

# THE DOCTRINE OF PRIVITY OF ESTATE IN CONNECTION WITH REAL COVENANTS

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It is generally stated as a fundamental requirement of a real covenant or covenant "running with the land" that there must exist "privity of estate."<sup>1</sup> An examination of the nature of such a requirement—a problem which has troubled many of the great legal scholars<sup>2</sup>—has much of interest to the legal student not merely because the authorities are in confusion and discord but especially because it is apparent that here the courts in defining an expression of some degree of antiquity in the law are powerfully influenced by modern and diverse views of public policy towards encumbrances on real estate titles. In certain jurisdictions a policy against such encumbrances is so strongly felt that except as to covenants in leases the obligations of all covenants are in general unenforceable except against the original covenantors. In the majority of jurisdictions in this country, however, covenants may run with the land, but only if there exists privity of estate as defined by the local law.

As we shall see, the basic element of this requirement is what distinguishes a real covenant—a covenant so connected with realty that either the right to enforce or the duty to perform passes to assigns of the land—from an interest "in the land of another" such as an easement or profit.<sup>3</sup> An easement is, in theory, considered as if attached to the land itself so as to pass with it<sup>4</sup> even in favor of or against disseisors; while a real covenant passes only to successors to the estate—privies in estate—of either of the original contracting parties. The basis of transfer of an easement interest is the taking of the land; the basis of transfer of a real covenant is succession to a particular estate in the land. Hence "privity of estate" is a means of explaining and justifying the transfer of certain legal benefits and obligations.

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<sup>1</sup> *Bally v. Wells* (1769, K. B.) 3 Wils. 25, Wilm. 341. See the preamble to the stat. (1540) 32 Hen. VIII, c. 34, sec. 1: "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."

<sup>2</sup> See discussions hereinafter referred to by Mr. Justice Holmes, Lord St. Leonards, Kent, Hare, Rawle, Washburn, Sims, Tiffany, Aigler, and others.

<sup>3</sup> The terms "real covenants" or "covenants running with the land" are of course metaphorical. The covenants are always personal in the sense that they are enforced in personal actions for damages, etc.; and they cannot actually run with the land as Coke seemed to think; the question is merely how far the transfer of an interest in land will also transfer either the benefit or the burden of covenants concerning it.

<sup>4</sup> Again a metaphorical expression. See Holmes, *The Common Law* (1881) 382-386.

Before considering in some detail the nature of the requirement of privity of estate, it seems desirable to review briefly the essentials of a real covenant. Privity is always assumed to exist in the case of covenants between lessor and lessee and the doctrine therefore assumes vital importance only in connection with covenants with estates in fee. We may therefore direct our attention to such covenants and need consider covenants with leasehold interests only incidentally as such consideration may aid in clarifying our present subject.

The essentials of a real covenant may be grouped under the following heads: (1) form, (2) intention of the parties, (3) nature of the promise (whether "touching" or "concerning" the land), (4) privity. As to form the promise must in theory be in writing, signed and sealed by the promisor. In many jurisdictions such formalities have been more or less dispensed with, as for instance where one who merely *accepts* a deed poll without signing or sealing it is treated as having entered into a covenant. The extent of such relaxation is outside the scope of this discussion.<sup>5</sup> A somewhat similar question is whether the promisor must expressly agree not only for himself but also "for his assigns." So far as concerns covenants in leases, the famous *Spencer's Case*<sup>6</sup> laid down the principle that while express words ordinarily need not be used, yet where the promise is to do acts concerning something not in *esse*, as to build a wall on the leased premises, "assigns" must be expressly named. How far this technical requirement still is recognized in this country and how far it has been merged into the requirement merely that the parties shall show an intention that the covenant is to run, has recently been interestingly discussed by Edwin H. Abbott, Jr.<sup>7</sup> So far at least as concerns covenants with fees there seems no such absolute requirement.<sup>8</sup>

As to intention of the parties, it seems clear that while a covenant cannot run with the land even if the parties so intend unless the legal requirements are fulfilled, yet in any event the parties must intend such running or else it is merely personal.<sup>9</sup> Sims has argued that in the

<sup>5</sup> See Sims, *Covenants Which Run With Land* (1901) 188-195; 2 Tiffany, *Real Property* (2d ed. 1920) 1402.

<sup>6</sup> (1583, K. B.) 5 Coke, 16a.

<sup>7</sup> *Covenants in a Lease which Run with the Land* (1921) 31 YALE LAW JOURNAL, 127, 144. See also *Comment* (1919) 14 ILL. L. REV. 327; 14 L. R. A. (N. S.) 185, note; 1 Tiffany, *op. cit.* 176.

