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COVENANTS IN LEASES IN WEST VIRGINIA

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The subject of covenants in leases has been dealt with by the courts and legal writers time and time again until it would seem that there can be very little said on the subject which has not already been said before and perhaps said many times.

However, the subject has not been before the Supreme Court of Appeals of West Virginia many times and, when it has been before that court, no detailed consideration has been given it in most instances. General statements have been made, and general rules have been laid down, often without a reason for the statement or rule and sometimes with reasons not entirely supported by adequate authority. Some statutes on the subject have been summarily mentioned by the court, and others have yet to be mentioned and construed.

The purpose of this paper is to consider covenants in general and covenants in leases which run with the land in particular. After a fairly general discussion of these two phases of the subject, an attempt will be made to analyze and discuss various West Virginia decisions and statutes having to do with covenants in leases which run with the land in the light of the common law and the law in other jurisdictions.

It is hoped that in treating the subject in this manner this paper will be of some benefit to the court and to lawyers in their future consideration of this interesting, if confusing, subject.

Covenants in General

The word "covenant" is derived from the Latin words "convenire", meaning to come together, and "conventio", meaning a coming together.¹

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¹ 1 BOUVIER'S LAW DICTIONARY 715 (8th ed. 1914).

COVENANTS IN LEASES

A covenant may be defined as an agreement between two or more persons to do or permit the doing of a particular act,² or a promise or stipulation that certain facts are true,³ but these definitions unduly limit the meaning of a word which has a very broad meaning and leave the impression that it is only used in an affirmative sense. Since there are also negative covenants, it is perhaps better to say that it is an agreement between two or more persons whereby one of the persons promises the performance or nonperformance of certain acts, or that a given state of things does or shall, or does not or shall not, exist.⁴

As to the characteristics of covenants, they are generally subject to the same rules as other contracts in regard to the qualifications of parties, the assent required and the purpose for which the contract is made.

A covenant is an agreement of the covenantor only,⁵ and no particular words are necessary to create a covenant.⁶ Any words importing an agreement may be a covenant,⁷ the precise form of the covenant is of no consequence if the intention is reasonably clear, and the obvious purpose should not be defeated by a technical construction of the language used.⁸ But there must be some agreement or promise to do or not to do a certain thing, or that a given state of facts does or shall, or does not or shall not, exist, before a provision in an instrument will be found to be a covenant, and a court will not torture a representation and the like into a covenant.⁹

² *Israelsky v. Levine*, 124 Misc. 827, 209 N.Y. Supp. 577 (1925).

³ *Adam v. Consolini*, 135 Conn. 321, 64 A.2d 44 (1949).

⁴ *Olcott v. Southworth*, 115 Vt. 421, 63 A.2d 189 (1949); *Broad & Brandford Place Corp. v. Hockenjos Co.*, 132 N.J.L. 229, 39 A.2d 80 (1944).

⁵ *Moe v. Gier*, 116 Cal. App. 403, 2 P.2d 852 (1931).

⁶ "Any words in a sealed instrument by which a party manifests an intention to do or not to do an act, either by himself or a third person, if the act be lawful, will make a covenant, and the law will hold him to his undertaking." *Hambly v. Delaware, M. & V.R. Co.*, 21 Fed. Cas. 541, 551 (C.C.D. Del. 1884).

⁷ *Guild v. Wallis*, 130 Ore. 148, 279 Pac. 546 (1929).

⁸ *Broad & Brandford Place Corp. v. Hockenjos Co.*, 132 N.J.L. 229, 39 A.2d 80 (1944).

⁹ A statement in a warranty deed that the tract conveyed contained 830 acres was held to be a mere representation or opinion of grantor and not a covenant in *Corraugh v. Hamill*, 110 Mo. App. 53, 84 S.W. 96 (1904). A provision in a lease that the lessee should give written notice sixty days before expiration of the lease if he desired an extension was held not to be a covenant; so that a provision that in the case of default in the performance of any covenant the acceptance of rent by the lessor or his failure to reenter should not be a waiver of his right to terminate the lease did not prevent lessor's acceptance of the rent after the expiration of the lease from amounting to a waiver of the requirement of the sixty days written notice by the lessee of his election to extend the lease. *Adam v. Consolini*, 135 Conn. 321, 64 A.2d 44 (1949).

In order to have a covenant it was at one time considered necessary that there be a writing under seal. The statute of 32 Hen. VIII, c. 34¹⁰ applied in terms to covenants in "indentures of lease" which had been under seal only, and consequently where the running of a covenant was dependent upon that statute it was considered necessary that the instrument containing the covenant be under seal.¹¹ But in the Conveyancing Act of 1881¹² the restriction as to indentures was removed.

The requirement as to a seal has rarely been referred to in this country and in common parlance a covenant can mean any agreement whether under seal or not.¹³ Of the many statutes in this country patterned after the statute of 32 Hen. VIII, c. 34 only the New Jersey statute has a like restriction as to indentures of lease and it is over a century old.¹⁴ Although the general statement that a covenant is a promise under seal is occasionally seen in the cases,¹⁵ it has been stated that there is no holding that a seal is a necessary element in a covenant,¹⁶ and now when a seal is referred to, it is generally referred to as being at least optional.¹⁷ However, in an early West Virginia case it was distinctly stated that a covenant real must be under seal as its very name imparts.¹⁸ But in West Virginia, and in many other states, where the necessity of a seal has been largely dispensed with by statute,¹⁹ the absence of a seal on the instrument would no doubt be immaterial today.

Indeed, it would seem that not only is a seal no longer necessary to the validity of a covenant, but the covenant need not even

¹⁰ This statute was enacted in England in 1540 for the purpose of making certain covenants run with the land.

¹¹ 1 TIEFFANY, REAL PROPERTY § 125 (3d ed. 1939).

¹² 44-45 VICT., c. 41, §§ 10, 11 (1881).

¹³ Jenkins v. Taylor Dry Goods Co., 352 Mo. 660, 179 S.W.2d 54, 58 (1944).

¹⁴ N.J. REV. STATS. 46:8-2-3 (1937).

¹⁵ Schram v. Coyne, 127 F.2d 205 (6th Cir. 1942); Petty v. Board of Trustees, 70 Ind. 290, 297 (1880); Broad & Brandford Place Corp. v. Hockenjos Co., 132 N.J.L. 229, 39 A.2d 80 (1944).

¹⁶ "No court in this country, it is believed, has denied the running of a covenant because the latter was not under seal, and it would be a distinct shock if one should." Bordwell, *English Property Reform and Its American Aspects*, 37 YALE L.J. 1, 23 (1927).

¹⁷ "A covenant is a promise, an agreement or a contract; formerly it was a contract under seal." Jenkins v. Taylor Dry Goods Co., 352 Mo. 660, 179 S.W.2d 54 (1944). "Any words importing an agreement in writing, whether sealed or unsealed, is a covenant." Guild v. Wallis, 130 Ore. 133, 279 Pac. 546 (1929).

¹⁸ Lydick v. Baltimore & Ohio R.R., 17 W. Va. 427, 442 (1880).

¹⁹ "The affixing of a seal, or any symbol or word intended to have the effect of a seal, to any instrument conveying or agreeing to convey land, or any interest whatever in land, shall not give to such instrument any additional force or effect, either by way of importing a consideration or any other manner whatsoever, either at law, or in equity, than such instrument would have if it were unsealed." W. VA. CODE c. 36, art. 4, § 3 (Michie, 1949). This statute was first enacted in 1923.

be in writing, although here again we find general statements that a covenant is an agreement in writing.²⁰ Covenants in parole leases have been held enforceable;²¹ and in speaking of one case where this was done, a noted authority on covenants stated that it was immaterial whether the lease was under seal or merely parole.²² To make oral covenants binding and even to make them run with the land has not bothered the courts in so far as the burden of stipulations in grants in fee by deeds poll are concerned. Such is the weight of authority in this country.²³ As a matter of fact, many of the modern adaptations of the aforementioned statute of Henry VIII are very general in their language and have nothing in them which would necessarily restrict their application to written leases.²⁴ Of course, many states have statutes which generally require deeds conveying real estate or leases thereof for long terms to be in writing to be valid, and in such cases it would naturally follow that any covenants in such conveyances would generally have to be in writing to be valid.²⁵ But the very fact that short term leases may be created by parole leads to the conclusion that parole covenants are effective.

As a further indication that covenants need not be in writing, and this would probably extend to cases where the instrument of

²⁰ *Guild v. Wallis*, 130 Ore. 138, 279 Pac. 546 (1929).

²¹ Where the lessor in a parole lease covenanted to repair, the covenant was held effective and to run with the land in *Hight v. McCulloch*, 150 Tenn. 117, 263 S.W. 794 (1924); and where the lessor prepared a lease, which was never executed, with a covenant to pay for all the lessee's property on the leased premises at the end of the term, the covenant was held not only to be an effective covenant between the parties but one which ran with the land in *Mansel v. Norton*, 22 Ch. D. 769 (1883). In the West Virginia case of *Lydick v. Baltimore & Ohio R.R.*, 17 W. Va. 427, 442 (1880) the court stated, "Of course a parol contract cannot be a covenant real, and therefore it cannot run with the land, and cannot therefore be sued on in a court of law by the grantee of the land which it affects." However, the court added, "But whenever the nature of the agreement is such, that it would have passed with the land, had it been sealed, subsequent purchasers of the estate to which it relates, who are substantially and beneficially interested in its performance, may enforce it in equity." Would the West Virginia statute abolishing the effect of a seal in an instrument conveying any interest in land, note 19 *supra*, have the effect of making a parole covenant enforceable in a court of law in West Virginia today? See also *Lucas v. Smithfield, C. & H.F. Turnpike Co.*, 36 W. Va. 427, 15 S.E. 182 (1892).

But see *Petty v. Board of Trustees*, 70 Ind. 290, 297 (1880), where the court, speaking of a covenant in a simple contract, stated that there was no such thing in legal parlance as a covenant which is not in writing.

