 32 Md. 487 (1870).

56. The subject of horizontal privity spawned a most remarkable and acrimonious flurry of literature a few years ago. It is not our purpose to resurrect this unfortunate exchange any further than to show that it has affected leading writings on real covenants. Occasion for this literary activity was the impending publication of the *Restatement of Property* in 1944. Section 534 of the *Restatement* imposes a requirement that the covenant have been created in connection with the transfer or creation of certain interests in land. Section 537 adds the further requirements that benefit or burden touch and concern land in a physical way and that there be a "reasonable relation" between benefit and burden. It is apparent that the reporter for this part of the *Restatement*, Professor Oliver Rundell, wished for policy reasons to limit the incidence of real covenants by imposing restrictions upon them. Judge Clark sprang to the attack, producing the second edition of his book on covenants, in which he added material not only denying the validity of §§ 534 and 537, but also bitterly criticizing

nantor and covenantee, which the law teacher might diagram by a horizontal line.⁵⁷ One of the chronically maddening features of writings on real covenants, and one of the chief motivations for this article, is that authors use the term "privity" without signalling which of these two entirely different kinds of privity they are discussing.⁵⁸

a. *Horizontal privity and the burden side*

There is some authority for saying that horizontal privity will not be required for the benefit side of a covenant to run, though some form of horizontal privity might be necessary to the running of the burden side.⁵⁹ Some writers deny that such a distinction does, or should, exist.⁶⁰ The only justification for the distinction lies in the broad policy against encumbering land titles; a burden is an encumbrance, while a benefit is not. So, the argument runs, tighter restrictions should be imposed upon the running of burdens than of benefits. This argument is inconclusive as far as the present subject is concerned, for it does not indicate why horizontal privity should be the point at which to do the tightening—only that tightening should be done on the burden side. Despite somewhat shaky underpinnings in either theory or authority for treating horizontal privity differently on the burden and benefit sides, we will consider them separately.

Professor Rundell's handling of his duties as reporter. C. CLARK, *supra* note 5, at 217–26, 241–49. Clark appears to have overstated his case with respect to § 534, as will be seen momentarily. We have already seen that the first part of § 537, defining the touch and concern element in a physical way, is too restrictive. The latter clause of § 537, using the phrase "reasonable relation," seems quite unsupportable. Most subsequent scholars on real covenants have, like Judge Clark, been critical of the *Restatement*, especially of § 537, which has little credit. 3 H. TIFFANY, *REAL PROPERTY* § 851 (3d ed. 1939); Newman & Losey, *Covenants Running with the Land, and Equitable Servitudes; Two Concepts, or One?*, 21 HASTINGS L.J. 1319, 1330 (1970); Sims, *supra* note 15, at 30–33; Walsh, *Covenants Running with the Land*, 21 N.Y.U.L.Q. REV. 28, 55–59 (1946).

57. We will not discuss whether there must be some relationship in addition to covenantor-covenantee between the original parties if their covenant is to be capable of running. Must they, for instance, be landlord and tenant or grantor and grantee, and must the covenant be made as part of the creation of that relationship?

58. See, e.g., C. CLARK, *supra* note 5, at 93–94. The author discusses vertical privity, then switches to what, from the context, has to be horizontal privity, all the time using the bare word "privity."

59. *City of Reno v. Matley*, 79 Nev. 49, 378 P.2d 256 (1963); *RESTATEMENT OF PROPERTY* § 548 (1944); 3 H. TIFFANY, *REAL PROPERTY* § 849 (3d ed. 1939) ("The authorities are about equally divided upon the question"); Walsh, *supra* note 56, at 31; Williams, *supra* note 47, at 440–43.

60. C. CLARK, *supra* note 5, at 131; 5 R. POWELL, *supra* note 53, ¶ 674.

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In American law, the most restrictive form of horizontal privity is commonly called "Massachusetts privity." This term originated in *Hurd v. Curtis*,⁶¹ the famous 1837 decision which established the rule that a covenant would not run⁶² unless it had been made in a transaction that left the original covenanting parties in privity of estate. By this the court meant that the parties must, as a result of the transaction, end up holding simultaneous interests in the same parcel of land. Taken strictly, this would mean the covenanting parties would create a relationship in which one held a lesser estate carved out of the other's larger estate in the same land, that is, a tenurial relationship. In practical, modern terms this generally means a landlord-tenant relationship. However, in *Morse v. Aldrich*,⁶³ decided the same year, the Massachusetts court held that the burden of a covenant made in the creation of an easement also ran. The Massachusetts doctrine as set forth in these cases still controls there and was adopted in Nevada in *Wheeler v. Schad*.⁶⁴ It seems not to have force elsewhere.

After the Massachusetts doctrine, the most restrictive rule is that the burden will run only if the covenant was made in connection with the transfer of some interest in land between covenantor and covenantee in addition to the covenant itself. Of course this includes leaseholds and easements, as in Massachusetts.⁶⁵ More importantly, it includes conveyances in fee, which do not satisfy the Massachusetts rule. This difference, in practical application, chiefly distinguishes the two rules.⁶⁶ A thin plurality of appellate decisions seems to support the *Restatement's* assertion that this was the American position.⁶⁷

61. 36 Mass. (19 Pick.) 459 (1837).

62. It was the burden side, but the court did not emphasize this fact.

63. 36 Mass. (19 Pick.) 449 (1837).

64. 7 Nev. 204 (1871). In Nevada, *Wheeler v. Schad* has been limited to the running of burdens and held not to govern the running of benefits. *City of Reno v. Matley*, 79 Nev. 49, 378 P.2d 256 (1963).

65. 165 Broadway Bldg., Inc. v. City Inv. Co., 120 F.2d 813 (2d Cir. 1941) (easement); *Carlson v. Libby*, 137 Conn. 362, 77 A.2d 332 (1950) (easement); *Conduitt v. Ross*, 102 Ind. 166, 26 N.E. 198 (1885) (easement); *Nye v. Hoyle*, 120 N.Y. 195, 24 N.E. 1 (1890) (cross-easement); *Northern Pac. Ry. v. McClure*, 9 N.D. 73, 81 N.W. 52 (1899) (leasehold).

66. E.g., *H.J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 A. 138 (1919); *Natural Prods. Co. v. Dolese & Shepard Co.*, 309 Ill. 230, 140 N.E. 840 (1923); *Newman & Losey*, *supra* note 56, at 1328-29; *Sims*, *supra* note 15, at 30-33; *Williams*, *supra* note 47, at 440-43.

67. RESTATEMENT OF PROPERTY § 534 (1944). In his eagerness to refute the *Restatement* position, Judge Clark, with an elaborate argument on the cases, denied that any appreciable number of jurisdictions required horizontal privity. See C. CLARK,

The third view, Judge Clark's, is that there should be no requirement of horizontal privity for the running of the burden of a real covenant. We have just seen that several states have espoused this position, which writers on the subject tend to favor.⁶⁸ Very likely the trend of decisional law, to the extent there is a trend, favors the Clark position. An article published in 1970 noted that only one state, Oregon, had adopted a horizontal privity requirement in the preceding twenty-seven years.⁶⁹ Modern thinking on covenants certainly militates against the requirement, because, instead of being disfavored as title burdens, covenant restrictions are now favored as a mode of preserving neighborhood plans. The issue will probably die before it is resolved, because the courts now rely heavily upon theories of equitable restrictions and little upon real covenant doctrine.

b. Horizontal privity and the benefit side

As noted previously, there is some authority for saying that, even if horizontal privity is required for the running of burdens, it is not required for the running of the benefit side—though the distinction also has been denied.⁷⁰ The *Restatement* takes the position that horizontal privity is not an element for the running of benefits,⁷¹ and here Clark agrees in the limited sense that he does not accept the requirement for either benefit or burden side.⁷² Case authority on the precise issue is slight. Nevada, which had required Massachusetts privity for the running of a burden,⁷³ has expressly held that no horizontal privity is needed on the benefit side.⁷⁴ The policy against encumbrances, which

supra note 5, at 127–28, 218, 226–41, 249–59. It appears, however, that a slight majority of the jurisdictions that have decided the issue have required horizontal privity either in the Massachusetts sense or in the sense of some kind of transfer between covenantor and covenantee. Newman & Losey, *supra* note 56, at 1328–29; Sims, *supra* note 15, at 30–33; Walsh, *supra* note 56, at 30–31; Williams, *supra* note 47, at 440–43. “Nose counts” vary, but the most recent and convincing article on the point lists seven states plus Massachusetts for that position, against six states that seem to have dispensed with any requirement of horizontal privity. Newman & Losey, *supra* note 56, at 1328–29.

68. Besides Clark, see 3 H. TIFFANY, REAL PROPERTY § 851, at 452 (3d ed. 1939); Newman & Losey, *supra* note 56, at 1331; Sims, *supra* note 15, at 30–33; Walsh, *supra* note 56, at 41–44.

69. Newman & Losey, *supra* note 56, at 1330.

70. See notes 59 & 60 *supra*.

71. RESTATEMENT OF PROPERTY § 548 (1944).

72. C. CLARK, *supra* note 5, at 131.

73. Wheeler v. Schad, 7 Nev. 204 (1871).

74. City of Reno v. Matley, 79 Nev. 49, 378 P.2d 256 (1963).

has traditionally made courts disfavor and impose restrictions upon the running of burdens, does not extend to the running of benefits; as we have seen, a number of courts do not require horizontal privity even on the burden side. Considering all the enumerated factors, it seems justifiable to conclude that horizontal privity is not required by most American courts for the running of the benefit side of a real covenant.

C. *Running of Benefit and Burden*

Throughout this article we have assumed that one should consider separately the running of benefit and burden. Hence, the frequent use of the phrases “burden side” and “benefit side.” However, almost any case on real (or equitable) covenants will find the court speaking of the running of “the covenant.” Usually nothing turns on this and no harm is done, for the question before the court will be whether a remote party is liable for the burden or is entitled to the right of the benefit; occasionally both parties are remote, so that there are really questions of the running of both sides. Reading the decision, we can say that the court did or did not allow the burden side, benefit side, or both sides to run.

Occasionally it matters whether we are precise in thinking separately of benefit and burden. The Nevada Supreme Court did so when, as just recounted, it distinguished the benefit from the burden side as to the issue of horizontal privity.⁷⁵ Another example of when the distinction matters occurs when one side of a covenant touches and concerns land, but the other side does not—that is, when it is “in gross.” Suppose, in a transaction conveying his land and selling the business upon it, a businessman covenants that he personally will not compete with that business. A few decisions have held that one side of a covenant will not run unless the other side also touches and concerns and otherwise meets the requirements to run.⁷⁶ In the strictest sense this view does not deny the existence of separate sides—it explicitly recognizes them—but it does tie them together. By far the preferable and, it is believed, usual view is that the running of burden and benefit should be tested separately.

75. See text accompanying notes 73–74 *supra*.

76. *E.g.*, *Lincoln v. Burrage*, 177 Mass. 378, 59 N.E. 67 (1901).

Separation of benefit and burden has been discussed in one further context, of which the leading case of *Thruston v. Minke*⁷⁷ affords an example. Leased property was adjacent to a hotel on property also owned by the landlord; the leaseholder covenanted not to build a structure over three stories high. The trial judge appeared to conclude that the benefit of the covenant had to run with the landlord's reversion in the demised premises (which he had conveyed), but the appellate court correctly determined that the benefit was for the landlord's fee estate in the adjoining hotel land (which he had retained). Strictly speaking, the issue was whether burden and benefit must be in the same land, and the case stands for the proposition which we have previously established: real covenants run with estates and not with land. This means, and *Thruston v. Minke* holds, that the benefit runs with one estate, the burden with another, and the estates may exist in separate parcels of land as well as in the same parcel.

D. Termination

As with other interests in land, a real covenant may end at a fixed time if the parties creating it so intend. Of course the clearest manifestation of their intent is express language in the instrument creating the covenant, e.g., "A covenants that, for a period of 25 years from the date hereof, . . ." Covenants, particularly those involving a number of owners, may provide some method for the owners to work a termination at any time. Some states have statutes like the Massachusetts law limiting the duration of covenants to thirty years. In any event, the person having the benefit of a real covenant may extinguish it by a formal release; which should be in deed form.⁷⁸ These modes of termination are pretty much self-explanatory.

More attention must be given to the so-called "change of neighborhood" doctrine. So great is the confusion about the basic nature and operation of this doctrine that, so far as one can cite authority, it is not clear whether the doctrine should apply to real covenants as well as to equitable restrictions and, if it should apply, how it should apply. An attempt will be made here to unwind the complications and to ar-

77. 32 Md. 487 (1870).