<sup>8</sup> *Brown v. Southern Pac. Ry.* (1899) 36 Or. 128, 58 Pac. 1104; *Sexauer v. Wilson* (1907) 136 Iowa, 357, 113 N. W. 941; 14 L. R. A. (N. S.) 185, note; *Doty v. Chattanooga Union Ry.* (1899) 103 Tenn. 564, 53 S. W. 944; *cf. Maryland & Pa. Ry. v. Silver* (1909) 110 Md. 510, 516, 73 Atl. 297, 300. Mr. Justice Holmes' suggested distinction, hereinafter discussed, between covenants analogous to easements and covenants analogous to warranties would suggest the necessity of such formality as to the latter covenants; but, as is later pointed out, the suggested distinction seems not to be followed. In any event no such formalities are required. Sims, *op. cit.* 206.

<sup>9</sup> See cases *supra* note 8, and *Gibson v. Holden* (1885) 115 Ill. 199, 3 N. E. 282.

case of covenants in leases, intention should not affect the running of the covenant,<sup>10</sup> but even in such covenants the tendency of the law is otherwise, to the effect that intention is a necessary element to the running of the covenant.<sup>11</sup>

The requirement as to the nature of the promise has more importance in connection with our present topic, since it, like the requirement of privity of estate, operates to limit the covenants permissible as encumbrances on title, and in effect the requirements seem sometimes to overlap. *Spencer's Case* settled the rule as to covenants with leaseholds—that only such covenants as touched or concerned the land might run—and the same rule has since been applied to covenants with fees. It has been found impossible to state any absolute tests to determine what covenants touch and concern land and what do not. The question is one for the court to determine in the exercise of its best judgment upon the facts of each case. Professor Bigelow has, however, in his article on *The Content of Covenants in Leases*<sup>12</sup> set forth a scientific method of approach to the problem which seems to afford the most practical working tests for the court to employ.<sup>13</sup> 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 covenant 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 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.<sup>14</sup> So a power in the lessor to terminate the lease under certain

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<sup>10</sup> Sims, *op. cit.* 115, 116.

<sup>11</sup> See Abbott, *loc. cit.*; 507 *Madison Ave. Realty Co. v. Martin* (1922) 200 App. Div. 146, 192 N. Y. Supp. 762, and note thereon (1922) 31 *YALE LAW JOURNAL*, 774.

<sup>12</sup> (1914) 12 *MICH. L. REV.* 639, (1914) 30 *L. QUART. REV.* 319; see also Abbott, *loc. cit.*

<sup>13</sup> This method is approved by Professor Aigler in *NOTE AND COMMENT* (1919) 17 *MICH. L. REV.* 93. See also 1 Tiffany, *op. cit.* 177, n. 46a.

<sup>14</sup> *Cockson v. Cock* (1606) *Cro. Jac.* 125. This was an action by the lessor against the assignee of the lessee; the same principle apparently would apply if an assignee of the lessor sued. *Chapman v. Smith* [1907] 2 *Ch.* 97; *cf.* (1907) 7 *COL. L. REV.* 627.

conditions is a beneficial power to the lessor as such and a burdensome liability to the lessee, and both benefit and burden run.<sup>15</sup> 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 right nor duty should run.<sup>16</sup>

The question immediately arises whether both benefit and burden must touch and concern the land in order that the covenant may run or whether, if either one alone touches or concerns the land, that one may run when the other does not.<sup>17</sup> Ordinarily if one end of a covenant touches or concerns the land the other will, but such is not always or necessarily the case. Thus a restriction on the lessee's use of the premises lessens the lessee's privileges of user, but it may or may not be an advantage to the covenantee as lessor, depending in the main upon the nature of the benefit which in the lessor's eyes the covenant was to give him. In the famous case of *Congleton v. Pattison*<sup>18</sup> where the lessee agreed to employ in a leased silk mill only persons complying with specified requirements as to their legal settlements, the lessors were benefited only in respect of the poor rates and not as reversioners.

The answer to the question is not clear on the authorities since it has rarely been carefully considered. On such authority as exists and on principle it would seem that benefit and burden should be capable of running separately. Hence covenantee's assignee may sue covenantor when the benefit runs; covenantee may sue covenantor's assignee when the burden runs; but covenantee's assignee may sue covenantor's assignee only when both run. This seems to have been Lord Holt's view in *Brewster v. Kidgill*, for he held that an assignee of the benefit might sue but argued that the particular covenant was not binding upon the assignee of the land.<sup>19</sup> To the same effect seems the well known

<sup>15</sup> *507 Madison Ave. Realty Co. v. Martin*, *supra* note 11, and note thereon (1922) 31 YALE LAW JOURNAL, 774.

<sup>16</sup> *Gower v. Postmaster-General* (1887, Ch. Div.) 57 L. T. R. (N. S.) 527.

<sup>17</sup> The proposition that both will necessarily be held to run if one does is hardly to be expected in view of the general tendency to restrict the running of covenants; it seems unsound on principle; and where either benefit or burden is in gross it is impossible, since there is no land with which such interest may pass. Where it has been so held (see *infra* note 24), apparently the holding is due to the court's failure to understand the problem and to separate benefit and burden. Cf. however, a suggestion to the contrary in Bigelow, *op. cit.* 12 MICH. L. REV. at p. 651 *et seq.*, 30 L. QUART. REV. at p. 331 *et seq.*

<sup>18</sup> (1808, K. B.) 10 East, 130.