²² *SMMS, COVENANTS WHICH RUN WITH THE LAND* 90 (1901).

²³ *Bordwell, English Property Reform and Its American Aspects*, 37 *YALE L.J.* 1, 23 (1927).

²⁴ Many of the statutes use general language to the effect that alienees of of lessors and lessees shall have the same legal remedies in relation to the land as their principals. *E.g.*, *IND. STATS.* §3-1625 (Burns, 1933, 1953 Replacement); and *KAN. GEN. STAT.* § 67-516 (1949).

²⁵ *E.g.*, *W. VA. CODE* c. 36, art. 1, §§ 1, 3 (Michie, 1949).

conveyance itself is required by statute to be in writing, there is extensive authority for the proposition that covenants may be implied;²⁶ and the effect of an implied covenant is as extensive as that of an express covenant.²⁷ Implied covenants depend for their existence upon the intention of the parties to the transaction and construction of law. It is not sufficient to say that an implied covenant is necessary in order to make the transaction fair, or that in the absence of such covenant it would be improvident or unwise, but it must arise from the presumed intention of the parties as gathered from the instrument as a whole.²⁸ There may even be implied covenants in an instrument where there are express covenants, but there can be none contradictory to or inconsistent with or repugnant to express covenants, nor to the expressed intention of the parties.²⁹

If the law will enforce a covenant which is unexpressed, either by writing or by parole, simply because it is presumed that the parties intended it to be a part of their agreement, there is ground for saying that the law will enforce a covenant which is expressed, though merely by parole.

The purpose of covenants in conveyances of land or estates therein is to establish the mutual obligations of the parties to the conveyance in regard to the land or estate conveyed. The promises and agreements have the immediate effect of being binding upon the parties if the instrument of conveyance is properly executed because of the privity of contract which exists between them. But upon a subsequent conveyance of the land or estate there exists no privity of contract between the original covenantor or covenantee and the then owner of the land or estate, the ones then interested in the subject matter of the covenant. To remedy this situation it became necessary for the law to develop some theory upon which these promises and agreements could be enforced by or against remote parties so that the person who made the covenant would be liable in case of a breach to the person interested in enforcing it.

²⁶ A covenant for quiet enjoyment is implied in a lease. *Johnson v. Missouri, Kansas, Texas R.R.*, 216 S.W.2d 499 (Mo. 1949); *Mayor v. Mabie*, 13 N.Y. 151 (1855); *Headley v. Hoopengartner*, 60 W. Va. 626, 55 S.E. 755 (1906). Covenant to develop premises is implied in an oil and gas lease. *Brimmer v. Union Oil Co. of Calif.*, 81 F.2d 437 (1936). Covenant to deliver possession is implied in a lease. *Goldman v. Dieves*, 159 Wis. 47, 149 N.W. 713 (1914). See 21 C.J.S., Covenants § 14 (1936); Notes, 137 A.L.R. 4408 (1941), 62 A.L.R. 1257 (1928).

²⁷ *Mayor v. Mabie*, 13 N.Y. 151 (1885).

²⁸ *Danciger Oil & Refinery Co. v. Powell*, 137 Tex. 484, 490, 154 S.W.2d 632, 635 (1941).

²⁹ *Hambly v. Delaware, W. & R. Co.*, 21 Fed. Cas. 541 (C.C.D. Del. 1884); *Johnson v. Missouri, Kansas, Texas R.R.*, 216 S.W.2d 499 (Mo. 1949).

This has been done on the theory that some covenants run with the land. How this developed with regard to transfers in fee is outside the scope of this paper, as its primary purpose is a consideration of covenants which run with the land in leases in general and covenants which run with the land in leases in West Virginia in particular.

Having given some slight consideration to the general aspects of covenants such as their meaning, characteristics and purpose, and without having attempted to mention any of the other aspects of covenants or to go into any great detail in regard to the aspects considered, the rest of the paper will be devoted to covenants in leases.

Nature of a Lease

While a lease is often referred to as a "contract of lease", this is, to some extent, a misnomer because a lease is generally recognized as a conveyance, not a contract.³⁰

In its primary sense a lease is a conveyance of any lands or tenements, usually in consideration of rent or other recompense, made for life, for years or at will, but always for a less time than that which the lessor has in the premises.³¹ But the word lease is often used in other senses, and when one speaks of covenants in a lease one is not referring to the estates created by a lease but the instrument or contract by which the parties create the estates. In this sense it is believed that the term "contract of lease" may be properly used, but the writer will, in general and for the sake of convenience, do as others generally do, and use the word lease itself in referring to the instrument or contract in which the covenants are incorporated as well as in its primary sense.

It is quite often difficult to distinguish a lease by which the relationship of lessor and lessee is established from other agreements which establish other types of relationships. For that reason there is confusion in the cases as to whether an agreement creates the relationship of lessor and lessee or a mere license which excuses an act done on the property of another which would otherwise be a trespass.³² Unlike a lease, a license conveys no interest in the

³⁰ 1 TIFFANY, REAL PROPERTY § 74 (3d ed. 1939).

³¹ *Simth v. Payne*, 153 Va. 746, 151 S.E. 295 (1930); *Greene Line Terminal Co. v. Martin*, 122 W. Va. 483, 10 S.E.2d 901 (1940).

³² *Baseball Publishing Co. v. Bruton*, 302 Mass. 54, 18 N.E.2d 362 (1938).

premises and is revocable at the will of the licensor, and such revocation will terminate the licensee's right to the premises.³³

There is also confusion as to whether certain agreements establish the lessor-lessee relationship or that of employer-employee. Typical of these cases is the agreement whereby one agrees to cultivate the land of another, receiving as his compensation a share of the crops. Such an agreement can create either of the above named relationships, and which of them is actually created in a given case is dependent generally upon the amount of control retained by the owner of the premises over the premises, crops and the other party to the agreement.³⁴

In another situation, where one acquires possession of property through an instrument whereby he agrees to pay a stipulated sum at intervals as rental for the premises for a term, the aggregate of such sums usually being the value of the property, there being in the instrument an option to purchase the property at the end of the term for the sum of one dollar, there is a split of authority as to whether this creates the relationship of lessor and lessee or is merely a contract to sell and purchase with payments in instalments. The weight of authority favors the latter view, even if the instrument purports to be a lease with an option to purchase, if the so-called rentals are sufficient, when paid through the term, to cover the purchase price.³⁵ The payment of the one dollar as additional purchase price is overlooked as inconsequential. In an early case the West Virginia court indicated that it would follow this view when it stated that such a contract was "plainly a contract of

³³ A.L.L. RESTATEMENT, TORTS §§ 176, 177 (1934). In *Baseball Publishing Co. v. Bruton*, note 32 *supra*, the court stated, "The revocation of a license may constitute a breach of contract, and give rise to an action for damages. But it is none the less effective to deprive the licensee of all justification for entering or remaining upon the land."

³⁴ *Carlson v. Industrial Accident Commission*, 294 Pac. 399 (Cal. 1930), *rev'd* 213 Cal. 237, 2 P.2d 151 (1931), *certiorari denied*, 284 U.S. 681 (1931). In this case the lower court had held that the agreement created the relationship of lessor and lessee. This holding was reversed in the appellate court because of the fact that the retention of the title to the crop by the owner of the premises and the extent of control given him by the instrument constituted the relationship one of employer and employee. In *Angel v. Black Band Consol. Coal Co.*, 96 W. Va. 47, 122 S.E. 274 (1924), the court held that there could be both a relationship of employer and employee and one of landlord and tenant. There the employer maintained houses at a financial loss for such employees as desired to live therein, deducting the rent and electricity charge from the employees' wages. Plaintiff and others quit work and went on a strike. In an action for forcible eviction against the defendant employer, the court held that plaintiff was an employee in regard to his mining coal, but a tenant in regard to his occupancy of the house which belonged to the defendant.

³⁵ *Mahoney v. San Francisco*, 201 Cal. 248, 257 Pac. 49 (1927); *Baltimore & Ohio S.W.R.R. v. People*, 200 Ill. 541, 66 N.E. 148 (1902); *Billings v. Bankers' Bond Co.*, 199 Ky. 490, 251 S.W. 643 (1923); Note, 71 A.L.R. 1318 (1929).

purchase in legal effect".³⁶ This was probably obiter dictum since the court indicated that it would reach the same result it did reach whether the instrument was a lease or contract of purchase. It might be said that the court gave some weight to the fact that the contract was twice designated as a contract of purchase in a paper made a part of the contract, but it is generally held that what the parties call the contract is not determinative in any case, as the court will look to the instrument as a whole and determine what it is in fact.³⁷ In a very recent West Virginia case,³⁸ however, the court without mentioning the *Spilman* case,³⁹ held that such an instrument was a lease with an option to purchase.⁴⁰

Also a lodger is to be distinguished from a tenant or lessee. Whether a person who is paying compensation for the use of a room in the home of another is one or the other is dependent upon the agreement between the parties.⁴¹

It is often important to establish the type relationship existing between the parties, because a different law may be applied dependent upon the relationship. If it is not that of lessor and lessee, the law of contracts will generally be applied, while if it is, the law of landlord and tenant will be applicable. A leasehold estate being a sort of hybrid estate, that is, it is an interest in land yet it is personal property,⁴² is governed by a hybrid type of law, that of landlord and tenant, which is neither wholly contract law nor wholly real property law.⁴³

Covenants in Leases

When a leasehold estate is created, the lessor or owner carves the estate in fee into two separate estates or interests by conveying

³⁶ *Spilman v. City of Parkersburg*, 35 W. Va. 650, 14 S.E. 279 (1891).

³⁷ *Baseball Publishing Co. v. Bruton*, 302 Mass. 54, 18 N.E.2d 362 (1938); *Lynch v. Robert P. Murray Hotel Co.*, 130 App. Div. 691, 115 N.Y.Supp. 465 (1909).

³⁸ *First Huntington National Bank v. Gideon Broh Realty Co.*, 79 S.E.2d 675 (W. Va. 1953).