78. The most extended discussion of the modes of termination listed in this paragraph is in 5 R. POWELL, *supra* note 53, ¶ 683.

rive at an analysis that will place the doctrine on a sound foundation with respect to real covenants.

Briefly, the change of neighborhood doctrine becomes an issue when the neighborhood in which the burden of a covenant inhibits land use has so changed that a court ought (under one theory) to declare the covenant terminated or at least (under a second theory) ought to refuse to enforce it.⁷⁹ It is usually said that the change must be physical and substantial and, of course, must have produced a use of land contrary to the restrictions of the covenant.⁸⁰ Courts look for a change that affects the general vicinity and not merely a few parcels.⁸¹ When the restrictions in question blanket a whole subdivision or area covered by a common plan of development, it is frequently said that the changes must have occurred within the bounds of that area.⁸² The ultimate test of a change sufficient to invoke the doctrine is most often stated to be such a change as has caused the restriction to become outmoded and to have lost its usefulness, so that its benefits have already been substantially lost.⁸³ Sometimes it is also said that the change must be such as would make it "inequitable" to enforce the restriction.⁸⁴ Addition of this last bit of language implies a theory (which will be explored later) that limits the extent to which the change of neighborhood doctrine applies to real covenants. Finally, judicial opinions sometimes state that changes in zoning and loss of

79. See *Osborne v. Hewitt*, 335 S.W.2d 922 (Ky. 1960); *Chevy Chase Village v. Jagers*, 261 Md. 309, 275 A.2d 167 (1971); *Jackson v. Stevenson*, 156 Mass. 496, 31 N.E. 691 (1892); 2 AMERICAN LAW OF PROPERTY § 9.22 (A.J. Casner ed. 1952); 5 R. POWELL, *supra* note 53, ¶ 684; RESTATEMENT OF PROPERTY § 564 (1944); 3 H. TIFFANY, REAL PROPERTY § 875 (3d ed. 1939). Some of these sources discuss the change of neighborhood doctrine as a branch of the law of equitable restrictions, but we are assuming for our discussion that the doctrine applies as well to real covenants.

80. See 5 R. POWELL, *supra* note 53, ¶ 684; RESTATEMENT OF PROPERTY § 564 (1944).

81. *E.g.*, *Chevy Chase Village v. Jagers*, 261 Md. 309, 275 A.2d 167 (1971); *Cilberti v. Angilletta*, 61 Misc. 2d 13, 304 N.Y.S.2d 673 (Sup. Ct. 1969).

82. *Osborne v. Hewitt*, 335 S.W.2d 922 (Ky. 1960); *Cilberti v. Angilletta*, 61 Misc. 2d 13, 304 N.Y.S.2d 673 (Sup. Ct. 1969); 5 R. POWELL, *supra* note 53, ¶ 684; 3 H. TIFFANY, REAL PROPERTY § 875 (3d ed. 1939).

83. *Osborne v. Hewitt*, 335 S.W.2d 922 (Ky. 1960); *Chevy Chase Village v. Jagers*, 261 Md. 309, 275 A.2d 167 (1971); *Jackson v. Stevenson*, 156 Mass. 496, 31 N.E. 691 (1892); 5 R. POWELL, *supra* note 53, ¶ 684; RESTATEMENT OF PROPERTY § 564 (1944); 3 H. TIFFANY, REAL PROPERTY § 875 (3d ed. 1939).

84. *Jackson v. Stevenson*, 156 Mass. 496, 31 N.E. 691 (1892); 2 AMERICAN LAW OF PROPERTY § 9.22 (A.J. Casner ed. 1952); RESTATEMENT OF PROPERTY § 564 (1944).

value to the benefited land do not establish a sufficient change of neighborhood,⁸⁵ though they may be evidence of it.

The extent to which the change of neighborhood doctrine should apply to real covenants depends on the theory upon which it operates. The theory most often advanced is that it is an equitable defense to an action to enforce the burden of the covenant.⁸⁶ Because equitable remedies have traditionally been said to be "extraordinary," an equity court may in its discretion refuse to grant a remedy in a particular case. In general, the chancellor may refuse relief if it would be "inequitable" to grant it. Some recognized grounds of "inequity" have been labeled laches, fraud, unclean hands, and, almost as broad as the term "inequity" itself, balancing the equities. This analysis of the change of neighborhood doctrine would say it is some such equitable defense, probably a form of balancing the equities.

The question is to what extent may such an equitable defense be interposed when the plaintiff, as beneficiary of the covenant, sues upon a real covenant, a creature of the common law courts, and not upon an equity cause of action? If the plaintiff seeks an equitable remedy on his common law covenant—especially the usual injunctive relief—he may be denied that relief if the defendant makes out the equitable defense of change of neighborhood. However, the plaintiff still would seem to have the ordinary common law remedy of damages; moreover, the covenant itself would be as alive as ever. This is in fact the result the *Restatement* adopts, and some cases support it.⁸⁷

This result seems awkward and unsatisfactory. Most recent legal writers, and some courts, have sought to find a theory under which the change of neighborhood doctrine can not only deny equitable or common law relief, but can be said to terminate the covenant.⁸⁸ Indeed, Professor Harry M. Cross found in 1960 that "there is essentially no indication in cases in the last twenty-five years that the character of the restriction is of the least importance" in application of the

85. *Osborne v. Hewitt*, 335 S.W.2d 922 (Ky. 1960); *Cilberti v. Angilletta*, 61 Misc. 2d 13, 304 N.Y.S.2d 673 (Sup. Ct. 1969).

86. See authorities cited at note 84 *supra*.

87. *Jackson v. Stevenson*, 156 Mass. 496, 31 N.E. 691 (1892); 2 AMERICAN LAW OF PROPERTY § 9.22 (A.J. Casner ed., 1952); 5 R. POWELL, *supra* note 53, ¶ 684; RESTATEMENT OF PROPERTY § 564 (1944).

88. 2 AMERICAN LAW OF PROPERTY § 9.22 (A.J. Casner ed. 1952); C. CLARK, *supra* note 5, at 184–86; 5 R. POWELL, *supra* note 53, ¶ 684; 3 H. TIFFANY, REAL PROPERTY § 875 (3d ed. 1939); Cross, *supra* note 14, at 1325–26; Pound, *The Progress of the Law, 1918–1919, Equity*, 33 HARV. L. REV. 813, 821 (1920).

doctrine.⁸⁹ It is not unusual to find juridical decisions ahead of supporting theory, but we are more comfortable when the two match. One possibility would be to allow the change of neighborhood doctrine, admitting that it is an equitable defense in origin, to be interposed to the common law cause of action. This has happened; fraud is an example of an equitable defense that has been transformed into a legal defense. Some equitable defenses, however, such as the clean hands doctrine, have not been so transformed.⁹⁰ Two problems arise with the theory being considered, though perhaps neither is intolerable. First, as just suggested, not all equitable remedies have been transformed; it might be a bit awkward to transform what seems to be a form of balancing the equities. Second, even if the equitable defense is transformed, it still is only a defense in bar of legal and equitable remedies, leaving the nagging question whether barring remedies terminates underlying rights. In this case the question is more than an abstract, jurisprudential exercise, for the burden of the covenant might still be regarded as a cloud on title.

A satisfactory solution is found in a theory suggested by Dean Roscoe Pound: "It is submitted that the sound course is to hold that when the purpose of the restrictions can no longer be carried out the servitude comes to an end; that the duration of the servitude is determined by its purpose."⁹¹ He was writing specifically of equitable restrictions, but the theory can be applied equally well to real covenants. The basic mechanism is a judicial inference of the covenanting parties' intent—that they intended the covenant to last only so long as it served their purpose. An analogue is found in the doctrine that an easement terminates when the purpose for which it was created comes to an end.⁹² That is precisely the state of affairs tested by the change of neighborhood doctrine. Because the covenant itself is at an end, both right and remedy are barred.

E. Judicial Attitudes

The traditional view has been that courts should not favor the existence of real covenants, especially of the burden side. At bottom was

89. Cross, *supra* note 14, at 1326 (footnote omitted).

90. See D. DOBBS, REMEDIES § 2.4 (1973).

91. Pound, *supra* note 88, at 821.

92. See *Union Nat'l Bank v. Nesmith*, 238 Mass. 247, 130 N.E. 251 (1921); 3 H. TIFFANY, REAL PROPERTY § 817 (3d ed. 1939).

the general policy against encumbrances on land titles. This judicial attitude was expressed in various ways, several of which we have already seen. Requirements of horizontal privity are the leading example.⁹³ In England, the burden is permitted to run only when the covenant was made between landlord and tenant.⁹⁴ New York's old rule against the running of affirmative duties was another example of the antagonistic policy.⁹⁵ So was the older concept that covenants had to touch and concern land in a physical sense.⁹⁶

A few courts have considered the question whether covenants restricting business activity on the burdened land created illegal restraints on trade. Although there is some reason to fear that unusually monopolistic or pervasive networks of covenants (such as the so-called exclusive clauses employed in large shopping centers) will run afoul of antitrust laws,⁹⁷ when the covenant is an isolated one the courts will uphold it on the theory that its utility to the parties outweighs its slight tendency to restrain competition.⁹⁸

As is clear from the foregoing discussion, the judicial tendency for some time has been toward favoring the existence of covenants. While covenants may theoretically encumber titles, as usually employed today they make land more marketable and improve its value. Also, in a society increasingly attracted to land-use planning—which at the operating level means restriction of land use—the sociopolitical climate is favorable to restrictions. These considerations can be seen best in connection with the schemes of covenants that are used to preserve planned residential subdivisions, which have almost become synonymous with “restrictive covenants” today. Except for the retention of specific rules, such as the horizontal privity requirement, it is realistic to say restrictive covenants are now judicial favorites.

93. See Part II-B-5 *supra*.

94. 2 AMERICAN LAW OF PROPERTY § 9.14 (A.J. Casner ed. 1952).

95. See text accompanying notes 40-43 *supra*.

96. See pp. 869-70 *supra*.

97. See *Savon Gas Stations No. Six, Inc. v. Shell Oil Co.*, 309 F.2d 306 (4th Cir. 1962); *Baum, Lessors' Covenants Restricting Competition*, 1965 U. ILL. L.F. 228; *Zimmerman, An Antitrust Survey and Review*, 51 U.S. LEAGUE OF SAV. A. LEGAL BULL. 55, 61-62 (1975); International Council of Shopping Centers, *A Review of Court Decisions Relating to Commercial Restrictions in Shopping Center Agreements*. (I.C.S.C. Legal Bull. 1973).

98. *Dick v. Sears-Roebuck & Co.*, 115 Conn. 122, 160 A. 432 (1932); *Natural Prods. Co. v. Dolese & Shepard Co.*, 309 Ill. 230, 140 N.E. 840 (1923); *Colby v. McLaughlin*, 50 Wn. 2d 152, 310 P.2d 527 (1957).

F. Remedies for Breach

Assuming that a person liable to perform the burden of a real covenant has breached it, the person entitled to enforce it may recover money damages for the breach. The covenant is a common law creation and damages are the common law remedy. As a practical matter, the beneficiary usually prefers an injunction against future breach of the covenant, together with any damages that may be due for past breaches. Although injunction is an equitable remedy and may once have been thought of as extraordinary, it is today routinely available on the theory that the legal remedy is inadequate to prevent future injury to unique property interests.⁹⁹

Even though he has conveyed his land to a grantee who is liable for performing the burden of a real covenant, the original covenantor may still have some liability. Bear in mind that his promise had a dual nature: as a contract, it bound him personally, and as a covenant, it bound him and his privies. If the burdened estate has been conveyed but the benefited estate is still in the hands of the original covenantee, the latter has two persons he may pursue for breach. He may pursue the grantee on the running covenant, and he may still pursue his covenantee, with whom he remains in "privity of contract," as it is called.¹⁰⁰ Between themselves the covenantor and his grantee stand in a suretyship relation, the grantee being primarily liable and the covenantor only secondarily so.¹⁰¹ If the covenantee has conveyed his land, so that the benefit of the promise has run to his grantee, the covenantee generally loses the right to enforce the covenant on any theory, so that the covenantor or his privy is liable only to the covenantee's grantee.¹⁰²

III. EQUITABLE RESTRICTIONS

A. Background

We now begin a whole new ballgame. Covenants that run in equity, which will here be called by the neutral name "equitable restrictions,"

99. See Cross, *supra* note 14, at 1325-26.

100. Gerber v. Pecht, 15 N.J. 29, 104 A.2d 41 (1954).

101. *Id.*

102. RESTATEMENT OF PROPERTY §§ 549, 550 (1944).

are today usually known as "equitable servitudes." They were created in 1848 as a result of Lord Chancellor Cottenham's decision in *Tulk v. Moxhay*.¹⁰³ One must realize that the equity chancellors were completely independent of the common law courts, literally a law unto themselves.¹⁰⁴

The decision in *Tulk v. Moxhay* was, in fact, precisely contrary to English common law of real covenants, which, as we have seen, did not and still does not in England allow the running of burdens against grantees in fee. This indicates that equitable restrictions are a separate subject from real covenants and should be approached that way.