³⁹ See note 36 *supra*.

⁴⁰ The court went on to hold that the option to purchase in the lease was void under the rule against perpetuities.

⁴¹ "The chief distinction between a tenant and a lodger apparently rests in the character of the possession. A tenant has the exclusive legal possession of the premises; he and not the landlord being in control and responsible for the care and condition of the premises. A lodger, on the other hand, has merely a right to the use of the premises; the landlord retaining the control and being responsible for the care and attention necessary and retaining the right of access to the premises for such purpose." *Marden v. Radford*, 229 Mo. App. 789, 84 S.W.2d 947, 955 (1935). See also *Mathews v. Livingston*, 86 Conn. 263, 85 Atl. 529 (1912); *Dewar v. Minneapolis Lodge*, 155 Minn. 98, 192 N.W. 358 (1923).

⁴² *Greene Line Terminal Co. v. Martin*, 122 W. Va. 483, 10 S.E.2d 901 (1940).

⁴³ 3 WILLISTON, CONTRACTS § 890 (Rev. ed. 1936).

an interest in the land to the lessee.⁴⁴ This interest is an estate in land and is called an "estate for years" or "leasehold estate". In so doing the lessor ceases to have an estate in possession and only reserves to himself an estate in reversion.⁴⁵ Thus there are created two estates, the leasehold estate and reversionary estate, one in privity with the other. One of these estates, the leasehold estate, will terminate at some future date leaving only one estate, the fee, in the hands of the owner of what was the reversionary estate. One person gives up something which he expects to get back at some future time and therefore he has a continuing interest in the estate conveyed. In this respect it is quite different from a conveyance in fee where the grantor reserves no interest and is therefore not concerned with the estate after he conveys it.

Because of the nature of a lease the covenants in the instrument creating the two estates become very important. The dual estates so created make it necessary that there be an understanding between the parties as to their obligations during the continuance of their relationship as the result of the creation of such interrelated estates, and so they generally agree as to what each is to do or not do in regard to the premises. The promises and agreements so made are referred to as covenants. In fact, certain covenants are so necessary in such case that if they are not expressly made they will be implied by law.⁴⁶

Since the law does not favor restraints upon the alienation of estates in property, and as a result the lessor can freely transfer his reversion,⁴⁷ and, as will be pointed out later, the lessee can usually transfer his leasehold interest, it is also necessary, in order that such covenants be fully effective, that covenants in a lease run with the land so that the assigns of either will have the benefit, and bear the burden, of such covenants. Otherwise, in many instances the lessor would find a stranger in rightful possession of his land against whom he would have no remedy in case the terms of the lease were not complied with, or the lessee, or his assigns, would find that the

⁴⁴ *Ibid.* That a leasehold estate is an interest in land will be the subject of a more detailed discussion later in this paper. See notes 277-279, *infra*, for authorities.

⁴⁵ "The reversion is that estate which is left when from the entire fee a lesser particular estate in being is granted. *Stinson v. Rouse*, 52 Me. 261. It is that present, vested, alienable, inheritable, and devisable residue of an estate remaining in a grantor or his successors, or in the successors of a testator, to be enjoyed in possession, from and after the happening of a particular event, at some future time." *Johnson v. Palmer*, 118 Me. 226, 230, 107 Atl. 291, 293 (1919).

⁴⁶ See note 26 *supra*.

⁴⁷ 2 TIFFANY, REAL PROPERTY § 313 (3d ed. 1939).

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lessor's interest had been transferred to a stranger and many of the benefits of the lease would be unenforceable as a practical matter. In so far as covenants in the lease run with the land, this difficulty is avoided since the holder of the reversion or of the leasehold interest would be bound by those covenants.

No attempt will be made here to give a complete definition of the term "covenants which run with the land". Such a definition would be difficult to put into a few words, and what is and what is not such a covenant will be the theme of a large part of this paper. It will suffice to say at this time that a covenant which runs with the land is a covenant which can be enforced by or against remote parties. Such a covenant is sometimes said by courts to be one which is attached to the land in such a manner as to be an incident to the ownership of the land so that the right to enforce it or the liability under it passes with the land conveyed.⁴⁸ While there seems to be a similarity between the running of a covenant and the assignment of rights under the covenant, the two situations are entirely distinct. The covenant which runs with the land does so because it is an incident to the ownership of the interest in land conveyed and can be enforced by the present owner of the interest even though he is a remote party. In the case of an assignment of rights under the covenant, the benefit of the covenant passes to the assignee solely because of a derivative privity of contract. The assignment of the rights under the covenant confers the benefit of the covenant to the assignee and rests upon the privity of contract existing between the assignor and the covenantor and is derivative, not direct. Further, only the benefits of a covenant are passed by such an assignment and not the burdens, while in the case of covenants which run with the land, both the benefits and the burdens may pass to the assignee, depending upon whether the transferee of the particular estate is the assignee of the covenantee or the covenantor.⁴⁹ When the covenant runs with the land, the transfer of the estate carries with it the benefit or the burden of the covenant without the necessity of an assignment, or even the mention of the covenant.⁵⁰ This is true even though the transfer of the estate does not relieve the original covenantor of the burden of the covenant since he is bound to the covenantee and his assigns by privity of contract.⁵¹

⁴⁸ Abbott, *Covenants in a Lease Which Run with the Land*, 31 YALE L.J. 127 (1921).

⁴⁹ *Ibid.*

⁵⁰ Kirby v. Goldman, 270 Mass. 444, 170 N.E. 414 (1930).

⁵¹ Abbott, *Covenants in a Lease Which Run with the Land*, note 48 *supra*

The aforementioned statute of Hen. VIII purported to give remedies to the lessor or his assigns against the lessee and his assigns, and, conversely, remedies to the lessee or his assigns against the lessor or his assigns. The mutuality of the remedy conferred by the statute rests only on privity of estate and, since it is only effective where there is no privity of contract, it continues only so long as such privity exists unless there is an assumption of the burdens of the covenants in the lease by the assignee which establishes privity of contract.⁵² Since this is true, the assignee of either of the original parties can escape liability by severing the privity of the estate. This can be accomplished by reassigning the estate previously assigned to him.⁵³ He can escape the liability which rests solely on privity of estate by such assignment to another party even though his express object in doing so is to escape liability under the covenants in the lease which run with the land.⁵⁴ This type of privity then, which arises only because the two parties have simultaneous interests in the same land, is entirely different from privity of contract in that it can be severed by the act of one of the parties without the consent or concurrence of the other.

It would seem that when we speak of covenants running with the land we are speaking of covenants running with the estate or interest conveyed. Such covenants are covenants which are so attached to the land that the right to enforce them, or the obligation to perform them, passes with the estate conveyed as an incident of ownership.⁵⁵ On the transfer of the leasehold estate or the estate in reversion, the transferee takes the estate subject to the burden of certain covenants or with the benefit of certain covenants.

Since there is no privity of contract upon which to base a personal action for damages, the courts must work out some kind of privity between an assignee of the covenantee and the covenantor or his assigns before there can be an action by one against the other. Thus we have the privity of estate basis for such an action. It should be pointed out that it is a serious matter to impose

⁵² 68 Beacon St. v. Sohler, 289 Mass. 354, 194 N.E. 303 (1935).

⁵³ Kirby v. Goldman, 270 Mass. 444, 170 N.E. 414 (1930); Tate v. McCormick, 23 Hun. 218 (N.Y. 1880); Sander v. Piggly Wiggly Stores, Inc., 20 Tenn. App. 107, 95 S.W.2d 1266 (1936).

⁵⁴ Fensterwald v. Samet, 138 Md. 201, 113 Atl. 750 (1921); McMorris v. Keeley Real Estate Co., 147 Mo. App. 667, 127 S.W. 411 (1911). In these cases it was held that a reassignment of a lease to an insolvent rag picker or peddler in order to get rid of burdensome covenants was effective as long as there was a valid assignment and not a sham or bogus transfer. The same would presumably be true in the case of a reassignment of the reversion, but such a case is not likely to arise.

⁵⁵ Masury v. Southworth, 9 Ohio St. 340 (1859); Abbott, *Covenants in a Lease Which Run with the Land*, 31 YALE L.J. 127 (1921).

personal liability upon a person for the breach of a promise he did not make. Accordingly, it is not surprising that not all covenants are held to run with the land. The covenant must be of the type which is so attached to the land as to be a part of the estate conveyed, or of a type which the covenantee cannot, after his assignment of the estate, take advantage of, and which is beneficial to the assignee as such, or an action will not lie upon the covenant merely because of privity of estate even though the covenant is incorporated in a lease.⁵⁶ In other words, a purely personal covenant will not run with the estate conveyed.⁵⁷ A collateral, as distinguished from a real, covenant will not run with the land and only the covenantee can have an action against the covenantor for the breach of the covenant unless there is an assignment of rights under the covenant to establish privity of contract.⁵⁸ A covenant is a covenant real and runs with the land only when it attaches to the land or some interest therein actually granted the covenantee or covenantor.⁵⁹ Or, as stated in other cases, if an interest in land is conveyed and in the conveyance a covenant is made to do an act which concerns the land and which thus becomes united to it so that it affects the value of the land in whosoever hands it may come, it is a covenant real and runs with the land and the assignee may have the benefit of, or be liable to perform, the covenant.⁶⁰ But covenants in leases by which parties bind themselves to do or not to do acts which in no way affect the use and enjoyment of the demised premises are merely personal obligations between themselves and do not run with the land.⁶¹ And if the covenant is beneficial to the covenantee without regard to his continuing to be the owner of the estate conveyed or reversion retained, it is a mere collateral or personal covenant upon which the assignee cannot sue.⁶² Even though the covenant may benefit the estate of the covenantee, it is a personal covenant, rather than a real covenant, if there is no privity of estate.⁶³

There will be a further discussion later concerning the problem

⁵⁶ *Vernon v. Smith*, 5 B. & Ald. 1, 106 Eng. Rep. 1094 (1821).