Tulk v. Moxhay concerned a covenant in a deed whereby the grantee of Leicester Square promised for himself, his heirs, and assigns, to maintain the square as a pleasure garden for the benefit of dwelling lots around the square. Owners of surrounding lots, upon payment of a fee, were to have access to the garden. The grantee conveyed the square which by further conveyances came to the defendant, who, though he well knew of the covenant, intended to build houses upon the square. Plaintiff was the original grantor-covenantee so that there was no question of the running of the benefit but only of the burden, which, as mentioned, did not run at common law. In Chancery, though, said Lord Cottenham, there was "an equity attached to the property" which bound anyone who took with notice of it.¹⁰⁵ It would be "inequitable," he said, for the original covenantor to shed the burden simply by selling the land. What was the mechanism underlying the decision? The question has caused much debate among scholars, for *Tulk v. Moxhay* did not resolve it.

Some distinguished scholars have argued that equitable restrictions run under a contract theory, in which the promise is enforced against third persons. For example, Professor James Barr Ames thought prevention of unjust enrichment was the basis.¹⁰⁶ Dean Harlan F. Stone

103. 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).

104. If there had ever been any doubt of this, it had long ago been settled in one of the famous constitutional struggles of English history. At the beginning of the 17th century, Lord Coke, Chief Justice of King's Bench, had taken on both Chancery and King James, claiming in essence that the law courts could control decisions of equity. Coke lost the battle, lost his job, and was lucky not to lose his neck; after that, until Parliament established a unified court system in 1875, the chancellor's independence was assured.

105. 2 Phil. at 778, 41 Eng. Rep. at 1144.

106. Ames, *Specific Performance For and Against Strangers to the Contract*, 17 HARV. L. REV. 174, 177-79 (1904).

Running Covenants

avored a variant of specific performance,¹⁰⁷ as does Tiffany's treatise.¹⁰⁸ Language in *Tulk v. Moxhay* about a "contract" tends to support a contract theory, and in certain situations such a theory works well. These matters will be discussed in detail later.

On the other side are scholars who consider equitable restrictions as creating servitudes on the burdened land, similar to easements; hence the name "equitable servitudes." Under this theory, the land itself, not estates in it, becomes burdened with the covenant; as the expression goes, the servitude "sinks its tentacles into the soil." As one might suppose, real property teachers tend to favor this theory. Adherents include Judge Clark,¹⁰⁹ Dean Roscoe Pound,¹¹⁰ Professor Richard R. Powell,¹¹¹ Professor William F. Walsh,¹¹² and the *Restatement of Property*.¹¹³ Not only the recent writers but also the recent case law tends strongly to employ the equitable servitude theory.¹¹⁴ It has become the accepted doctrine in England.¹¹⁵ As with the contract theory, the servitude theory creates problems in certain situations, as we will see as we go along. While neither theory can completely explain the operation of equitable restrictions as they have developed in the courts, the servitude theory has by far the better of it.

One other general observation ought to be made about equitable restrictions: They have nearly replaced real covenants in the courts today.¹¹⁶ Recent court decisions rarely turn upon real covenant doctrine. Most recent litigation concerning running covenants involves subdivision covenants whose operation can be explained best, or only, by equitable theory. Landlord and tenant covenants comprise most of the modern examples of real covenants. Increasingly, one finds deci-

107. Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 18 COLUM. L. REV. 291, 294-96 (1918).

108. 3 H. TIFFANY, REAL PROPERTY § 861, at 489 (3d ed. 1939).

109. C. CLARK, *supra* note 5, at 174-75.

110. Pound, *supra* note 88, at 813-15.

111. 5 R. POWELL, *supra* note 53, ¶ 671 (the contract theory is "historically correct, but presently inadequate").

112. Walsh, *Equitable Easements and Restrictions*, 2 ROCKY MTN. L. REV. 234, 236 (1930).

113. RESTATEMENT OF PROPERTY § 539, Comment a (1944).

114. 2 AMERICAN LAW OF PROPERTY § 9.24 (A.J. Casner ed. 1952); 5 R. POWELL, *supra* note 53, ¶ 671 ("the great weight of authority"); L. SIMES & C. TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION 219 (1960).

115. London County Council v. Allen, [1914] 3 K.B. 642 (C.A.); Hayton, *Restrictive Covenants as Property Interests*, 87 L.Q. REV. 539, 540-41 (1971).

116. Cross, *supra* note 14, at 1327.

sions that do not articulate any clear theory but which must go upon equitable theory or, more and more, upon extensions of it that might be termed "second-generation" theories.

As was done with real covenants, the detailed discussion of equitable restrictions will be subdivided according to their elements. These are: (1) form of the covenant; (2) intent of the covenanting parties that the covenant shall run; (3) the requirement of touch and concern; (4) (horizontal) privity between the covenanting parties; (5) benefit or burden to successors of the covenanting parties; and (6) notice. Following these subdivisions there will be analysis of several specific problems; and finally we will explore modern extensions of equitable restriction theory, especially as it has developed in the residential subdivision cases.

B. Elements

1. Form of the covenant

Most of what was said under the same heading in the prior discussion of real covenants should apply here, too. We presuppose that there is a covenant that, under the rules of contract interpretation, is binding between covenantor and covenantee. Obviously the language of the covenant must be such that a court can conclude that the parties intended to burden land and not to bind the covenantor to perform some personal act.¹¹⁷ Detailed exploration of this matter will be made later in the discussions of intent and of touch and concern.

A great divergence of result and of theory attends the question whether equitable restrictions must be created in an instrument that complies with the Statute of Frauds. At one end of the spectrum are those decisions that argue that the statute does not apply at all, because equitable restrictions are contract rights and not interests in land.¹¹⁸ Henry Upson Sims, writing in 1944, counted fourteen states that had adopted this position, against nine that had done otherwise.¹¹⁹ *Tiffany on Real Property* seems to be the only major treatise in cur-

117. Compare *Buckley v. Mooney*, 339 Mich. 398, 63 N.W.2d 655 (1954), with *Finley v. Glenn*, 303 Pa. 131, 154 A. 299 (1931).

118. *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920); C. CLARK, *supra* note 5, at 178; Sims, *supra* note 15, at 27-28.

119. Sims, *supra* note 15, at 27-30.

rent use that agrees with this conclusion and reasoning.¹²⁰ In view of the fact that both decisions and writers have come to regard equitable restrictions as interests in land,¹²¹ it is doubtful that this conclusion on the Statute of Frauds could now be said to be the majority position.

The opposing view, that equitable restrictions as interests in land must comply with the Statute of Frauds, was adopted in the *Restatement of Property*,¹²² by Clark,¹²³ by Powell,¹²⁴ and apparently by the *American Law of Property*.¹²⁵ As a practical matter, it may well be that the supposed application of the Statute of Frauds does not serve to invalidate many more covenants than if the Statute were not applied. Obviously, the large majority of covenants will be contained in instruments that comply with every required formality. Exceptions to the applicability of the Statute save most of the rest. As the cases occur today, equitable restrictions are generally associated with subdivision development; they will either be made by the land developer-grantor or by a lot purchaser-grantee. Possibly the developer will expressly burden his other lots in the deed; because he executes the deed, this ordinarily poses no Statute of Frauds problem. Such a problem will arise when the grantee or a successor of the developer-grantor attempts to establish in court that the developer made the covenant only orally and impliedly, *e.g.*, via sales literature, salesman's representations, and by the fact that he developed the subdivision in line with the alleged restriction under a common plan of development; we will discuss the so-called "common plan" or "common scheme" later. If the court is convinced that the developer-grantor did orally and impliedly covenant to restrict his other lots, that covenant must be taken out of the Statute of Frauds if it is to have legal life even between the original parties. That means application of either the doctrine of part performance or the doctrine of equitable estoppel. Fortunately, the fact pattern that produces the problem tends to solve it as well.¹²⁶ The lot purchaser has relied upon the developer's representations in buying his lot, so that it should ordinarily be workable to estop the developer and his successors from asserting the Statute. On

120. 3 H. TIFFANY, REAL PROPERTY § 860 (3d ed. 1939).

121. See text accompanying notes 109–15 *supra*.

122. RESTATEMENT OF PROPERTY § 539, Comment j (1944).

123. C. CLARK, *supra* note 5, at 178.

124. 5 R. POWELL, *supra* note 53, ¶ 672.

125. 2 AMERICAN LAW OF PROPERTY § 9.25 (A.J. Casner ed. 1952).

126. The mechanism for this is spelled out in 5 R. POWELL, *supra* note 53, ¶ 672.

the other side of the purchase-sale arrangement, a problem arises when the deed contains a covenant purporting to burden the purchaser-grantee's lot. The problem is, the grantee does not customarily sign the deed. Here the courts have almost universally held that the grantee is bound by covenants in the deed by his accepting it. Sometimes it is reasoned that the grantor's signature is all that the Statute of Frauds requires; sometimes other reasons, or none, are given.¹²⁷

One must also concede that American courts have taken a considerably more relaxed view of the Statute of Frauds in recent equitable restriction decisions. That is apparent from the preceding discussion. Under the correct principle that equitable restrictions are interests in land, however, the Statute of Frauds should apply to their creation, subject to its exceptions. To avoid uncertainty and litigation in deeds setting up subdivision covenants, the draftsmen should have the developer expressly burden his retained land and have the grantee execute the deeds with due formality.

2. *Touch and concern*

To run, equitable restrictions must touch and concern benefited and burdened land, and the requirement should be exactly the same as for real covenants.¹²⁸ The prior discussion of the touch and concern requirement for real covenants in subsection II-B-2 is generally applicable here and will not be repeated. Statements have occasionally been made that the touch and concern requirement is not as restrictive or rigorous for equitable restrictions as for real covenants.¹²⁹ This is true in a sense as a matter of history, because equitable theory has come to be used more and more and real covenant theory less and less during a period when the courts have generally relaxed the restrictions on covenants for policy reasons. In principle, though, there is as much reason to require an equitable restriction to touch and concern as there is when a real covenant is involved. It is this

127. See 2 AMERICAN LAW OF PROPERTY § 9.25 (A.J. Casner ed. 1952); 5 R. POWELL, *supra* note 53, ¶ 672.

128. See 2 AMERICAN LAW OF PROPERTY § 9.28 (A.J. Casner ed. 1952); 5 R. POWELL, *supra* note 53, ¶¶ 675-679. The treatises treat the touch and concern element the same for both real covenants and equitable restrictions.

129. *E.g.*, *Hodge v. Sloan*, 107 N.Y. 244, 17 N.E. 335 (1887). *Pittsburgh, C. & St. L. Ry. v. Bosworth*, 46 Ohio St. 81, 18 N.E. 533 (1888) (dictum).

quality that justifies our attaching them to land or to estates in land—that most fundamentally distinguishes them from a covenant to paint someone's portrait.

On the other side of the balance sheet, there is one kind of equitable restriction which, it can be argued, should not touch and concern: the covenant to do an affirmative act. We previously saw that only New York has had difficulty with the running of affirmative real covenants, and even there the problem has practically disappeared.¹³⁰ In fact, most courts have held that affirmative equitable restrictions do touch and concern,¹³¹ but theoretical justification is more complicated. If, as we should, we follow the theory that equitable restrictions are interests in land similar to easements, how is it possible to have an easement requiring the owner of the servient estate to do affirmative acts? Upon posing this question, Judge Clark concluded that present thinking should allow only negative equitable restrictions—that affirmative ones should “wait upon the development of a more enlightened policy.”¹³² The answer, enlightened or not, that supports what the courts have in fact done is that equitable restrictions are not easements; perhaps the word “similar” is too strong. Perhaps we should say only that they are something like easements or interests in land of that general family. Statistically it happens that most equitable covenants today are negative; the covenants limiting structures to single-family dwellings are typical. But there is not much question that covenants to join homeowners' associations and to support them and pay their dues, all affirmative undertakings, will run as well.¹³³

Perhaps this is the place to discuss a question that has not received enough attention: whether an equitable covenant may burden land the covenantor does not now own but later acquires. For example, if *A* conveys or leases land to *B* that *B* intends to use for a certain business, *A* may covenant in the deed or lease that no similar business will be operated on any land which *A* now or hereafter occupies or owns within a radius of two miles. Such clauses, called “radius” clauses, are

130. See text accompanying notes 40–43 *supra*.

131. *Everett Factories & Terminal Corp. v. Oldetyme Distillers Corp.*, 300 Mass. 499, 15 N.E.2d 829 (1938); *Bald Eagle Valley R.R. v. Nittany Valley R.R.*, 171 Pa. 289, 33 A.2d 239 (1895); Annot., 41 A.L.R. 1363, 1364 (1926); Annot., 102 A.L.R. 781, 784 (1936); *Newman & Losey, supra* note 56, at 1339.