⁵⁷ *Luray Caverns Co. v. Kaufman*, 112 Va. 725, 72 S.E. 709 (1911); *Mayor v. Pattison*, 10 East 130, 103 Eng. Rep. 725 (1808).

⁵⁸ *Ibid.*

⁵⁹ *Rawlings v. Fisher*, 101 W. Va. 253, 132 S.E. 489 (1926); *Tennant v. Tennant*, 69 W. Va. 28, 70 S.E. 851 (1911).

⁶⁰ *Mayor v. Pattison*, 10 East 130, 103 Eng. Rep. 725 (1808); *Lydick v. Baltimore & Ohio R.R.*, 17 W. Va. 335 (1880).

⁶¹ *507 Madison Avenue Realty Co., Inc. v. Martin*, 200 App. Div. 146, 192 N.Y. Supp. 762 (1922), *aff'd*, 233 N.Y. 683, 135 N.E. 969 (1922).

⁶² *Vyvyan v. Arthur*, 1 B. & C. 410, 107 Eng. Rep. 152 (1823); *Vernon v. Smith*, 5 B. & Ald. 1, 106 Eng. Rep. 1094 (1821).

⁶³ *Hurxthal v. Boom Co.*, 53 W. Va. 87, 44 S.E. 520 (1903).

of whether there is a sufficient touching and concerning of the estate by the covenant to make it a covenant real so as to run with the land.

History of the Running of Covenants

For all practical purposes the running of covenants in leases can be traced to the statute of 32 Hen. VIII, c. 34, enacted by Parliament in 1540. Whatever was the status of the law in this regard prior to the enactment of this statute, and there is good reason to believe that covenants in leases were held to run,⁶⁴ many courts broadly accept the view that the statute was the origin of the running of covenants in leases and that they did not run at common law.⁶⁵ But a probable majority of the courts take the view that covenants did run with the leasehold at common law although they did not run with the reversion.⁶⁶

At the time of the enactment of this statute many lands which had belonged to the monasteries and other religious organizations had come into the possession of the king by operation of the mortmain statutes, and the king had granted most of such land to various favored subjects. A considerable amount of this land was subject to leases made by the religious organizations which contained many covenants and provisions for the benefit of the lessors. Coming to the king by forfeiture as the land did, the king and his grantees lost many of these rights in the property. They could not claim rights under the covenants or conditions in the leases for these all required a privity, or at least a personal succession to be enforceable. Thus it will be seen that there was more reason for the passage of a law allowing actions on covenants in this situation than in the ordinary situation where there was at least personal succession between the parties. The king's interest had already been protected by 31 Hen. VIII, c. 13, §§ 1-2 (1539), but still a way of transferring the rights of the king to his grantees was needed.⁶⁷ This was the situation which the statute 32 Hen. VIII, c. 34, was enacted to remedy.⁶⁸

⁶⁴ SIMS, COVENANTS WHICH RUN WITH THE LAND 58 (1901); 1 TIFFANY, REAL PROPERTY § 125 (3d ed. 1939).

⁶⁵ SIMS, COVENANTS WHICH RUN WITH THE LAND 58 (1901).

⁶⁶ Masury v. Southworth, 9 Ohio St. 340 (1859); Bream v. Dickinson, 2 Hump. 126, 21 Tenn. 126 (1840); Magoon v. Eastman, 86 Vt. 261, 84 Atl. 869 (1912); 1 TIFFANY, LANDLORD & TENANT § 158a (1910).

⁶⁷ See Co. Litt. 21a.

⁶⁸ 32 HEN. VIII, c. 34, 1540: "Where before this time divers, as well temporal as ecclesiastical and religious persons, have made sundry leases, demises and grants to divers other persons, of sundry manors, lordships, fermes, meases, lands, tenements, meadows, pastures, or other hereditaments, for term of life or lives, or for term of years, by writing under their seal or seals, containing

It is clear from a reading of the statute that it was intended to apply only to leases, but this intention, like many other reasonably apparent intentions of law-making bodies, has not been carried

certain conditions, covenants and agreements to be performed, as well on the part and behalf of the said lessees and grantees, their executors and assigns, as on the behalf of the said lessors and grantors, their heirs and successors; (ii) and forasmuch as by the common law of this realm, no stranger to any covenant, action or condition, shall take any advantage or benefit of the same, by any means or ways in the law, but only such as be parties or privies thereunto, by the reason whereof, as well all grantees of reversions, as also all grantees and patentees of the King our sovereign lord, of sundry manors, lordships, granges, fermes, meases, lands, tenements, meadows, pastures or other hereditaments late belonging to monasteries, and other religious ecclesiastical houses dissolved, suppressed, renounced, relinquished, forfeited, given up, or by other means come to the hands and possession of the King's majesty since the fourth day of February the seven and twentieth year of his most noble reign, be excluded to have any entry or action against the said lessees and grantees, their executors or assigns, which the lessors before that time might by the law have had against the same lessees for the breach of any condition, covenant or agreement comprised in the indentures of their said leases, demises and grants: (iii) be it therefore enacted by the King our sovereign lord, the lords hereditary and temporal, and the commons, in this present parliament assembled, and by authority of the same, That as well all and every person and persons, and bodies politic, their heirs, successors and assigns, which have or shall have any gift or grant of our said sovereign lord by his letters patents of any lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments, or of any reversion or reversions of the same, which did belong or appertain to any of the said monasteries, and other religious and ecclesiastical houses, dissolved, suppressed, relinquished, forfeited, or by any other means come to the King's hands since the said fourth day of February the seven and twentieth year of his noble reign, or which at any time heretofore did belong or appertain to any other person or persons, and after came to the hands of our said sovereign lord, (iv) as also all other persons being grantees or assignees to or by our said sovereign lord the King, or to or by any other person or persons than the King's highness, and the heirs, executors, successors, and assigns of every one of them, (v) shall and may have and enjoy like advantages against the lessees their executors, administrators and assigns, by entry for non-payment of the rent, or for doing of waste or other forfeiture; (vi) and also shall and may have and enjoy all and every such like, and the same advantage, benefit and remedies by action only, for not performing of other conditions, covenants or agreements contained and expressed in the indentures of their said leases, demises or grants, against all and every the said lessees and farmers and grantees, their executors and administrators and assigns, as the said lessors or grantors themselves, or their heirs or successors, ought, should, or might have had and enjoyed at any time or times; (vii) in like manner and form as if the reversion of such lands, tenements or hereditaments had not come to the hands of our said sovereign lord, or as our said sovereign lord, his heirs and successors, should or might have had and enjoyed in certain cases, by virtue of the act made at the first session of this present parliament, if no such grant by letters patents had been made by his Highness.

"II. Moreover be it enacted by authority aforesaid, That all farmers lessees and grantees of lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments, for term of years life or lives, their executors, administrators and assigns, shall and may have like action, advantage and remedy against all and every person and persons and bodies politic, their heirs, successors and assigns, which have or shall have any gift or grant of the King our sovereign lord, or of any other person or persons, of the reversion of the same manors, lands, tenements, and other hereditaments so letten, or any parcel thereof, for any condition, covenant or agreement contained or expressed in the indentures of their lease and leases, as the same lessees, or any of them might and should have had against the said lessors and

out and many courts have based their holdings that covenants in conveyances in fee run with the land upon this statute.⁶⁹

An analysis of the statute shows that it purported to give to the grantees of the king, and to the grantees of any other person, any right of entry for nonpayment of rent, waste or other forfeiture, and the benefit of any condition, covenant or agreement in the lease, which the original lessor had. These rights extended to the assigns of the king, or lessor, but the burdens created by these rights extended to the assigns of the lessee only if the original lessor would have had such rights against them.

So, while the motivating purpose of the statute was to benefit the grantees and assigns of the king, it was broad enough to give the assignees of any land which was subject to a lease the benefit of the terms of the lease. Whatever was the state of the common law with regard to the running of covenants in leases with the reversion, here was a statute broad enough in terms to make them run, at least so far as the benefits were concerned.

Even in 1540 it apparently was thought necessary to give something to the other side in order to get a statute enacted, and, interestingly enough, one which the king and the lords wanted passed. It has been noted that in the first part of the statute the benefits extended to others than the king's grantees, and it will be noticed that the second part was for the benefit of the lessees, possibly so that the statute would not appear to be too one-sided. And the language in the second part of the statute seems broad enough to make the burdens of covenants in leases run with the reversion so that the grantees of the king, and assigns of lessors, would be bound by them since it purports to give lessees and their assigns the benefit of covenants against the grantees of the king and assignees of other persons which the lessee had against the original lessors. However, if the view that covenants run with the leasehold, but not with the reversion,⁷⁰ is accepted, then the lessees obtained nothing by the statute, in so far as the running of the benefits of covenants is concerned, which they did not

grantors, their heirs and successors; (ii) all benefits and advantages of recoveries in value by reason of any warranty in deed or in law by voucher or otherwise only excepted." See SIMS, COVENANTS WHICH RUN WITH THE LAND 71 *et seq.*

⁶⁹ Or at least these cases base their holdings upon the law laid down in *Spencer's Case*, 5 Co. Rep. 16a, 77 Eng. Rep. 72 (1583), which was a lease case and is generally considered to have construed this statute. See note 74 *infra*. See *Maryland & P. R.R. v. Silver*, 110 Md. 510, 73 Atl. 297 (1909); *Burbank v. Pillsbury*, 48 N.H. 475 (1869); *Kellogg v. Robinson*, 6 Vt. 276 (1834); CLARE, COVENANTS AND INTERESTS RUNNING WITH THE LAND 96 (2d ed. 1947).

⁷⁰ See note 66 *supra*.

already have, but the statute did aid them in making the burdens run as against the assigns of the lessor.

While the subject of the running of benefits and burdens in leases will be dealt with in detail later, it is important now to see what effect the statute had on the problem in order to compare later the statute as enacted and interpreted. If a covenant runs with the land it is difficult to see how its benefits can run without its burdens also running, or vice versa, but it seems to be entirely possible for them to do so.⁷¹

In the statute the grantees of the king or lessors were given the same rights on all covenants and conditions in the lease against the lessees or their assigns *which the original lessors might have had*, but they were not given any rights which the original lessors did not have. In other words, for the assigns of the lessor to have a right or benefit under a covenant in a lease against assigns of the lessee, the lessor himself must have had this right against such assigns. So if the original lessor did not have a right against the assigns of the lessee, either by the terms of the lease or because the burden of the covenant ran with the land and bound the assigns of the lessee, then the assigns of the lessor were given no rights under the statute against such assigns of the lessee. The statute made the benefit of the covenant run so that the assigns of the lessor received what benefits the lessor had, but the burden of the lessee's covenant stood still and remained with the original covenantor, the lessee, even though the lessee had assigned his estate. So, in order for the lessor, the original covenantee, and his assigns to be able to enforce the burden of the covenant against the assigns of the lessee, the original covenantor, it was necessary that (1) the lease in terms bound the assigns of the lessee, or (2) the common law made such burden run with the land, or (3) the courts interpreted the statute as making the burden run.

Another aspect of the statute was that it did not in any way distinguish between conditions, covenants or agreements. Therefore, it would seem that the probable intent of Parliament was to make available to the assigns of lessors and lessees all the benefits to which their assignors were entitled, irrespective of whether they were covenants, conditions or agreements. And there was nothing in the statute to indicate that the subject matter of the covenant, condition or agreement should be in existence when the conveyance was made in order that the assign should be entitled to its benefit,

⁷¹ CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND 102 (2d ed. 1947).

nor any indication of an intent that the mention or non-mention of assigns in the instrument of conveyance should have any effect, nor that the covenant, condition or agreement should be required to concern the land in order for such benefit to pass to the assigns. The statute, in general terms, was apparently meant to put the assigns of the lessor and lessee in the place of, and give them the rights of, and, in some cases, more rights than, their assignors in so far as benefits under the lease were concerned.

But the statute had only been in existence forty-two years when the now famous *Spencer's Case*⁷² was decided. In that case the court held that a covenant did not run with the land unless certain conditions existed and thus put very definite limitations on the effect of the statute of Hen. VIII.⁷³ Whether or not Lord Coke was correct in holding as he did in that case, the case, even more than the statute it interpreted, became the basis for the running of covenants in conveyances of land, and in any article dealing with the running of covenants more than passing notice must be given to it.

However, it should be pointed out, as it seldom is, that *Spencer's Case* may not have been intended to be an interpretation of the statute of Hen. VIII. There was no mention of the statute in the case at any point, and the statute was not applicable to the facts of the case. The lessee had covenanted to build a brick wall on the demised premises and assigned the lease to defendant's assignor who had assigned it to defendant, the wall not having been built. The lease did not purport to bind the assigns of the lessee. The original lessor brought an action against defendant for breach of the covenant. As stated above, the statute did not purport to enlarge the rights of the lessor, or for that matter to give the assigns of the lessor any greater rights than the lessor had, but only purported to give these assigns the same benefits that the lessor had. So there was really no reason for the court to mention the statute as the lessor only had a right of action against the assignee of the lessee if he had such a right at common law. Nevertheless, the case is generally considered as an interpretation of the statute of Hen. VIII.⁷⁴

⁷² 5 Co. Rep. 16, 1 Smith's Leading Cases 55 (11th ed.), 77 Eng. Rep. 72 (1583).

⁷³ The extent to which the statute of Hen. VIII was modified by *Spencer's Case* is discussed at length in *Massachusetts Mutual Life Ins. Co. v. Jeckell*, 124 F.2d 339, 342 (6th Cir. 1941).

⁷⁴ *Ibid*; *Purvis v. Shuman*, 273 Ill. 286, 112 N.E. 679 (1916); SIMS, COVENANTS AND INTERESTS RUNNING WITH THE LAND 109 (1901).

But even at common law covenants were held to run with the leasehold interest, if not with the reversion,⁷⁵ and the court in *Spencer's Case* stated that the burden of a covenant would ordinarily run with the land, but it held that it would not run if the subject matter of the covenant were not "in esse", unless assigns were named. In other words, the subject matter of the covenant had to be in being at the time of the conveyance, when the covenant was made, or assigns had to be named, for the covenant to be binding on the assigns of the covenantor.⁷⁶

Having decided this, which decided the case before it, the court went on to lay down other rules in the form of resolutions as to the running of covenants. The court stated that a covenant such as the one involved in that case, although the subject matter of the covenant was not in esse, could run with the land so as to bind the assigns of the covenantor if the covenantor had covenanted for himself and his assigns, and that the assigns of the covenantee would be entitled to the benefits of the covenant if it were made to the covenantee and his assigns.⁷⁷ Thus it made a great difference in the running of covenants whether the word "assigns" was used in the instrument of conveyance, and apparently, to make both the benefits and the burdens of the covenant run, the word must be used twice if the subject matter of the covenant were not in existence when the covenant was made. Otherwise, if the covenant were made by the covenantor for himself and his assigns, or to the

⁷⁵ See note 66 *supra*.

⁷⁶ The first resolution in *Spencer's Case*: "1. When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee although he be not bound by express words: but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being: as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is *quodammodo* annexed appurtenant to houses, and shall bind the assignee although he be not bound expressly by the covenant: but in the case at bar, the covenant concerns a thing which was not *in esse* at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being."

⁷⁷ The first part of the second resolution in *Spencer's Case*: "2. It was resolved that in this case, if the lessee had covenanted for him and his assigns, that they would make a new wall upon some part of the thing demised, that for as much as it is to be done upon the land demised, that it would bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. So on the other side, if a warranty be made to one, his heirs and assigns, by express words, the assignee shall take benefit of it, and shall have a *warrantia chartae*, F. N. B. 135, & 9 E. 2 Garr' de Charters 30, 36 E. 3. Garr. 1. 4 H. 8. Dyer 1."

covenantee and his assigns, the burden only would run in the first instance and the benefit only in the last, making it entirely possible for the benefits to run without the burdens running and vice versa.

The court further laid down the rule that in certain cases, even though the subject matter of the covenant was in existence, or, if not, and the covenantor had covenanted for himself and his assigns to the covenantee and his assigns, the covenant would not run if the thing to be done did not touch or concern the land demised.⁷⁸ In other words, if the covenant by the lessee in *Spencer's Case* had been to build a fence on other land of the lessor, land other than that leased to the lessee, then that covenant would not have been binding upon the assigns of the lessee even though the lessee had covenanted for himself and his assigns, nor would the lessor's assigns have been able to enforce it had the covenant been made to the lessor and his assigns. The covenant, in order that it be held to run with the land, must be in regard to the very land which is the subject matter of the conveyance in which the covenant is made.

As stated above, there was nothing in the statute of Hen. VIII that would restrict the running of covenants in leases to covenants made in regard to things in existence at the time the covenant was made, or to things which touch or concern the land which was the subject matter of the lease; indeed, the language was broad enough to include all covenants in the leasing instrument. But when the purpose for which the statute was enacted, the mischief to be remedied by the statute, is looked to, and this is one of the better rules in the field of statutory construction,⁷⁹ a good reason for the

⁷⁸ The second part of the second resolution in *Spencer's Case*: "But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over; and therefore in such case the assignee of the thing demised cannot be charged with it, no more than any other stranger."

⁷⁹ In the leading case on the mischief-rule approach in statutory interpretation and construction, decided a year after *Spencer's Case*, it was stated that four things are to be considered in interpreting a statute. "1st. What was the common law before the making of the Act. 2nd. What was the mischief and defect for which the common law did not provide. 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, 4th. The true reason of the remedy. And then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and proprivoto commodo, and to add force and

latter rule can be seen. The mischief to be remedied was the fact that covenants made in regard to things to be done or not to be done on, or concerning, the land leased could not be enforced by others than the original parties to the conveyance because of lack of privity of contract. Both the leasehold interest and the reversionary interest being freely alienable, these interests often came into the hands of others who might then need the benefit of such covenants, and the original party might no longer be interested in enforcing them. The grantees of the king were not interested in enforcing covenants made by the lessee of the land granted to them in regard to other land of the original lessor, but were interested in enforcing the covenants in the leases of the land which they and the lessees now owned in common, one the reversionary interest and the other the leasehold interest. It may well be that the reason that this is the only rule laid down in *Spencer's Case* that has survived the test of time is because it is the only rule of that case which had a firm foundation.

Requirements for the Running of Covenants

Before a covenant can be said to be one which can run with the land it must comply with certain requirements. Since the time *Spencer's Case* was decided, at least, the courts have used various tests to determine whether a particular covenant could run with the land. As has been shown, *Spencer's Case* laid down the requirements that the subject matter of the covenant must be in esse, or assigns named, and the covenant must touch or concern the land, before it can run with the land. Some of these requirements are held to be essential elements for the running of covenants yet today. But some jurisdictions have expressly discarded some of them as will appear later.

Another test often applied in order to determine whether a covenant runs with the land is the intent of the original parties in regard to the matter. While this cannot be a determining factor in many cases, it does have considerable bearing in other cases.

And the courts generally hold that there must be privity of estate before a covenant can run with the land. This is considered by nearly all courts to be an essential element in the running of covenants. This is easy to understand since before the question of running of covenants can arise there must have been an assign-

life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*." *Heydon's Case*, 3 Co. Rep. 7a, 76 Eng. Rep. 634 (1584). See also *Cabell v. Markham*, 148 F.2d 737 (2d Cir. 1945); *Judd v. Laudin*, 211 Minn. 465, 1 N.W.2d 861 (1942).

ment of his interest by one of the original parties to a person who was not a party to the instrument of lease. Thus a covenant in the lease is sought to be enforced by or against one who is not in privity of contract with the other and the basis of the action must be privity of estate.