132. C. CLARK, *supra* note 5, at 180–81.

133. *E.g., Rodruck v. Sand Point Maintenance Comm'n*, 48 Wn. 2d 565, 295 P.2d 714 (1956).

sometimes given by shopping center owners to their tenants. Will the covenant burden land within the radius that *A* later acquires? Presumably the land would not be bound until *A* acquired it,¹³⁴ but in basic equitable restriction theory no reason appears why the land should not be burdened at that time. The slight authority on the subject supports this conclusion.¹³⁵ However, some collateral problems may impinge to prevent the existence of such covenants or to make it difficult for them to run.

Assuming that equitable restrictions are interests in land that may, with exceptions already noted, have to be created in a formal document sufficient to transfer such interest, rules in some states require the creating instrument to describe the land with more or less specificity. A reference to "such other land as I may acquire within a radius of two miles from Blackacre" may not be sufficient to satisfy such rules, and would thus prevent the burden from attaching to any land, even between the covenanting parties. Next, the running of the covenant may be impeded by lack of notice of its existence. As we will discuss later, an essential element in the running of equitable restrictions is that the covenantor's successors must have "notice" of them to be bound. This notice requirement is satisfied if the successor has actual, communicated notice of the covenant when he acquires the burdened land; if that is present, we have no problem. More commonly in practice, the successor has "constructive notice" through the recording of an instrument containing the covenant. In the case we are supposing, the covenant burdening *A*'s after-acquired land will be contained in an instrument conveying or leasing another parcel of land. Without detailing at this point all the convolutions of a complex matter, suffice it to say that in most jurisdictions there would not be adequate record notice. First, the notice is contained in an instrument pertaining to land other than that burdened. Second, that instrument will be recorded earlier than the time the covenantor acquired the burdened

134. See *Hazen v. Mathews*, 184 Mass. 388, 68 N.E. 838 (1903).

135. *Guaranty Trust Co. v. New York & Q.C. Ry.*, 253 N.Y. 190, 170 N.E. 887 (dictum), *appeal dismissed*, 282 U.S. 803 (1930); *Lewis v. Gollner*, 129 N.Y. 227, 29 N.E. 81 (1891); 2 AMERICAN LAW OF PROPERTY § 9.35 (A.J. Casner ed. 1952). *American Law of Property* suggests the covenant could attach to the after-acquired land under the contract theory of equitable restrictions, but not under the servitude theory. However, by analogy to the real property doctrine of after-acquired title, it seems that after-acquired land might be impressed with the burden.

parcel.¹³⁶ Thus, although equitable restrictions may attach to after-acquired lands, in practice there are some impediments to their attaching and especially to their running.

3. *Intent to bind successors*

Again, one must discuss the running of benefits and burdens separately. On the burden side, there seems to be no requirement that the parties to an equitable restriction have a specific intent that it shall run. With real covenants, *Spencer's Case*¹³⁷ held that a covenant relating to a thing not then in existence would run only if the parties used the word "assigns." We saw that this element has recently been softened, so that the courts look for the parties' intent that the burden shall run.¹³⁸ Because equitable restrictions have never been controlled by *Spencer's Case*, the courts have not had to deal with the word "assigns" and apparently have not developed an intent doctrine paralleling that for real covenants. No discussion of such a doctrine has been found in the case law. Of course, the touch and concern element must still be present. As we saw in discussing real covenants, the quality of touching and concerning is a circumstance that tends powerfully to imply the intent to run, so that the two elements are now much blended. It seems, then, that while there is no separate requirement that the burden of equitable restrictions be intended to run, by their nature equitable restrictions generally manifest such an intent.

When we consider the benefit side, we do find authority of sorts that the benefit of an equitable restriction will run only if the covenanting parties intend it.¹³⁹ Upon closer analysis the decisions in this area divide into two patterns. One pattern establishes the proposition that the benefit side may not run to anyone if the thing to be done or refrained from by the covenantor is for the covenantee's personal benefit only, if it does not benefit some land of his.¹⁴⁰ In other words, the

136. On the first problem, compare *Finley v. Glenn*, 303 Pa. 131, 154 A. 299 (1931), with *Glorieux v. Lighthipe*, 88 N.J.L. 199, 96 A. 94 (1915). On the second problem, which is the crucial one, see *Wack v. Collingswood Extension Realty Co.*, 114 N.J. Eq. 253, 168 A. 639 (1933); 4 AMERICAN LAW OF PROPERTY § 17.20 (A.J. Casner ed. 1952); 1 C. & R. PATTON, LAND TITLES § 70 (2d ed. 1957).

137. 5 Co. 16a, 77 Eng. Rep. 72 (Q.B. 1583).

138. See text accompanying note 49 *supra*.

139. See 2 AMERICAN LAW OF PROPERTY § 9.29 (A.J. Casner ed. 1952).

140. *Stegall v. Housing Auth.*, 278 N.C. 95, 178 S.E.2d 824 (1971) (apparent basis for decision); *Clark v. Guy Drews Post of American Legion*, 247 Wis. 48, 18 N.W.2d 322 (1945).

benefit cannot run if it is in gross. This must be so; a benefit, if it runs, must run with land, and it must touch and concern that land to run with it. We simply have a restatement of the touch and concern requirement for the benefit side. The other line of cases deals instead with the issue of whose land is intended to be benefited by a covenant, assuming it is of a kind that touches and concerns land. If a court is willing to employ third-party-beneficiary theory, it is possible for the parties to attach the benefit to a third person's land by an express statement.¹⁴¹ In addition, third parties are sometimes allowed to enforce a covenant when the covenant is part of a common plan of development and they have land within the area covered by this plan. In substance, the court infers that, because the covenant was part of the common plan for the area, the covenant was intended to benefit (and also burden) all parcels within the area.¹⁴² Some courts employ a different theory, known as "implied reciprocal servitudes," for making common-plan covenants attach; a detailed comparison of that theory and a third-party-beneficiary, or contract, doctrine will be made later.¹⁴³

Intent to benefit may be inferred in one other situation which, although it is common, has not been much analyzed. Suppose *A* covenants with *B* not to build certain kinds of structures on his (*A*'s) land. *B* owns adjacent land that will be greatly benefited, but the covenant does not expressly refer to *B*'s land. Courts routinely infer that the benefit attaches to and runs with *B*'s adjacent land.¹⁴⁴ To state the matter more abstractly, the courts admit extrinsic evidence to show the parties' intent. As circumstances change, so that the implication of intent becomes weaker, at some point an intent to benefit the covenantee's land can no longer be inferred. Therefore, if the covenantee does not own land which is both nearby and capable of being benefited, the benefit will not attach to land he owns some distance away.¹⁴⁵ Careful draftsmanship will not leave the matter to inference,

141. *Vogeler v. Alwyn Improvement Corp.*, 247 N.Y. 131, 159 N.E. 886, 226 N.Y.S. app. (1928). *Cf. Hazen v. Mathews*, 184 Mass. 388, 68 N.E. 838 (1903) (where the court refused to apply third-party beneficiary theory).

142. *Rodgers v. Reimann*, 227 Or. 62, 361 P.2d 101, 103-04 (1961) (dictum); 2 AMERICAN LAW OF PROPERTY § 9.29, at 417-18 (A.J. Casner ed. 1952); 5 R. POWELL, *supra* note 53, ¶ 679.

143. See Parts III-G-1 and 2 *infra*.

144. *Bauby v. Krasow*, 107 Conn. 109, 139 A. 508 (1927); *Clem v. Valentine*, 155 Md. 19, 141 A. 710 (1928); *Peck v. Conway*, 119 Mass. 546 (1876); 2 AMERICAN LAW OF PROPERTY § 9.29, at 417 (A.J. Casner ed. 1952).

145. See *Stegall v. Housing Auth.*, 278 N.C. 95, 178 S.E.2d 824 (1971).

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but will expressly describe the land intended to be benefited, as well as that to be burdened.

4. *Horizontal privity*

A major difference between real covenants and equitable restrictions is that the latter may run even if they are not created in connection with the transfer of an interest in land. In other words, horizontal privity, as the phrase was used in discussing real covenants,¹⁴⁶ is not an element of equitable restrictions.¹⁴⁷ In practice, equitable restrictions are usually made in an instrument of conveyance, today typically a deed to a lot in a subdivision. But they need not be so made, and the reason is obvious enough: they are self-contained equitable interests in land that do not ride along on any other interest or estate.¹⁴⁸ This point should not be confused with the requirement that equitable restrictions should either conform to the Statute of Frauds or fall within one of its exceptions.¹⁴⁹ That does not mean, however, that the instrument need be a conveyance or lease; it refers only to the formalities with which the document is executed.

5. *Succession to burdened land (sink their tentacles into the soil)*

This section corresponds to the discussion of “vertical privity” for real covenants.¹⁵⁰ We saw, in that discussion, that real covenants run with estates in land; hence, the simile that they ride with estates “like a bird on a wagon.” The corresponding simile for equitable restrictions is that they “sink their tentacles into the soil.” By this we mean the land itself—more precisely, every possessory interest in it—is bound

146. See Part II—B—5 *supra*.

147. *E.g.*, *Pratte v. Balatsos*, 99 N.H. 430, 113 A.2d 492 (1955); *Lewis v. Gollner*, 129 N.Y. 227, 29 N.E. 81 (1891); *Bald Eagle Valley R.R. v. Nittany Valley R.R.*, 171 Pa. 284, 33 A. 239 (1895) (by implication). See 2 AMERICAN LAW OF PROPERTY § 9.26 (A.J. Casner ed. 1952); 5 R. POWELL, *supra* note 53, § 674; RESTATEMENT OF PROPERTY § 539, Comment a (1944); *Newman & Losey*, *supra* note 56, at 1327–28. *Newman & Losey* have the most definitive discussion; they count several states that have rejected horizontal privity for equitable restrictions and report that no state has required it.

148. RESTATEMENT OF PROPERTY § 539 (1944), especially Comments a and i, is wonderfully incisive on the basic nature of “equitable obligations,” as the *Restatement* calls them.

149. See text accompanying notes 117–27 *supra*.

150. See text accompanying notes 52–55 *supra*.

by the equitable covenant.¹⁵¹ Anyone who succeeds the covenantor as possessor of the burdened land may be bound, whether or not he happens to hold the covenantor's precise estate. Thus, a tenant¹⁵² or a contract purchaser who does not have title¹⁵³ may be bound; there is some suggestion that even an adverse possessor may be bound.¹⁵⁴

The underlying theory should be obvious enough by now. As we have previously seen, both American and English courts and writers have pretty much come to agree that equitable servitudes are equitable interests in land at least in the same family as easements.¹⁵⁵ Application of this basic concept to the subject at hand is well stated in the *Restatement of Property's* brief but trenchant discussion of equitable restrictions:

The equitable obligation has as a corollary to it an equitable interest in the land of the promisor which is affected by the promise. The burden of this equitable interest binds all those having interests in the land subordinate to or arising posterior to that of the promisor who possesses the land without defense to it regardless of whether they have the same estate the promisor had or whether they succeeded him in anything other than possession.¹⁵⁶

6. Notice/value

We come now to the aspect which most decisively distinguishes equitable restrictions from real covenants. "[F]or if an equity is attached to the property by the owner," said the court in *Tulk v. Moxhay*,¹⁵⁷ "no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchases." In *Tulk v. Moxhay* the purchaser who was bound by the covenant had "actual notice," subjective awareness induced by communicated information, of the covenant. It has never been doubted that such actual notice is

151. 2 AMERICAN LAW OF PROPERTY § 9.27 (A.J. Casner ed. 1952); C. CLARK, *supra* note 5, at 93-94; RESTATEMENT OF PROPERTY § 539, Comment i (1944); Bordwell, *supra* note 1, at 3.

152. *Oliver v. Hewitt*, 191 Va. 163, 60 S.E.2d 1 (1950).

153. *Huber v. Guglielmi*, 29 Ohio App. 290, 163 N.E. 571 (1928).

154. See RESTATEMENT OF PROPERTY § 539, Illustration 3 (1944).

155. See notes 109-15 and accompanying text *supra*.

156. RESTATEMENT OF PROPERTY § 539, Comment i (1944).

157. 2 Phil. 774, 778, 41 Eng. Rep. 1143, 1144 (Ch. 1848).

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sufficient to fasten an equitable restriction upon a successor to the burdened land, provided of course the other elements for running are present.¹⁵⁸

By far the commonest form of notice in American cases today is "constructive notice" through the operation of recording acts. In fact, the recognition of this form of notice has largely made possible the widespread application of equitable restriction theory and has enabled it to eclipse real covenant theory. It is settled, to the point of being commonplace, that one who acquires an interest in land is charged with notice of an equitable restriction that is contained in a duly recorded prior instrument in his chain of title.¹⁵⁹ Some doubt exists about constructive notice, however, when the prior instrument is outside the direct chain of title. Suppose *A*, who owns both Blackacre and Whiteacre, conveys Whiteacre to *B* and covenants in the deed that nothing but a single-family dwelling will be built on Blackacre; *i.e.*, the deed is to Whiteacre, but Blackacre is the burdened land. Assume the deed is properly recorded at once. Will *C*, a subsequent purchaser of Blackacre, who has no other notice of the covenant, have constructive notice of it via the recording of the *A-B* deed? One line of cases, represented by *Finley v. Glenn*,¹⁶⁰ says yes; another line, represented by *Glorieux v. Lighthipe*,¹⁶¹ says no. The *Finley* line of cases holds that, because recorded deeds are indexed under the name of the grantor in the typical grantor-grantee index, and because *C* is liable to search the index under the name of his prior grantor, *A*, he is charged with discovering the *A-B* deed. *Glorieux* finds it an intolerable burden to require *C* to examine deeds *A* has given to land other than Blackacre itself. To carry this discussion much further would

158. The proposition about actual notice, being part of *Tulk v. Moxhay*, hardly needs documentation. But because it is customary to support important statements, see, *e.g.*, *Bauby v. Krasow*, 107 Conn. 109, 139 A. 508 (1927); *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925) (dictum); *Pratte v. Balatsos*, 99 N.H. 430, 113 A.2d 492 (1955); *Hodge v. Sloan*, 107 N.Y. 244, 17 N.E. 335 (1887); 3 H. TIFFANY, REAL PROPERTY § 863 (3d ed. 1939).

159. *Wiegman v. Kusel*, 270 Ill. 520, 110 N.E. 884 (1915); *Everett Factories & Terminal Corp. v. Oldetyme Distillers Corp.*, 300 Mass. 499, 15 N.E.2d 829 (1938); *Oliver v. Hewitt*, 191 Va. 163, 60 S.E.2d 1 (1950); 2 AMERICAN LAW OF PROPERTY § 9.24 (A.J. Casner ed. 1952); C. CLARK, *supra* note 5, at 183-84; 5 R. POWELL, *supra* note 53, ¶ 671; RESTATEMENT OF PROPERTY § 539, Comments *l* and *m* (1944); 3 H. TIFFANY, REAL PROPERTY § 863 (3d ed. 1939).

160. 303 Pa. 131, 154 A. 299 (1931). See also *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925).

161. 88 N.J.L. 199, 96 A. 94 (1915).

divert us from our proper subject, but perhaps one observation may be added. In some states, the official grantor-grantee index is required by law to contain an abbreviated description of the land covered by the instrument being recorded; in others this is not a part of the index or at least not a required part. Where the index is so required, perhaps it is reasonable to say that a title searcher is entitled to limit his search to those instruments which the index indicates are in the chain of the title he is searching. This is the position taken by the *Glorieux v. Light-hipe* line of cases. Conversely, if the abbreviated description is not required, then perhaps it is reasonable to charge him with examining all documents indexed under the names of prior owners, to discover whether they relate to the title check he is running, that is, the *Finley v. Glenn* rationale.

Some decisions suggest that there is a kind of constructive notice besides recording notice. *Sanborn v. McLean*,¹⁶² a leading and very instructive, though perhaps extreme, equitable restriction case, apparently held that, because of the uniform appearance of the area, a purchaser of a lot in a subdivision was charged with knowledge that all lots were restricted to private dwellings. The court said that anyone purchasing would thereby have either constructive notice of the uniform restriction or at least inquiry notice to make a further investigation to determine if the restriction had been recorded. Other decisions may be suggesting something similar.¹⁶³

So far we have spoken only of the effect of notice upon acquirers of the land burdened by an equitable restriction. It also appears that the acquirer, even though he has neither actual nor constructive notice, will be free of the covenant only if he has given value for the land.¹⁶⁴ To state the proposition conversely, the equitable restriction binds any successor to the burdened land who is not a bona fide purchaser. The implications of this statement seem never to have been fully spelled out—certainly they have never been appreciated to any extent. Yet, the proposition describes the single most important characteristic of equitable restrictions.

Section 539 of the *Restatement of Property* has already been cited as a "brief but trenchant" exposition on equitable restrictions. It has

162. 233 Mich. 227, 206 N.W. 496 (1925).

163. See, e.g., *Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302 (Fla. Dist. Ct. App. 1966).

164. C. CLARK, *supra* note 5, at 183; RESTATEMENT OF PROPERTY § 539, Comment I (1944); 3 H. TIFFANY, REAL PROPERTY § 861 (3d ed. 1939).

not received due credit, perhaps because commentators' attention has been drawn to some less satisfactory sections on real covenants. Section 539, especially Comments a, i, and 1, describe "equitable obligations" as "equitable interests" which are "subject to the rule that equitable interests in a given tract of land are *cut off* by a transfer of the legal title to the land to an *innocent purchaser for value*. As against such a purchaser, the equitable interest *ceases to be effective*."¹⁶⁵ There are indeed other kinds of equitable interests in land, of which the most frequent examples are equitable liens and beneficial interests in trust. And there is an established doctrine that such equitable interests are ineffective against a subsequent grantee, provided he is innocent of their existence and purchases for value, *i.e.*, is a bona fide purchaser.¹⁶⁶ Or, as it is usually expressed and the way that best fits our subject, equitable interests are good against a subsequent grantee who is not a bona fide purchaser. This is true whether he acquires legal or equitable interests in the land.

Thus understood, equitable restrictions are not mysterious, misshapen Calibans; they are members of a family whose features are known and admired. They are, as recognized in English and most American courts, interests in land—equitable interests. Their family of equitable interests was ancient in Chancery when Lord Cottenham gave the opinion in *Tulk v. Moxhay*, which explains why he spoke of "an equity attached to land."¹⁶⁷ It is both sound and utilitarian theory today to phrase the so-called "notice" requirement thusly: Equitable restrictions are equitable interests in land that are good against subsequent possessors who are not bona fide purchasers.

C. *Running of Benefit and Burden*

This section parallels part of what is contained under the same heading in the previous examination of real covenants.¹⁶⁸ The general issue that has concerned courts is whether the benefit side and the burden side of an equitable restriction should be considered to exist separately. We have consistently spoken of them separately, and the decisions generally agree that they are best considered separately.

165. RESTATEMENT OF PROPERTY § 539, Comment 1 (1944) (emphasis added).

166. *Martin v. Bowen*, 51 N.J. Eq. 452, 26 A. 823 (1893); *Cave v. Cave*, 15 Ch. D. 639 (1880); 4 A. SCOTT, TRUSTS §§ 284, 287–289 (3d ed. 1967).

167. 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).

168. See Part II—C *supra*.

The more precise issue has been whether both sides of the restriction must touch and concern and otherwise meet the requirements for running for either side to run. More specifically, some decisions have raised the question whether the burden side shall be allowed to run if the benefit side is "in gross," *i.e.*, if the benefit side does not touch and concern any land. In England it has been held that the burden side cannot run in this situation, supposedly pursuant to the English rule against easements in gross.¹⁶⁹ American decisions have split on the point,¹⁷⁰ some allowing the burden side to run,¹⁷¹ and some not.¹⁷² If the English view really is in furtherance of the policy against easements in gross, one would expect that American courts would adopt a contrary view because easements in gross are recognized in this country. But it is difficult to see how the English view in fact furthers the policy against easements in gross. Courts could accomplish that end by refusing to allow the benefit side to run, but by allowing the burden side to run, for only the benefit is in gross. English courts, however, refuse to separate benefit and burden, operating on the unfortunate underlying assumption that benefit and burden are one entity instead of two.

D. Termination

In section II-D we fully considered the change of neighborhood doctrine as it now applies to equitable restrictions, as well as how it ought to apply to real covenants. A theory was suggested, under which the doctrine may be applied equally to both real and equitable covenants and applied so as to work their termination and not merely to bar remedies. That section should be reconsidered at this point. The only new matter to add here is a discussion of authorities that, contrary to the suggested theory, employ the change of neighborhood doctrine in a way that allows it to apply only as a defense to equitable remedies.

169. *London County Council v. Allen* [1914] 3 K.B. 642 (C.A.).

170. C. CLARK, *supra* note 5, at 181-83.

171. *E.g.*, *Van Sant v. Rose*, 260 Ill. 401, 103 N.E. 194 (1913); *Pratte v. Balatsos*, 99 N.H. 430, 113 A.2d 492 (1955). *See also* *Vogeler v. Alwyn Improvement Corp.*, 247 N.Y. 131, 159 N.E. 886 (1928).

172. *E.g.*, *Shade v. M. O'Keeffe, Inc.*, 260 Mass. 180, 156 N.E. 867 (1927); *Stegall v. Housing Auth.*, 278 N.C. 95, 178 S.E.2d 824 (1971) (alternative ground of decision).

A well-known historical note may be instructive at this point. Whereas the common law courts have never, at least openly, withheld damages from a party entitled to it under the rules of law, equity always did regard its remedies as discretionary. For instance, if the purchaser on a real estate sale contract refuses to perform, normally the vendor may have an equitable decree for specific performance, as an alternative to the legal remedy of damages. But if the vendor has engaged in certain conduct, such as waiting too long before bringing suit (laches) or in some way conniving to use the contract for an ulterior purpose (unclean hands), an equity judge may simply say, "In your particular case, on a discretionary basis, I will withhold any remedy." An equity judge may also base discretionary refusal on the grounds that an equitable remedy would help the plaintiff little and harm the defendant much (balancing the equities) or simply that relief would be "inequitable," which certainly fills in any gaps. The change of neighborhood doctrine has frequently been described as an equitable defense of the latter type.¹⁷³ Some decisions seem to speak of enforcement as being "inequitable,"¹⁷⁴ while others seem to be balancing the equities;¹⁷⁵ because both approaches depend upon a finding that the neighborhood has changed to a substantial extent, there would rarely be a practical difference between them.

If the change of neighborhood doctrine operates as described, it should not apply to equitable restrictions per se, but rather serve as a defense to any equitable remedies. An equitable remedy, injunction, may be had for the breach of a (common law) real covenant, as well as for breach of an equitable restriction. With the real covenant, however, the plaintiff should be able to fall back on his legal remedy of damages; he could hardly expect to do so with an equitable restriction because, while equity regularly gives its remedies for certain law causes of action, the law courts historically have not given damages on equitable actions, and equity only rarely gives damages.¹⁷⁶ To be consistent, therefore, courts that regard change of neighborhood as an equitable defense should allow the plaintiff to fall back on a damages

173. 5 R. POWELL, *supra* note 53, ¶ 684; RESTATEMENT OF PROPERTY § 564 (1944). See 2 AMERICAN LAW OF PROPERTY § 9.39 (A.J. Casner ed. 1952); C. CLARK, *supra* note 5, at 184-86.

174. *E.g.*, Jackson v. Stevenson, 156 Mass. 496, 31 N.E. 691 (1892).

175. *E.g.*, Chevy Chase Village v. Jagers, 261 Md. 309, 275 A.2d 167 (1971).

176. See notes 184, 189-90 and accompanying text *infra*.

remedy on a real covenant, but not on an equitable restriction. Some decisions give an indication of doing that.¹⁷⁷ In one sense, then, the change of neighborhood doctrine may apply differently to equitable restrictions than to real covenants.

Another issue in the change of neighborhood doctrine is whether it bars the remedy or extinguishes the covenant—does it bar the remedy or destroy the right? We discussed this in section II—D and saw there that, on theories that are not clear, American courts in recent years have apparently applied the doctrine to real covenants and equitable restrictions indiscriminately to extinguish the covenant. If that is done, the doctrine may, for practical purposes, be said to have no special affinity with equitable restrictions. That is a desirable result, and a satisfactory rationale was offered for it in section II—D.