The "In Esse" and "Assigns" Rules

The rule that in order for a covenant in a lease to run with the land the subject matter of the covenant must be in esse at the time of the demise or leasing, or assigns be named, was carried over from England to this country as the law in some states,⁸⁰ but it has now been discarded by most of the states as an unnecessary and arbitrary rule,⁸¹ and covenants in a lease will run with the land without regard to whether the subject matter of the covenant was in existence at the time the demise was made.

However, the effect of this rule is not so easily lost and the courts sometimes arrive at a decision because of it apparently without realizing it. In a fairly recent West Virginia case⁸² the court stated that a covenant by the lessor that he would, at the end of the term, pay the lessee for improvements which the lessee placed on the premises was not a covenant which ran with the land. The court did not give as a reason for its statement the fact that the subject matter of the covenant was not in existence when the lease was made, but it cited an old New York case⁸³ which does base its decision on that ground. The West Virginia court also cited two old Illinois cases⁸⁴ which based their holdings on the ground that the improvements were not in existence when the lease was made and cited *Spencer's Case* as authority for their holdings; and the only other case cited by our court for this proposition was an

⁸⁰ *Hansen v. Meyer*, 81 Ill. 321, 25 Am. Rep. 282 (1876); *Maryland & Pennsylvania R.R. v. Silver*, 110 Md. 510, 73 Atl. 297 (1909); *Thompson v. Rose*, 6 Cow. 302 (N.Y. 1826); *Bream v. Dickerson*, 2 Humph. 126 (Tenn. 1840).

⁸¹ In *Sexaur v. Wilson*, 136 Iowa 357, 113 N.W. 941 (1907), the court stated, ". . . the covenant may as well be said to be annexed, not to the thing not in esse, but to the land itself upon which the thing is to be made or done. . . ." In *Bordwell, English Property Reform and Its American Aspects*, 37 YALE L.J. 1, 26, (1927), the author states, "The whole trend of modern decisions is against the relevance of the existence or nonexistence of the subject matter of the covenant". In *Bald Eagle Valley R.R. v. Nittany Valley R.R.*, 171 Pa. 284, 33 Atl. 239 (1895), the court criticized the rule as an arbitrary ancient rule like that of *Shelley's Case*, *Twyne's Case* and others. See also *Brown v. Southern Pacific Co.*, 36 Ore. 128, 58 Pac. 1104 (1899).

⁸² *Miami Cooperative Mining Co. v. Cherokee Coal Co.*, 96 W. Va. 11, 122 S.E. 286 (1924).

⁸³ *Tallman v. Coffin*, 4 N.Y. 134 (1850).

⁸⁴ *Hansen v. Meyer*, 81 Ill. 321, 25 Am. Rep. 282 (1876); *Watson v. Gardner*, 119 Ill. 312, 10 N.E. 192 (1887).

old Tennessee case⁸⁵ which relied wholly upon *Spencer's Case* for its holding. So our court in fairly recent times stated a rule of law, dictum since it was not necessary to its decision,⁸⁶ based, in effect, on the in esse rule in *Spencer's Case*. It is interesting to note that prior to the time the West Virginia case was decided, and subsequent to the time it decided the two cases cited by our court, the Illinois court had held that the lessor's covenant to purchase improvements at the expiration of the term did run with the land though assigns were not mentioned in the lease. The court stated, "Whether there was ever any rational ground for a distinction between things which are or are not in esse when the covenant is made where they do not concern the use and enjoyment of the demised premises, there certainly is none where the covenant directly concerns such use and enjoyment."⁸⁷ In the West Virginia case the improvements covenanted to be paid for were improvements to be made to put a leased mine in condition to be operated and so certainly the covenant directly concerned the use and enjoyment of the demised premises.

If, as many courts hold, the in esse rule is no longer effective, then the use of the words "and assigns" to make a covenant run in regard to things not in existence is no longer useful as the covenant will run as well without them as with them. This rule, like the in esse rule, was carried over into this country,⁸⁸ and then discarded along with it in most jurisdictions.⁸⁹ But the use of this term has other effects, e.g., to establish the intent of the parties⁹⁰ as will be pointed out later. It has been stated by the West Virginia court fairly recently that the use of this term will have the effect of making

⁸⁵ *Bream v. Dickerson*, 2 Humph. 126 (Tenn. 1840).

⁸⁶ In the West Virginia case, note 82 *supra*, the only thing the court had to decide was whether the lessee had the right to hold the premises after the lease had terminated until it was paid for the improvements it placed upon the premises. Further, the lease contained a stipulation that the lease was to terminate immediately upon a sale of the premises by the lessor, and so the grantee of the lessor would not take the property subject to the lease and would not be bound by its covenants.

⁸⁷ *Purvis v. Shuman*, 273 Ill. 286, 298, 112 N.E. 679, 683 (1916).

⁸⁸ *Maryland & Pennsylvania R.R. v. Silver*, 110 Md. 510, 73 Atl. 297 (1909); *Tallman v. Coffin*, 4 N.Y. 134 (1950).

⁸⁹ In *Brown v. Southern Pacific R.R.*, 36 Ore. 128, 58 Pac. 1104 (1899), the court stated that the necessity of the word "assigns" originated at a time when it was necessary to use the word "heirs" or other words of inheritance in order to grant an estate in fee. See also *Sexaur v. Wilson*, 136 Iowa 357, 113 N.W. 941 (1907). But see W. VA. CODE c. 36, art. 4, §§ 1 and 17 (*Michie*, 1949), and revisers' note following section 17, at notes 253, 254 and 255 *infra*.

⁹⁰ *Hart v. Socony-Vacuum Oil Co.*, 291 N.Y. 13, 50 N.E.2d 285 (1943).

a covenant run with the land when it would not otherwise run in a case which will be discussed in detail later.⁹¹

Thus we see that in modern times, except for occasional unguarded statements,⁹² the only rule laid down in *Spencer's Case* in regard to leases of real property which has any real significance is the rule that in order that a covenant in a lease run with the land the covenant must touch or concern the land, meaning the land which was the subject matter of the lease, and that this rule is with us today is evidenced by numerous cases.⁹³ But granting this, still the effect of *Spencer's Case* was to put a limitation upon the broad general terms of the statute of Hen. VIII by limiting the effect of the statute to covenants which run with the land.⁹⁴

"Touch or Concern" Rule

What determines when a covenant touches or concerns the land demised is difficult of solution. Judge Clark has said that it is impossible to lay down any absolute tests,⁹⁵ but he goes on to state:

"Professor Bigelow has, however, in his article on *The Content of Covenants in Leases*, [12 MICH. L. REV. 639 (1914)] set forth a scientific method of approach to the problem which seems to afford the most practical working tests for the court to employ. The method he states is to ascertain the exact effect of the covenant upon the legal relations of the parties. In effect it is a measuring of the legal relations of the parties with and without the covenant. 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 promise touches or concerns that land. It is necessary that this effect should be had upon the legal relations of the parties as owners of the land in question,

⁹¹ *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 112 S.E. 513 (1922).

⁹² *E.g.*, statement in *Miami Cooperative Mining Co. v. Cherokee Coal Co.*, 96 W. Va. 11, 122 S.E. 286 (1924), that a covenant by lessor to pay for improvements put on the premises by the lessee does not run with the land and bind the assigns of the lessor. The West Virginia court would probably not approve of the grounds that the courts used in the cases it cited as authority for this statement.

⁹³ *165 Broadway Building v. City Investment Co.*, 120 F.2d 813 (2d Cir. 1941); *Jordan v. Indianapolis Water Co.*, 159 Ind. 337, 64 N.E. 680 (1902); *Maryland & Pennsylvania R.R. v. Silver*, 110 Md. 510, 73 Atl. 297 (1909); *Myers v. Burns*, 33 Barb. Ch. 401 (N.Y. 1861); *McIntosh v. Vail*, 126 W. Va. 395, 28 S.E.2d 603 (1943); *Tennant v. Tennant*, 69 W. Va. 28, 90 S.E. 861 (1911).

⁹⁴ *Magoon v. Eastman*, 86 Vt. 261, 84 Atl. 869 (1912); CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND 96 (2d ed. 1947).

⁹⁵ CLARK, *op. cit. supra* note 94, at p. 96.

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and not merely as members of the community in general, such as taxpayers, or owners of other land, in order that the covenant may run. Thus, an agreement by the lessee to leave part of the leased land unploughed each year restricts the lessee's privilege of user, while it gives a right benefiting the lessor in his reversion in the land by securing a crop rotation; hence both right and duty should run. So a power in the lessor to terminate the lease under certain conditions is a beneficial power to the lessor as such and a burdensome liability to the lessee, and both benefit and burden should run. But an agreement by the lessee to pay taxes for the lessor on other than the leased premises calls for the duty of making a money payment unconnected with the leased premises and a right for the benefit of the lessor not in his capacity of reversioner, and neither the right nor duty should run."⁹⁶

While it may be difficult to determine whether a covenant touches or concerns the land as a general proposition, one can always look at the cases to see what covenants have been held to touch or concern the land and get a good general idea of the courts' thinking on the subject. Examples of covenants which have been held to touch or concern the land are the benefit and burden of a covenant to repair the leased premises,⁹⁷ the burden of a covenant by the tenant to pay rent,⁹⁸ the burden of a covenant by the lessee to pay the taxes on the leased premises,⁹⁹ the benefit of a covenant by the lessee to vacate on sale and notice,¹⁰⁰ and the benefit and burden of a corresponding covenant by the lessor to renew the lease,¹⁰¹ and the burden of a covenant by the lessee not to carry on a business on the leased premises which would compete with the lessor,¹⁰² but the benefit of a covenant by the lessor not to carry on a business which would compete with the lessee within a certain distance of the premises does not touch or concern the leased premises and so does not run with the land.¹⁰³

Many other covenants have been held to touch or concern the land or not to touch or concern the land, but these examples will serve to give a general idea of the courts' thinking concerning the two types of covenants.

⁹⁶ *Id.* at 96, 97.

⁹⁷ *Myers v. Burns*, 33 Barb. Ch. 401 (N.Y. 1861).

⁹⁸ *Jordan v. Indianapolis Water Co.*, 159 Ind. 337, 64 N.E. 680 (1902).

⁹⁹ *Peck v. Christian*, 94 Ill. App. 435 (1900).

¹⁰⁰ *507 Madison Avenue Realty Co. v. Martin*, 200 App. Div. 146, 192 N.Y. Supp. 762 (1922), *aff'd* (without opinion), 233 N.Y. 683, 135 N.E. 969 (1922).

¹⁰¹ *Edwards v. Tobin*, 132 Ore. 38, 284 Pac. 562, 68 A.L.R. 152 (1930).

¹⁰² *American Seaboard Co. v. Haldeman Paper Co.*, 83 Fed. 619 (5th Cir. 1897). See *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N.W. 47 (1890).

¹⁰³ *Thomas v. Hayward*, L.R. 4 Ex. 311 (1869). *Contra: Norman v. Wells*, 17 Wend. 136 (N.Y. 1837).

Intent of the Parties

Another thing which affects the running of covenants in leases to a very great extent is whether or not the original parties intended that they should run as indicated by the whole instrument of conveyance. Although there was nothing in the statute of Hen. VIII in regard to the intent of the parties and under its general terms a covenant would run regardless of such intent, and in the limitations put upon that statute in *Spencer's Case*, nothing was said as to the intent of the parties, and one authority says that the intent of the parties should not affect the running of covenants,¹⁰⁴ the trend of the modern decisions is to the contrary.¹⁰⁵ In some cases it has been stated to be one of the "age old" essentials of a covenant which runs with the land; the other two being that there be privity of estate and that the covenant touch or concern the land with which it runs.¹⁰⁶ In fact, cases now quite often hold that the only effect of the word "assigns" in a lease is to show the intent of the parties that covenants therein should run with the land.¹⁰⁷ In a West Virginia case¹⁰⁸ where the word "assigns" was used, the court held that, although there was no privity of estate (this was not a lease case) and so the covenant was not in nature and kind a covenant real, the assignee of the covenantee could enforce the covenant where the covenant benefited and did not charge the land, since it was provided that the heirs, devisees and assigns of the covenantee should have its benefits.

And in West Virginia the legislature has manifested a plain intent that the intent of the parties to the instrument of conveyance as to the running of certain covenants, hereinafter to be discussed at length, should be considered, if not controlling. In one statute it is provided that certain covenants mentioned in the article containing the statute shall run with the land "unless a contrary intent shall

¹⁰⁴ SIMS, COVENANTS WHICH RUN WITH THE LAND 115, 116 (1901).

¹⁰⁵ 165 Broadway Bldg. Co. v. City Investment Co., 120 F.2d 813 (2d Cir. 1941); Neponset Property Owner's Ass'n v. Immigrant Industrial Savings Bk., 273 N.Y. 248, 15 N.E.2d 793 (1938); Masury v. Southworth, 9 Ohio St. 340 (1859); Brown v. Southern Pacific R.R., 36 Ore. 128, 58 Pac. 1104 (1899); TIFFANY, REAL PROPERTY 126 (3d ed. 1939).

¹⁰⁶ Neponset Property Owner's Ass'n v. Immigrant Industrial Savings Bk., note 105 *supra*; Masury v. Southworth, 9 Ohio St. 340 (1859).

¹⁰⁷ In *Hart v. Socony-Vacuum Oil Co.*, 291 N.Y. 13, 50 N.E.2d 285, 148 A.L.R. 390 (1943), the court stated that a provision in a lease purporting to make all its provisions binding upon the parties and their assigns is ordinarily employed not to impose direct contractual liability upon assigns but to make it clear that the covenants in the lease run with the land. *Masury v. Southworth*, 9 Ohio St. 340 (1859).

¹⁰⁸ *Hurxthal v. St. Lawrence Boom Co.*, 53 W. Va. 87, 44 S.E. 520 (1903).

be apparent from the conveyance",¹⁰⁹ and in another statute it is provided that "The legal scope and effect of the covenants mentioned in this article, and the person or persons by and against whom such covenants may be enforced, shall be determined according to the rules of law applicable to such cases, and the plain intent and meaning of the parties".¹¹⁰

However, mere intent to make a covenant run with the land is not sufficient in itself to make it run. As the original parties cannot bind their assigns by privity of contract, it is necessary that privity of estate exist between the party seeking to enforce the covenant and the one against whom he is trying to enforce it. It is further necessary that the covenant touch or concern the land conveyed in order that the covenant be conveyed along with the land. So it is generally held that, while a covenant which is of a character that can run with the land does not run if the intent of the parties appears otherwise, a covenant which is not of such character will not run even if it clearly appears to have been the intent of the parties that it should.¹¹¹

Privity of Estate

The main objection to the enforcement of covenants in leases by or against the assigns of the original parties has always been the lack of privity of contract between others than the original contracting parties. Chief Justice Holmes once said, ". . . from a very early date down to comparatively modern times lawyers have been perplexed with the question how an assignee could sue upon a contract to which he was not a party."¹¹²

The requirement of privity of estate is to establish a connecting link between the two parties so that the assignee steps into the shoes of his assignor and receives what benefits or burdens his assignor had in regard to covenants. No privity, in a contractual sense, exists between a covenantor and the assigns of the covenantee, or the assigns of both the covenantor and the covenantee. To cure this defect, at least as between the lessee and the assigns of the lessor the statute of Hen. VIII was enacted. According to the preamble of that statute it was thought necessary to enact the

¹⁰⁹ W. VA. CODE c. 36, art. 4, § 16 (Michie, 1949).

¹¹⁰ W. VA. CODE c. 36, art. 4, § 17 (Michie, 1949).

¹¹¹ Gibson v. Holden, 115 Ill. 199, 3 N.E. 282 (1885); Masury v. Southworth, 9 Ohio St. 340 (1859); Hurxthal v. St. Lawrence Boom. Co., 53 W. Va. 87, 44 S.E. 520 (1903); Thomas v. Hayward, L.R. 4 Ex. 311 (1869). The intent of the parties is only one of three essentials often held necessary for the running of covenants. See note 106 *supra*.

¹¹² Norcross v. James, 140 Mass. 188, 2 N.E. 946 (1885).

statute in order that strangers to the covenant who had become grantees of the estates could take advantage of the covenants in the leases. The effect of the statute, and the common law rule which made covenants run with the leasehold interest, was to create a cause of action based upon privity of estate rather than privity of contract.

Even though a covenant is of the type which runs with the land, still there must be privity of estate between remote parties, or between an original party and a remote party, before one can enforce it against the other. The covenant may touch or concern the land and the original parties may have intended that it should run with the land, yet, if there be no privity of estate between remote parties, it cannot be enforced by one against the other.

The courts, as has been noted, generally state that privity of estate is one of the essentials of a covenant which runs with the land. For example, in a West Virginia case the court stated:

“It is not sufficient that the covenant is concerning land, but to make it run with the land there must be privity of estate between the parties, and the covenant must have relation to an interest created or conveyed, in order that the covenant may pass to the grantee of the covenantee.’ . . . It is true that this covenant has one element of a covenant real in the fact that it benefits the estate of the covenantee, the mill property; but it lacks another material element, privity in estate, as the company conveyed no interest in the mill, but merely made a personal obligation on the company touching the mill. So this covenant is not in its inherent nature, a real covenant.”¹¹³

But the courts do not, as a rule, explain what they mean by privity of estate. They use the term as though it has a simple and well-known meaning.

The term “privity of estate” is an ambiguous one, and it is used in two different senses. It is sometimes used to describe the situation in which two parties have simultaneous interests in the same land. This might be called “mutual” privity. It is obvious that in the landlord-tenant relationship we have the clearest kind of privity of estate in the sense of co-existing interests in the same land. Accordingly, in this sense, there is always privity of estate between the original parties to the lease transaction, and in so far as that is a requirement for the running of covenants, it presents no problems.

Privity of estate is sometimes used, however, to describe the relationship between *successive* holders of the same estate. Thus,

¹¹³ Hurxthal v. St. Lawrence Boom Co., 53 W. Va. 87, 92, 44 S.E. 520, 522 (1903).

when *L* leases to *T*, there is privity of the mutual type between *L* and *T*. When, thereafter *T* assigns his leasehold to *A*, there is privity of estate of the successive type between *T* and *A*. Or, if *L* should transfer his reversion to *R*, there is privity of estate of the successive type between *L* and *R*. It should also be noted that after *T* has transferred his leasehold interest to *A* and *L* his reversion to *R*, there exists a mutual privity of estate between *A* and *R*, because they own, simultaneously, interests in the same land. One is a possessory interest, and the other a future interest which will become possessory immediately upon the termination of the first.

In order for a covenant to run with the land, however, there must be that "successive" privity of estate between the covenantee and the remote party who seeks to enforce the covenant, or between the covenantor and the remote party against whom the covenant is being enforced. Thus, suppose *L* leases to *T*, but *T*, instead of assigning his entire leasehold, sublets to *S*, a subtenant. It will be noted that although *L* now has an interest in the same land that *S* does, and at the same time, *L*'s interest does not immediately follow *S*'s in possession. Instead, when *S*'s sublease ends, the possession will revert to *T*. Moreover, there is not successive privity between *T* and *S*, as that term is used, because *S* has not *fully* succeeded to *T*'s interest. He has not so identified himself with the leasehold interest of *T* that he can be charged with liability for a breach of a covenant made by *T*. The covenant does not run with the land so that it can be enforced by *L* against *S*. Notice that in this case we could say that the covenant does not run because there is no privity between the tenant (*T*) and the subtenant (*S*), or we could say that it does not run because there is no privity between the landlord (*L*) and *S*.¹¹⁴ We would mean no successive privity between *T* and *S*, but we would mean there is no mutual privity between *L* and *S*, and we would be defining mutual privity to mean more than merely having simultaneous interests in the same land. We would be defining mutual privity as the relationship that exists between the holders of two estates in the same land which estates follow each other in possession.