E. Judicial Attitudes

One important facet of the history of running covenants, real and equitable, has been a change in judicial attitudes toward them. Traditionally they have been disfavored as being encumbrances on land titles, but, at least in the last hundred years or so, they have become increasingly favored. We saw this during the portion of the article on real covenants.¹⁷⁸ This latter period of time just coincides with the time since *Tulk v. Moxhay*.¹⁷⁹ In fact, *Tulk v. Moxhay* itself was the Chancellor's reaction against the law courts' dislike of running covenants and especially the English common law rule that burdens may not run except in leases.¹⁸⁰ If, as we saw, the courts have tended to favor real covenants, how much more true this has been of equitable restrictions.

Perhaps a few illustrations should be offered to demonstrate the point. First, we have seen that the notice requirement has been greatly facilitated by the concept of constructive notice from recording. Sec-

177. *Jackson v. Stevenson*, 156 Mass. 496, 31 N.E. 691 (1892); 2 AMERICAN LAW OF PROPERTY § 9.39 (A.J. Casner ed. 1952); 5 R. POWELL, *supra* note 53, ¶ 684; RESTATEMENT OF PROPERTY § 564, Comment d (1944).

178. Part II—E *supra*.

179. 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).

180. *Id.* Note particularly Lord Cottenham's remarks about *Keppell v. Bailey*. See also discussions in 2 AMERICAN LAW OF PROPERTY § 9.24 (A.J. Casner ed. 1952); 5 R. POWELL, *supra* note 53, ¶ 671.

ond, in subdivision cases, the courts have been willing to imply the making of covenants by the subdivider from his common plan of development, together perhaps with promotional statements he and his agents have made; we will speak of this later. Third, some decisions have seemed eager to construe ambiguous language as creating land restrictions,¹⁸¹ despite the traditional rule that running covenants are not to be created out of doubtful words.¹⁸² Similarly, the tendency is to give restrictions a broad meaning and scope, although courts sometimes fall back on the rule of narrow interpretation.¹⁸³ One gets the impression that, while the general tendency is as indicated, a court may on occasion invoke the narrow rule to reach a desired result. Fourth, we have already seen that the touch and concern requirement has been relaxed, a development which has, as an historical matter, greatly affected equitable restrictions. A good example is the covenant, now found in many subdivision deeds, requiring all lot owners to join, support, and obey the rules of a community association. This is a long way from a physical touching of land, but most courts today would probably regard such a covenant as touching and concerning if they were satisfied that the association existed to regulate land use and otherwise to maintain property values.¹⁸⁴

F. Remedies for Breach

General principles distinguishing the equity-common law systems of relief¹⁸⁵ support some propositions for us at this juncture. First, an

181. *E.g.*, *Finley v. Glenn*, 303 Pa. 131, 154 A. 299 (1931) (interpreted a grantor's covenant to insert restrictions in deeds to other land as actually creating the restrictions). *Contra*, *Buckley v. Mooney*, 339 Mich. 398, 63 N.W.2d 655 (1954). *See* *Scaling v. Sutton*, 167 S.W.2d 275 (Tex. Ct. App. 1942) (interpreted language to create a restriction, though clause contained words that are used to create conditional estates). *But see* *Werner v. Graham*, 181 Cal. 174, 183 P. 945 (1919).

182. *See, e.g.*, *Buckley v. Mooney*, 339 Mich. 398, 63 N.W.2d 655 (1954); *Werner v. Graham*, 181 Cal. 174, 183 P. 945 (1919).

183. *Compare* *Lincoln Sav. & Loan Ass'n v. Riviera Estates Ass'n*, 7 Cal. App. 3d 449, 87 Cal. Rptr. 150 (1970) (a very liberal, broad interpretation), *with* *Bove v. Giebel*, 169 Ohio St. 325, 159 N.E.2d 425 (1959) (narrow).

184. *Rodruck v. Sand Point Maintenance Comm'n*, 48 Wn. 2d 565, 295 P.2d 714 (1956). *But see* *Petersen v. Beekmere, Inc.*, 117 N.J. Super. 155, 283 A.2d 911 (1971), which reaches a result contrary to that suggested in the text; however, the court emphasized that the community association was not bound to improve or regulate the subdivision. In part the statement in the text is a prediction, based upon the modern tendency to enforce restrictions that promote land-use planning. *See also* *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938).

185. Equity, as a separate, coordinate system, had (and still has) two functions;

equitable remedy, an injunction, is available to prevent future breach of an equitable restriction. Moreover, because damages would ordinarily be inadequate to remedy future breach of a common law real covenant, equity should in most cases be willing to enjoin that breach also.¹⁸⁶ One cannot agree with the writer who claimed that all cases in which an injunction is given therefore involve equitable restrictions.¹⁸⁷ Conversely, however, the fact that damages are granted does tell us, under traditional equity and common law principles, that the covenant is probably a real covenant. Note that the word "probably" must be inserted because equity occasionally would give money damages if for some reason its preferred specific remedy, injunction, could not be given. This has been called equity's "cleanup" jurisdiction.¹⁸⁸ An example might arise when the plaintiff sued to enjoin breach of an equitable restriction but during the pendency of the action the defendant sold the land to a bona fide purchaser to whom the restriction did not run and against whom the court could not issue an injunction. In such a case, an equity court might decree that the plaintiff was entitled to equitable damages for the defendant's past breaches. Such cases are rare.

The situation is more complex in America today, because most states have merged the functions of law and equity into unified court systems. Many of the historical distinctions between law and equity have broken down. Still, judges and lawyers have a notion of the differences between equitable and legal courses of action; there must be a general awareness of the origins of real covenants and equitable restrictions. It would be fairly novel for a merged court to grant dam-

the remedial, that of fashioning remedies, and the substantive, that of originating theories of recovery. Its remedial side has been the more important and receives the most attention in law schools; we are especially familiar with injunctions and specific performance. On its less well known substantive side, equity's great contributions were the trust, the equity of redemption in mortgages, and, of course, the equitable restrictions we are discussing. Equitable remedies were, naturally, available in chancery to vindicate equitable substantive claims, but equity never gave common law remedies as such, though certain equitable remedies paralleled the legal ones. For their part, the common law courts neither recognized equitable causes of action nor gave equitable relief, though law, too, developed a few theories of recovery and a few remedies similar to those in equity. In equity, however, it was not only possible but the ordinary course to give equitable forms of relief on a common law cause of action, provided the chancellor was convinced the remedy available in law, usually damages, was "inadequate." D. DOBBS, REMEDIES §§ 2.1-2.5 (1973).

186. See Cross, *supra* note 14, at 1317-20.

187. See Newman & Losey, *supra* note 56, at 1319.

188. See D. DOBBS, REMEDIES § 2.7 (1973).

ages for breach of an equitable restriction, though there is perhaps some indication of movement in that direction.¹⁸⁹ Other complications also enter into the picture, such as the constitutional right to a jury trial in actions at law, but these are beyond the scope of our present subject.¹⁹⁰

On a practical level, an injunction is usually the preferred remedy if available. Most owners would rather enjoin their neighbor from violating a building restriction, for example, than be paid but have the breach go on. Perhaps the suggestion is a bit cynical, but plaintiffs who are out for money can turn an injunction into a profitable item anyway, by using it as leverage for settlement.

G. Equitable Restrictions in Subdivisions

Today running covenants are generally found in connection with residential subdivisions; indeed, as we have observed, where the subject of running covenants has become virtually synonymous with subdivision restrictions. Although they are very common and as well known to the public as to the legal profession, the theoretical mechanism by which such restrictions operate is exceedingly complicated and not at all well understood. In truth this is partly because courts, in their desire to enforce subdivision restrictions for policy reasons, have outrun their understanding of theory. However, most subdivision decisions can be explained under an extension of equitable theory, which is what the courts usually seem to have in mind, though many decisions might be as well explained with no greater extension of real covenant doctrine.

This section can only be understood by those who have a firm working grasp on all the preceding parts of the article, especially those on equitable restrictions. Propositions previously established will be drawn upon and used without citation of further authority or specific reference to prior sections. In a sense the present section is the culmination of what has gone before, bringing together and applying the principles worked out. In another sense, the section is an attempt to state a sound, usable theoretical basis for the dominant form of running covenant.

189. *Miller v. McCamish*, 78 Wn. 2d 821, 479 P.2d 919 (1971).

190. *See D. DOBBS, REMEDIES* § 2.6 (1973).

1. *Implied reciprocal servitudes*

The theory to be traced in the examples to follow is known as the "implied reciprocal servitude" or "implied reciprocal negative easement" theory. Suppose first a comparatively simple and ideal plan of subdivision restrictions. The developer of fifty lots, as he sells each one, inserts in each deed in uniform language a covenant by the grantee that the lot will contain no structure other than a single-family dwelling and also an express grantor's covenant similarly burdening all other lots in the subdivision that the developer still owns. The execution, delivery, and acceptance of that deed, whether it is signed by both grantor and grantee or by the grantor alone, will impose reciprocal benefits and burdens enforceable between the original parties against their respective lands. *E.g.*, when the first lot is sold (let us call it Lot 1 and assume Lots 2, 3, 4, *etc.* will be sold in numerical order), it will be burdened by the restriction, of which the beneficiary will be the developer. And the developer's remaining lots will be burdened by the same restriction, of which the grantee of Lot 1 is beneficiary. Now suppose the developer sells Lot 2, with the same deed restrictions. What if the buyer of Lot 2 begins to build a service station on it? It seems the developer may enforce the covenant, as a contractual covenant, against Lot 2's owner; but may the owner of Lot 1 enforce it? He may if the burden runs with Lot 2.

Does the covenant run as a real covenant? Quickly, the elements are: (1) a promise which is enforceable between the original parties; (2) which touches and concerns; (3) which the parties intended to bind privies; (4) which is, by the bare majority rule, created in an instrument leasing or conveying some interest in land (horizontal privity); and (5) which is sought to be enforced by or against an original party or one in vertical privity. It seems that all the elements are accounted for—but the covenant may not be enforced against Lot 2. We did not say the deed to Lot 1 was recorded, and it is the covenant the developer made in that deed (not the covenant which the owner of Lot 2 made in his deed) that the owner of Lot 1 is trying to enforce as a running covenant against the grantee of Lot 2. Typical American recording acts intervene to make the restriction on Lot 2 void against the subsequent purchaser of that lot, provided the instrument containing the restriction has not been recorded and the purchaser has given value and has no actual or constructive notice of the restriction.¹⁹¹

This has the practical effect of making notice, through recording or otherwise, a requirement of real covenants in virtually all cases. We will dwell later upon the similarity to equitable restrictions they thus acquire. If the deed to Lot 1 was recorded or (infrequent in practice) if the purchaser of Lot 2 knew of the restriction, then the recording act impediment would disappear, and he should be bound under real covenant theory. It may be possible to argue, following *Glorieux v. Lighthipe's*¹⁹² analysis, that a purchaser of Lot 2 should not be bound by a deed out of his chain of title, but somehow this seems to be overlooked in today's decisions.

Suppose now it is Lot 1 upon which the service station is being erected, Lot 2 having been sold. If Lot 1 is still in the original grantee's ownership, it takes no explanation to see that the benefit already attached to Lot 2 will have run to its purchaser. Recording or other notice is immaterial, because the burden side does not have to run, and because the grantee of benefited land, who is the subsequent grantee under the recording acts, is not the one whose instrument is voided by non-recording. If Lot 1 had been conveyed by its original purchaser to a second grantee, Lot 1 in this grantee's hands would be bound only if the original deed to it was recorded or the second grantee had notice or failed to give value. We would then have essentially the same analysis as in the preceding paragraph, except there would be no issue about whether the original deed to Lot 1 was out of the second grantee's chain of title.

It remains to be said—perhaps it is already obvious—that the foregoing analyses may also be worked between the original owner or subsequent grantees of Lot 1 and the purchasers and successors of lots 3 through 50. The same is true between the owners and successors of any two of the lots. We are still supposing, bear in mind, that express grantor and grantee covenants were inserted in all fifty deeds. As a result, we have a complete network of reciprocal and mutually enforceable covenants, which run under the common law real covenant doctrine (provided the recording act requirements are met).

Now let us see how the same network of covenants work under equitable restriction theory. The elements, we know, are: (1) a promise which is enforceable between the original parties; (2) which touches

191. Cross, *supra* note 14, at 1324; Newman & Losey, *supra* note 56, at 1340-42.
192. 88 N.J.L. 199, 96 A. 94 (1915).

and concerns; (3) which the parties intended to bind successors; and (4) which is sought to be enforced by an original party or a successor, against an original party or a successor in possession; (5) who has notice of the covenant or has not given value. Comparing this list with the five elements given for real covenants, we see that we have dropped the requirements for horizontal and vertical privity and have added the notice/value and succession elements. Theoretically, these may seem like substantial changes; in practice, they will seldom produce different results. First, the intervention of typical recording acts has, as noted, essentially added a notice/value requirement to real covenants. Second, horizontal privity is normally present because covenants are almost always made in deeds, leases, or other conveyances. Finally, the remote party seeking to enforce a covenant or against whom it is sought to be enforced is usually in vertical privity of estate with an original party; occasionally he may be the party's tenant, rarely a mere possessor. This gives some suggestion of the range of situations in which either real covenant and equitable restriction theory might apply and the other not be workable. A bit of reflection will demonstrate, however, that equitable theory can virtually always be applied if real covenant theory can be. It is, in fact, an interesting exercise and wonderful mental gymnastics to try to devise hypothetical situations in which this is not so.¹⁹³ This is why it has been observed that the much broader equitable theory has nearly swallowed up real covenants.¹⁹⁴

We were supposing a system of subdivision covenants in which there were uniform and express grantor and grantee covenants in all fifty deeds. It should be apparent by now that, in the examples we put, the results will in all cases be the same whether an equitable restriction theory or a real covenant theory is used. Notice, via recording or otherwise, remains a critical element, though now it is not only because of the recording act, but also because of the specific notice requirement of the equitable theory.

193. Here is one such situation to stimulate thinking: A covenant is contained in an instrument that is not of a kind the recording act "requires" to be recorded (*i.e.*, makes void against a subsequent bona fide purchaser if not recorded). For example, let us assume the covenant is made by the tenant in a short-term lease that, because it is only for a short term, is not mentioned in the recording act. The lease is not in fact recorded. Later the tenant assigns his leasehold for value in another instrument. Because the assignee does not see the lease and has no other form of notice of the covenant, it cannot run in equity, though it appears to run under the real covenant theory.

194. Cross, *supra* note 14, at 1324; Newman & Losey, *supra* note 56, at 1344.

Running Covenants

We shall now introduce some variables into our hypothetical fact pattern. Assume that the developer-grantor does not insert an express grantor's covenant into any deed, though he continues to insert the uniform grantee's covenant in all fifty deeds. This is actually a frequent pattern. No new problem exists as long as the developer or one of his purchasers is trying to enforce the restriction against another purchaser who has, as grantee of a lot, expressly made a covenant or against a successor to such an express covenantor. We may run out the analyses previously traced. The result of doing so is that the owner of a given lot may enforce the covenant against the owner of a lot previously purchased, but the owner of a previously purchased lot may not enforce a covenant against the owner of a subsequently purchased lot. *E.g.*, the purchaser of Lot 2 may go against the grantee of Lot 1, or the grantee of Lot 50 against the purchasers of lots 1–49, but the purchaser of Lot 1 may not go against the grantee of Lot 2 nor the grantee of Lot 2 against the purchasers of lots 3–50. This is because subsequent lots, to be burdened in favor of prior lots, must be burdened while in the hands of the developer-common grantor. In our example, this means he must make a covenant in the deed to a prior grantee burdening the lots that then remain unsold, but here, the grantor has made no covenants in his deeds.

Is there any way we can find a covenant by the common grantor? If we can, it must be an informal covenant, and this is where the so-called "common plan" of development enters. Suppose that when Developer sold Lot 1, he represented to the purchaser of Lot 1 through agents, sales literature, and the like that "all fifty lots of this subdivision are going to be developed as a high class residential area—single-family homes exclusively." Furthermore, the layout of the lots and, to the extent homes may have been built in advance of sales, the overall appearance is consistent with the representations. The court, favoring the existence of such covenants, is willing to infer that Developer has orally-implicitly covenanted to the purchaser of Lot 1 that lots 2–50, still owned by Developer, were then burdened by the restriction. Because the promise is parol, there is a problem with the Statute of Frauds, but as we have seen, this may be sidestepped by a theory of estoppel or part performance or by the court's simply looking the other way.¹⁹⁵ So, as between Developer and purchaser of

¹⁹⁵. See *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920).

Lot 1, Developer is bound as to his remaining lots 2–50. As these lots are sold, their purchasers are also bound to the purchaser of Lot 1, provided the recording act and notice requirements are met. That is a difficult problem that requires us to pause.

Because the covenant burdening a subsequently sold lot—let us use Lot 25 as an example—was made only orally and impliedly by Developer, a purchaser of Lot 25 cannot find it as a grantor's covenant written in the deeds to lots 1–24, even if he is charged with notice of the contents of those deeds. The leading case to go into this question is *Sanborn v. McLean*, a 1925 Michigan decision.¹⁹⁶ The defendant, a subsequent lot purchaser, was held to have notice from what the court seems to regard as a combination of factors. The defendant could see that twenty prior recorded deeds all bound grantees to a more or less uniform single-family-dwelling restriction. He could then see that the subdivision was developing in that uniform way. From these facts, the defendant was charged, as a matter of law, with sufficient information to conclude that the developer had impliedly burdened land remaining in the developer's hands, including the lot subsequently sold to the defendant, when he sold lots prior to the defendant's lot. *Sanborn v. McLean* is a very liberal decision, and there are some factual difficulties the court overlooks. For instance, the restriction had to have attached at the time the defendant's lot was originally sold, some years before it was resold to the defendant. But it is not clear what representations the developer then made, nor is it clear that a common plan of development was visible. Nevertheless, *Sanborn* does set out the mechanism that has to be used to give notice.

Let us introduce yet another variable into the basic hypothetical example. Suppose Developer, in selling his fifty lots, (1) makes no express grantor's covenant and (2) only inserts grantees' covenants in some rather than all of the deeds; say, in deeds to Lots numbers 6–20 and 26–50. Factor (1) we have just discussed and we may simply carry that discussion in our minds. Factor (2), however, is new and critical. First, is there any way Lot 1 can be burdened? It seems not. The purchaser of that lot made no covenant burdening it, and unless the burden attached at that point, it could not be attached later in transactions between persons who had no interest in Lot 1. Is it pos-

¹⁹⁶ 233 Mich. 227, 206 N.W. 496 (1925). See also text accompanying notes 162–63 *supra*.

sible that Lot 1 may have the benefit of restrictions burdening later lots? Under the theory we are discussing, that is possible but very unlikely. (It is more likely under the third-party-beneficiary theory we will soon discuss). If Developer made strong representations to the purchaser of Lot 1 that lots 2–50 were restricted, arguably, the purchaser of Lot 1 could enforce the representations, if we assume they could be taken out of the Statute of Frauds. But courts put so much weight on the existence of a common plan, manifest in a pattern of deed covenants or on the ground, that the inference would probably not be made when, as here, the plan is not yet manifest.¹⁹⁷ Purchasers of lots 2–5 probably will be treated the same way as Lot 1. The only difference with them is that one, two, three, or four prior lots may have in fact been improved in a uniform manner; however, courts generally do not regard coincidental development (development not pursuant to a pattern of deed restrictions) as establishing a common plan.¹⁹⁸ The original grantees of lots 6–20, however, have expressly burdened their lots. Under principles we have already developed, it is clear that *within* this group, which consists of the purchasers of lots 6–20, the subsequent purchasers and their successors may enforce the restriction against prior purchasers and their successors. The subsequent purchasers have acquired from Developer lots with the benefit of express covenants that prior purchasers made to Developer for the benefit of the subsequent lots he then still owned. However, it is more difficult to make the benefit of the covenants run backward, *e.g.*, to give the prior purchaser and his successors of Lot 6 an action against the subsequent purchasers and their successors of lots 7–20. This can be accomplished, under the theory we are now exploring, only if a court is willing to infer the oral, implied promise back from Developer to the original purchaser of Lot 6. We have seen that this depends upon Developer's representations, together with the existence of the common plan. (We will soon discuss the third-party-beneficiary theory, which some courts use to reach this result.) The problem, of course, is that the common plan, an important factor in the implication

197. See *Buckley v. Mooney*, 339 Mich. 398, 63 N.W.2d 655 (1954); *Rodgers v. Reimann*, 227 Or. 62, 361 P.2d 101 (1961).

198. *Hamlen v. Keith*, 171 Mass. 77, 50 N.E. 462 (1898). *But see* *Ward v. Prudential Ins. Co. of America*, 299 Mass. 559, 13 N.E.2d 411 (1938); *Buckley v. Mooney*, 339 Mich. 398, 63 N.W.2d 655 (1954); *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920).

process, is a snowballing condition; it is much more apparent when Lot 20 is sold than when Lot 6 is. Decisions on the question apparently allow the purchaser of Lot 6 to enforce the covenant against the later lot-owners to the extent the Developer contemplated the restrictions when Lot 6 was sold and represented them to the purchaser.¹⁹⁹ In this the courts, despite the obvious logical lacuna, seem often to look to the later uniform development as evidence of what the plan was originally.²⁰⁰

The "implied reciprocal servitude" or "implied reciprocal negative easement" theory builds upon the concept that running covenants are interests in land of the family of servitudes or easements. Real covenant doctrine as well as equitable restriction doctrine may usually be stretched to fit the theory, though, as the phrase "reciprocal servitude" implies, the courts seem to be contemplating predominantly the equitable doctrine. The important point is that one or the other, or both, of the established doctrines fits and is being employed, though it may be that the courts themselves do not always see just how this is so. There is certainly a stretching of the elements or of the facts to fit the elements, but the elements may be accounted for. And actually the stretching is not as great as it may seem. Courts are working principally with the requirement that a covenant be made, and are allowing it to be implied; then, to a certain extent, they are allowing the notice/recording requirement to be relaxed somewhat. Other elements are present in traditional forms.

2. *Third-party-beneficiary theory*

Instead of the implied reciprocal servitude theory, some courts employ what is known as the "third-party-beneficiary" theory. This approach, which is espoused and clearly explained in the *Restatement of Property*,²⁰¹ is employed by some courts to make the benefit of subdivision covenants run "backward." Earlier, we saw that using the implied reciprocal servitude theory to make the benefit run backward can prove awkward. The third-party-beneficiary doctrine is easier to apply in that particular situation; however, it is subject to the funda-

199. 2 AMERICAN LAW OF PROPERTY § 9.30 (A.J. Casner ed. 1952).

200. *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925).

201. RESTATEMENT OF PROPERTY § 541 (1944).

mental objection that it supposes equitable restrictions, at least on the benefit side, to be contract rights rather than interests in land.

An example we previously used will illustrate operation of the third-party-beneficiary theory. Suppose again that Developer, in selling his fifty lots, (1) makes no express grantor's covenants and (2) inserts grantees' covenants in the deeds to only lots 6–20 and 25–50. Now is there a way that the purchaser of Lot 1 may have the benefit of the promises burdening lots 6–20 and 25–50? There is if a court is willing to make the purchaser of Lot 1 and his successors third-party beneficiaries of the covenants made by the grantees of these latter groups of lots. Of course if the latter grantees had expressly recited that "this covenant is intended to be for the benefit of Lot 1," that should suffice. The real question is whether a court will infer such a recital. Again the existence of a common plan of development becomes the key factor. From it courts which adopt the third-party-beneficiary theory are willing to infer that the covenants made by subsequent grantees, burdening in our example lots 6–20 and 25–50, were intended for the benefit of previously conveyed lots, numbers 1–5 and 21–24 in the example.²⁰² In fact, it can as plausibly be said that the grantees who make the covenant intend it for the benefit of all owners, previous or subsequent, who acquire lots within the area covered by the common plan. Many judicial opinions seem to make that broad statement.²⁰³ Subsequent purchasers, however, who are generally protected by the implied reciprocal servitude theory, have little need to rely upon the third-party-beneficiary theory and may create unnecessary problems by so relying.²⁰⁴

With either the implied reciprocal servitude or third-party-beneficiary theories, we have seen that it is crucial to determine if a common plan of development exists. Whether it exists is a question of fact, depending upon the concurrence of several factors. The basic pattern requires that the restriction in question be included in deeds to lots in a certain area, usually a subdivision, and actually followed on the ground.²⁰⁵ Restrictions do not have to be in every deed, but they

202. This mechanism is brought out clearly in *Rodgers v. Reimann*, 227 Or. 62, 361 P.2d 101 (1961), and in *RESTATEMENT OF PROPERTY* § 541 (1944).

203. *E.g.*, *Wiegman v. Kusel*, 270 Ill. 520, 110 N.E. 884 (1915); *Snow v. Van Dam*, 291 Mass. 477, 197 N.E. 224 (1935); *Evans v. Foss*, 194 Mass. 513, 80 N.E. 587 (1907); *Booth v. Knipe*, 225 N.Y. 390, 122 N.E. 202 (1919).