The term "privity of estate" is used to describe the existence of a mutual or successive relationship in the same land between two

¹¹⁴ "Since, in the case of a sublease, as distinguished from an assignment of the lessee's full term, there remains an estate in the lessee, intervening between the reversion and the estate or interest in the sublessee, there is no privity of estate between the subtenant and the lessor, and, as there is no privity of contract, the former is not liable to the latter for rent." *Lunsford v. McCann*, 67 Okla. 196, 197, 169 Pac. 871 (1917); see also *Times Square Imp. Co. v. James McCreery Realty Corp.*, 228 N.Y. 597, 127 N.E. 922 (1920).

or more different people. As between tenants in common, for example, the privity of estate is solely of the mutual type, while between a grantor and grantee it is of the successive type. But in the relationship of lessor and lessee there exists a privity of estate which is both mutual, since there is a simultaneous ownership of two interests in the same land at the same time, and successive, since the estate of the lessee issued from the lessor's ownership of the land. Thus any assignee of the lessee or the lessor steps into the shoes of his assignor and is in privity of estate with the owner of the other interest in the land in both senses. There exists the mutual type of privity of estate between the owners of the two interests in the same land and since either assigned interest would issue from the lessor's ownership of the land there also exists the successive type of privity of estate.

It is easy enough to see that there is in fact privity of estate in the case of leases inasmuch as in such case there exists a severance of one estate, a fee, into two estates, a leasehold estate and a reversionary estate. Since the lessee obtains his estate from the lessor there is privity of estate of the successive type which can be passed on by assignment. There is also a mutual, simultaneous ownership of two parts of one estate by two persons, and these two estates are so interrelated that the leasehold estate cannot end without that estate disappearing and the owner of the reversionary estate again having the whole estate, the fee. So when the lessee's estate ends, whether it is then held by the original lessee or his assigns, his estate in possession immediately goes to the one then holding the estate in reversion, whether it is held by the original lessor or his assigns. So there is a mutual ownership of two parts of one estate, and at the termination of one interest in such estate a successive right to possession. Is it any wonder then that in such a situation, in the first place, the owners of the two interests in the fee should be interested in making covenants and conditions in regard to the ownership and use of such interests, and, in the second place, the successive owner of the two interests should be interested in seeing that the covenants and conditions are carried out?

This same type situation exists where the interest granted is a right-of-way or other easement out of the fee estate. There again when the interest granted terminates, it disappears into the fee. And while it is in existence there is a simultaneous ownership of two interests created out of what was one interest, the fee.

A further illustration might be utilized as an aid to the understanding of privity of estate. *A* leases premises to *B* and then sells the reversion (the property subject to the lease) to *P*. *B* assigns his interest to *C* and *C* subleases the premises to *D*. There is privity of estate between *P* and *C* because they each own a part of the whole estate and because when *C*'s interest terminates that interest disappears and *P* then has the fee, the reversion plus the right to possession; but there is no privity of estate between *P* and *D* because, the sublease being for less than the remainder of the term, *C* has retained the reversion in the leasehold estate and when *D*'s interest terminates *C*, not *P*, has the right to possession, and so *C* is the only person with whom *D* is in privity of estate. There remains privity of contract between *A* and *B* and between *C* and *D*. If *C* should assign his interest that would destroy the privity of estate existing between him and *P*, and he would no longer be under any obligation to *P* as there would be no privity of any kind upon which to base that obligation.¹¹⁵

Since there exists no privity of contract between one of the original parties to the lease or his assigns and the assigns of the other party, the courts generally hold that there must be privity of estate before one can enforce a covenant in the lease against the other.¹¹⁶ It is necessary, in order that there be such privity of estate between the parties to the action, that land, or some interest therein, even less than the entire fee, to which a covenant in the lease may attach as its vehicle of conveyance, must have been transferred by the covenantor or covenantee or both before the benefit or burden of a covenant will pass to the transferee.¹¹⁷ Of course, there must have been a conveyance between the original parties to establish privity of estate before that privity can be passed on to subsequent transferees.¹¹⁸

So, to establish privity of estate there must have been a conveyance of an estate;¹¹⁹ a conveyance of something to which a

¹¹⁵ *Kanawha-Gauley C. & C. Co. v. Sharp*, 73 W. Va. 427, 80 S.E. 281 (1914).

¹¹⁶ In *Sexaur v. Wilson*, 136 Iowa 357, 113 N.W. 941 (1907), the court stated that privity of estate had been held by many decisions to be the foundation of the running of covenants. In *McIntosh v. Vail*, 126 W. Va. 395, 28 S.E.2d 607 (1943), the court stated that one of the essentials of a covenant real is that there must be privity of estate even where the covenant touches or concerns the land. See also *165 Broadway Bldg. v. City Investment Co.*, 120 F.2d 813 (2d Cir. 1941); *Logan v. United Interests*, 236 N.Y. 194, 140 N.E. 240 (1923).

¹¹⁷ *McIntosh v. Vail*, 126 W. Va. 395, 28 S.E.2d 607 (1943); *Hurxthal v. St. Lawrence Boom Co.*, 53 W. Va. 87, 44 S.E. 520 (1902).

¹¹⁸ *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335 (1871).

¹¹⁹ In *Hurxthal v. St. Lawrence Boom Co.*, 53 W. Va. 87, 92, 44 S.E. 520, 522 (1903), the court stated, "A covenant does not run with the land unless contained in a grant thereof, or of some estate therein".

covenant or condition in the instrument of conveyance which affects that estate, beneficially or as a burden, which touches or concerns it in such a way that such condition or covenant is annexed or attached to the estate and will go along with it. Therefore, it has been held that even though a covenant touched or concerned land, was a benefit to the land in whosoever hands it might come, it did not run with the land when it was not contained in a grant of land or an estate therein.¹²⁰ Nor would a covenant run which touched or concerned an estate reserved rather than the one conveyed, as in the case of a lease of minerals and then a conveyance of the land with the minerals reserved.¹²¹

Privity of estate being necessary in order for an assignee of one of the original parties to be liable on covenants in the lease which run with the land, it follows that when such an assignee, be he an immediate or remote assignee, is only liable on, or entitled to the benefits of, covenants in the lease during such time as such privity exists; for if he in turn assigns the estate, all his relationship to the covenant is sundered. So an assignee of one of the parties who has not assumed the burdens of the covenants in the lease is only liable for, or can only have the benefit of, breaches of covenants in the lease which occur while the privity of estate exists and not breaches occurring after he assigns the estate.¹²²

It has been stated by the courts that privity of estate is merely a substitute for an assignment of rights and delegation of duties.¹²³ Therefore, unless the covenant is one which touches or concerns the land and there is privity of estate, the only way that an assignee can ordinarily take advantage of a covenant in a lease is upon a contractual basis, that is, by obtaining an assignment of the rights under the covenant along with the assignment of the lease. He may then bring action on the covenant in case of a breach in the name of his assignor, or, in many states such as West Virginia, in his own name by virtue of a statute¹²⁴ allowing such procedure.¹²⁵

¹²⁰ Hurxthal v. St. Lawrence Boom Co., 53 W. Va. 87, 44 S.E. 520 (1903).

¹²¹ Rawling v. Fisher, 101 W. Va. 253, 132 S.E. 489 (1926); Tennant v. Tennant, 69 W. Va. 28, 70 S.E. 851 (1909).

¹²² Hart v. Socony-Vacuum Oil Co., 291 N.Y. 13, 50 N.E.2d 285, 148 A.L.R. 390 (1943); Farmer's Bank v. Mutual Assurance Society, 4 Leigh 69 (Va. 1832); Kanawha-Gauley C. & C. Co. v. Sharp, 73 W. Va. 427, 80 S.E. 281 (1914).

¹²³ "So privity of contract is connection of interest through the contract relation, and privity of estate is such connection by means of estates in property." CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND 112 (2d ed. 1947). See also, DONLEY, LAW OF COAL, OIL AND GAS IN VIRGINIA AND WEST VIRGINIA 182 (1951).

¹²⁴ W. VA. CODE c. 55, art. 8, § 9 (Michie, 1949).

¹²⁵ This was held to be the only way that the assignee of the lessor could take advantage of the covenant in a lease in Ohio, since covenants did not run

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The only way that an assignee can be held liable to perform the covenants in a lease where they are not of a character that can run with the land is by an assumption of the burdens of such covenants when he takes the assignment of the lease. In such case he is bound by privity of contract and he cannot rid himself of the burden of the covenants by the simple expedient of assigning over.¹²⁶ Even if the assignee does assume the burden of the covenants in the lease, he may be liable only to his assignor because he is in privity of contract with him only. This lack of privity is overcome in states allowing actions by the third-party beneficiary of a contract. But in West Virginia, although there is a statute allowing action by third-party beneficiaries,¹²⁷ the contract or promise must have been made for their sole benefit before they can bring an action at law on it.¹²⁸ This is not likely to be the case where an assignee assumes the burdens of covenants in a lease as the assignor also benefits in most cases. However, it has been held that such a beneficiary can enforce covenants in equity in such a case even if the contract was not made for his exclusive benefit.¹²⁹

To be concluded.

with the reversion at common law and the statute of Hen. VIII was held not to be a part of the Ohio law. *Masury v. Southworth*, 9 Ohio St. 340 (1859).

¹²⁶ *S. S. Kresge Co. v. Sears*, 15 F. Supp. 522 (D. Mass. 1936); *Bankers Pocahontas Coal Co. v. Monarch Smokeless Coal Co.*, 123 W. Va. 53, 14 S.E.2d 922 (1941); 1 *TIFFANY, LANDLORD & TENANT* § 158 (n) (1912).

¹²⁷ W. VA. CODE c. 55, art. 8, § 12 (Michie, 1949).

¹²⁸ *Petty v. Warren*, 90 W. Va. 397, 110 S.E. 896 (1922).

¹²⁹ *Bankers Pocahontas Coal Co. v. Monarch Smokeless Coal Co.*, 123 W. Va. 53, 14 S.E.2d 922 (1941).