204. See *RESTATEMENT OF PROPERTY* § 541, Comment f (1944).

205. See *Wiegman v. Kusel*, 270 Ill. 520, 110 N.E. 884 (1915); *Clark v. McGee*,

must be "general." No precise percentage can be given, since generality is a factual conclusion. In most cases the restriction has appeared in a large majority of the deeds although in *Sanborn v. McLean*,²⁰⁶ the court, liberal here as on other points, found fifty-three out of ninety-one deeds sufficient. Nor does the restrictive language have to be identical from deed to deed; a common pattern is sufficient. As to the development on the ground, it too need only "generally" conform to the deed restrictions. It need not be observed in every lot nor uniformly in those lots in which it is observed. It should also be noted that a uniform or common plan is not always one that calls for every lot to be developed with the same restrictions. For instance, if the original plan called for several hundred lots to be restricted to single family dwellings, but for a few appropriately located lots to be set aside for, say, a school, a fire station, and a reasonable number of businesses to serve the residential area, all the lots might be said to be included in the common plan. While the most prominent factors in a common plan are the deed restrictions and the pattern of physical development, representations made by the developer and his agents, orally or in literature, that the area is being developed according to a common plan are also of some importance. To sum up, existence of a common plan is a question of fact dependent upon a combination of the factors mentioned.

H. "Second-Generation" Cases

There are some decisions, tending to be recent ones, in which running covenants appear to be worked out on other than real covenant or equitable restriction theories. Quite a few of the subdivision opinions cited in the last section make only elliptical reference to either theory, and there are some decisions in which the courts enforce running covenants without relying rhetorically at any rate upon either of the traditional theories at all.

First are a group of subdivision cases in which courts make some

159 Ill. 518, 42 N.E. 965 (1896) (no common plan existed); *Ward v. Prudential Ins. Co. of America*, 299 Mass. 559, 13 N.E.2d 411 (1938); *Snow v. Van Dam*, 291 Mass. 477, 197 N.E. 224 (1935); *Hamlen v. Keith*, 171 Mass. 77, 50 N.E. 462 (1898) (no common plan existed); *Buckley v. Mooney*, 339 Mich. 398, 63 N.W.2d 655 (1954) (no common plan existed); *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925); *Booth v. Knipe*, 225 N.Y. 390, 122 N.E. 202 (1919); *Scaling v. Sutton*, 167 S.W.2d 275 (Tex. Ct. App. 1942); *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920).

206. 233 Mich. 227, 206 N.W. 496 (1925).

variation of this statement: When a common plan of development has been found to exist, with covenants by grantees of the lots and reciprocal covenants by the common grantor, the covenants may be enforced by or against the owner of any lot.²⁰⁷ Such a statement, being but a conclusion, invites speculation as to its theoretical base. One explanation, of course, is simply to say that the result in the case is based upon some recognized extension or variation of equitable restriction doctrine, such as we traced in the preceding section of this article. As we saw, to make the benefit of the covenant run backward as well as forward in some contexts, it might be necessary to resort to third-party-beneficiary theory in addition to, or in lieu of, implied reciprocal covenant theory. Possibly other courts may be willing to follow the Supreme Court of Oregon, which said in *Rodgers v. Reimann*²⁰⁸ that it was willing to employ these theories alternatively if necessary. There is a question of judgment and of scholarly accuracy however, about how far one ought to go in rationalizing a decision on some theory, however plausible, when the court itself did not suggest that theory. It seems more accurate, then, to accept the thesis that at least a few of the subdivision decisions are *sui generis*, as the Massachusetts Supreme Judicial Court implied in *Snow v. Van Dam*.²⁰⁹ One suspects that such decisions are not so much aberrant as they are precursory.

It may be germane at this point to note that some comparatively recent subdivision decisions have allowed homeowners' associations to enforce common plan covenants. The cases involve lot owners' restrictive covenants which require the owners to pay dues or maintenance assessments to the association²¹⁰ or to have its permission to erect buildings.²¹¹ Under a true running covenant theory, the benefit of a covenant should be enforceable only by one who owns land benefited by the covenant.²¹² In many situations the homeowners' association

207. *Clark v. McGee*, 159 Ill. 518, 42 N.E. 965 (1896); *Snow v. Van Dam*, 291 Mass. 477, 197 N.E. 224 (1935); *Scaling v. Sutton*, 167 S.W.2d 275 (Tex. Ct. App. 1942); *L. SIMES & C. TAYLOR*, *supra* note 114, at 220. See also Chief Justice Cardozo's suggestion in the penultimate paragraph of *Bristol v. Woodward*, 251 N.Y. 275, 167 N.E. 441 (1929).

208. 227 Or. 62, 361 P.2d 101 (1961) (dictum).

209. 291 Mass. 477, 197 N.E. 224 (1935).

210. *Rodruck v. Sand Point Maintenance Ass'n*, 48 Wn. 2d 565, 295 P.2d 714 (1956).

211. *Hannula v. Hacienda Homes*, 34 Cal. 2d 442, 211 P.2d 302 (1949); *Jones v. Northwest Real Estate Co.*, 149 Md. 271, 131 A. 446 (1925).

212. See *A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY* 1073 (2d ed. 1969); *Annot.*, 19 A.L.R.2d 1274, 1276 (1951).

may own land within the subdivision that might be said to be benefited, such as a clubhouse or recreational facilities. It seems, however, that the decisions referred to do not contemplate the association's vindicating its own rights as landowner as much as they regard it as third-party beneficiary of the promise and as trustee to seek enforcement for the lot owners.²¹³ Whether one wants to label this reasoning a departure from traditional running covenant theory or simply the appending of other doctrines to such theory, it opens up a new dimension for subdivision restrictions. Clearly, here is another case in which American courts are persuaded of the socioeconomic utility of private land use controls.

Finally, in reviewing "second-generation" theories, we come upon what might be described as the natural evolution of equitable restrictions. It will be recalled that courts commonly term these as "equitable servitudes" or "negative easements." What if we were to say literally that an equitable restriction, whether it is negative or affirmative, is a kind of easement that may be created and may pass as does an easement? The chief result of such reasoning would be to remove the requirement that a successor to the burdened land is bound only if he has notice of the restriction. While this might be a sharp departure from the original theory of *Tulk v. Moxhay*,²¹⁴ with its emphasis on the element of notice, in practice it would cause only a ripple—notice nearly always comes through the operation of American recording acts anyway. Of course a purchaser is not bound by an easement unless he has notice of it or is charged with notice by the recording of an instrument creating or identifying it.²¹⁵ The theory here described is suggested strongly by the 1877 New York opinion in *Trustees of Columbia College v. Lynch*.²¹⁶ It is true that the court speaks of "negative easements" and "equities" as well as of "easements," but it seems to have in mind a more literal affinity between easements and "negative easements" than have other courts using the latter term. It may be that what might be called the "pure easement" theory has not been pressed more in the courts precisely because traditional equitable

213. This is explicitly stated in *Merrionette Manor Homes Improvement Ass'n v. Heda*, 11 Ill. App. 2d 186, 136 N.E.2d 556 (1956), and seems implicit in the decisions cited in notes 210 & 211 *supra*.

214. 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).

215. 6 R. POWELL, *supra* note 53, ¶ 914 (1977). See also 5 H. TIFFANY, REAL PROPERTY § 1263 (3d ed. 1939) (party walls). Most recording acts provide for the recording of easements. See, e.g., WASH. REV. CODE §§ 65.08.060-.070 (1966).

216. 70 N.Y. 440 (1877).

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easement theory, combined with the recording acts, produces such similar results.

IV. A FUTURE HISTORY

It is a contradiction in terms, of course, to speak of a future history unless one means to prophesy what a future historian might write. Prophecy is more dangerous than history, but a correct prophecy is more useful than the best history. Events usually unfold in an evolutionary rather than a cataclysmic way. A knowledge of the current trend of affairs is usually a reasonably accurate guide to their shape in the future, provided we do not project our thoughts so far into the future that forces shaping events will significantly change beyond our power to foresee. In the evolution of judge-made law, with particular reference to running covenants, it should be possible to predict the general contours of a subject for a generation or two, which for one's readers is the most important period of all. Over the past several generations, the most significant trend in the law of running covenants has been their increasing judicial acceptance. In the technical sense we saw equity, by its creation of equitable restrictions in 1848, vastly expand the opportunities the common law afforded for the burden side to run. We saw covenants, once warily regarded as encumbrances on title, become judicial favorites. Especially with subdivision covenants, we saw and continue to see a willingness approaching eagerness to satisfy doctrinal requirements, for instance to find constructive notice from recording and to imply reciprocal covenants from land developers. Few, if any, recent cases narrowing the incidence of running covenants can be found; the trend is all toward expanding, liberalizing. In this trend, legal scholars join, indeed urge.

Policy reasons for the trend are evident enough. Restrictions on land use, instead of being burdens, have been recognized as methods of increasing the desirability and value of land, especially land in planned residential areas. As zoning and other means of public land use control have become increasingly popular, so have private controls. As long as these policies continue to find favor, it seems fairly predictable that both public and private restrictive arrangements will be welcome. In a society in which land continues to become a scarce commodity and in which urbanization grows, it seems that the policies favoring land use restrictions will at least continue and will probably

gain in strength. Therefore, it seems reasonable to predict that the courts will continue to favor the creation and running of restrictive covenants.

It is not so safe or so easy to predict the precise doctrinal expressions by which the courts (or perhaps legislatures) will implement the policy favoring running covenants. Not only is it a truism that the law is always being reshaped, but there is special evidence this is going on in the law of running covenants. When one sees courts fictionalizing by interpreting facts to fit doctrinal requirements, movement in the doctrine itself is going on. The question is, "In what direction?"

In a relatively recent article, it was urged that the distinctions between real covenants and equitable restrictions should be abandoned.²¹⁷ In practice, this has nearly come to pass. Partly this is because equitable restriction theory, or some derivation of it, has largely replaced real covenants;²¹⁸ partly it is because recording acts have almost obliterated the main practical distinction between the two doctrines. Damages, a common law remedy, are theoretically not available for breach of an equitable covenant, but again, in practice this is of no great consequence. In the first place, plaintiffs usually prefer injunction as their remedy. In the second, it is not at all clear that a court having merged law and equity powers will not give damages upon an equitable obligation, whether the remedy be called equitable damages or possibly even common law damages. It would cause little practical inconvenience and only a modest rearrangement of theoretical principles if courts were to say that either real or equitable covenants or a combination of them create legal interests in land. The trend in American decisions has been in this direction, and a number of writers have at least come close to suggesting it.²¹⁹

More specifically, the trend points to a theory that combines elements of both legal and equitable running covenants. There must be a covenant enforceable between the original parties, and it must touch and concern burdened and benefited land for the respective sides of the covenant to run—these are essential elements common to both real covenants and equitable restrictions. No requirement of privity

217. Newman & Losey, *supra* note 56, at 1344-45.

218. Cross, *supra* note 14, at 1327.

219. See Cross, *supra* note 14, at 1324-27; Newman & Losey, *supra* note 56, *passim*; Walsh, *Equitable Easements and Restrictions*, 2 ROCKY MOUNT. L. REV. 234, 236 (1930).

between the original parties (horizontal privity) should be imposed; the equitable theory has become popular in part because of the complications this element introduces into real covenants. Vertical privity should not be required in the real covenant sense, but only succession in possession in the equitable restriction sense—here again the courts have preferred the equitable theory. Finally, notice should not be required; the recording acts make this element of equitable restrictions archaic. The elements of running covenants could then be listed as: (1) a covenant enforceable to create an interest in land between the parties who made it, (2) the burden of which touches and concerns the covenantor's land (and the benefit of which may touch and concern the covenantee's land), (3) compliance with the applicable recording act as to the burdened land, and (4) a succession of interest in or possession of the burdened land (or in or of the benefited land if the benefit is to run).

One final point needs to be made. The burdens and benefits created should be viewed as interests in the parcel or parcels of land affected. Indeed, this view is already overwhelmingly espoused by judges and scholars; this we have seen. Perhaps it would be tidy to label such interests as a form of easements, though recognizing that they may impose affirmative as well as negative duties. The label would not much matter, as the elements suggested above would accomplish that end in reality. In this way we may reach the conclusion toward which courts and writers have long been pointing. We may at last bring *Spencer's Case*²²⁰ and *Tulk v. Moxhay*²²¹ together with their own true family.

220. 5 Co. 16a, 77 Eng. Rep. 72 (Q.B. 1583).

221. 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).