<sup>19</sup> *Brewster v. Kidgill* (1698, K. B.) 12 Mod. 166, an agreement to pay a rent charge "without any deduction or abatement of taxes" on the rent. For other reports see 5 Mod. 369, 1 Ld. Raym. 317, 1 Salk. 198, 615, Carth. 438, Holt. 175, 669, Comb. 424, 466. Unfortunately, according to the report in 1 Ld. Raym. 317, the other three judges did not know what Lord Holt was talking about. They "seemed to be in a surprise, and not in truth to comprehend this objection, and therefore they persisted in their former opinion, talking of agreements, intent of

statement in *Savage v. Mason*,<sup>20</sup> a case of a party wall covenant: "A covenant is said to run with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of the land." Professor Bigelow's views seem in general to accord.<sup>21</sup> So do certain cases where the point is raised. Thus, in *Thruston v. Minke*,<sup>22</sup> the lessee covenanted not to build higher than the third story of the lessor's adjoining building. This is the kind of agreement often enforced against an occupier of property and would clearly run so far as burden is concerned. Yet, as it was designed to benefit the lessor merely as owner of other premises, it was held not to run with the reversion.<sup>23</sup>

In many cases, however, the point has not been clearly considered. The court has fixed its attention upon either the benefit or the burden

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the party, binding of the land, and I know not what." Judgment was therefore given for the plaintiff, though in 12 Mod. 166, it is put on the ground that the covenant might charge the land, being in the nature of the grant or as defining the extent of the grant. The point was later decided to the contrary in *Milnes v. Branch* (1816, K. B.) 5 M. & S. 411.

<sup>20</sup> (1849, Mass.) 3 Cush. 500.

<sup>21</sup> *Supra* note 12. Professor Bigelow feels unable to generalize to the extent of the statement in the text but makes four classes: (1) burden on lessee as such while the benefit is personal to the lessor—the burden is held to pass; (2) burden on lessee is personal while the benefit to the lessor is not, as in the case of a covenant to insure or to pay taxes—the burden is again held to pass; (3) the converse of (1) where lessor has the burden and the lessee the personal benefit, as in the option to purchase—here there is a conflict as to whether the burden passes; (4) the converse of (2), where the lessor has the personal burden and the lessee the real benefit—the assignee of the lessor's estate is held bound. Classes (1) and (2) are justified on the derivative nature of the lessor's estate, while class (4) is justified on the ground of the wording of the statute of leases, (1540) 32 Henry VIII, c. 34, sec. 2; and, as to (3), Professor Bigelow argues that the burden should not pass unless the covenant also operates to benefit the lessee as such. It is suggested, however, that these classes are not in opposition to the statement in the text that burden and benefit may run independently. Class (1) is directly in accord with the statement while as to Class (3) the option cases are conflicting, many cases holding the burden to run. The case of *Woodall v. Clifton* [1905] 2 Ch. 257, cited as settling the English rule that such contracts do not run, was a case of assignee against assignee, an attempt to make both benefit and burden run. *Quære* if the result should not be otherwise where lessee sues assignee of the lessor? As to classes (2) and (4) the illustrating cases accord with the statement in the text if the rule of "touching and concerning" is given a little broader meaning, that is in those cases the burden should not be considered personal. Thus the burden of a covenant to pay taxes on the leased premises should not be considered personal since it intimately concerns the lessee's duties as such. True it requires the making of a money payment which may be made by one other than the lessee, and yet to hold that such fact renders the burden personal is to go too far, since performance of most covenants (for example, a covenant to repair) may be obtained by the promisor by expending money to hire the work done.

<sup>22</sup> (1870) 32 Md. 487.

<sup>23</sup> *Cf.* also cases such as *American Strawboard Co. v. Haldeman Paper Co.* (1897, C. C. A. 6th) 83 Fed. 619 (covenant not to manufacture a specified kind of product enforced by the lessor against the assignee of the lessee).

and has based its final decision upon such half-view. Thus in *Congleton v. Pattison* the actual decision was that as the plaintiffs were benefited only as taxpayers they could not sue the assignee of the lessee, that is, that the burden did not run.<sup>24</sup> So far as policy is concerned it would seem desirable that certain agreements should be enforceable though one end cannot run with the land. Thus an agreement that the lessor should not enter into a competing business seems one properly enforceable by anyone taking the leased premises. Obviously the burden cannot run since it is the lessor, and not any particular realty which is bound. So it was properly held in *Hebart v. Dupaty*<sup>25</sup> that a purchaser from the lessor of the reversion and of other premises was not bound to refrain from the prohibited business on the adjoining premises. On the other hand, as concerns the running of the benefit, many cases have permitted the assignee of the lessee to sue the lessor, and while there has been some conflict based, not on the non-running of the burden, but on an attempt to distinguish between the physical benefit and the business or financial benefit to the land, the cases permitting suit seem clearly to have the better of it.<sup>26</sup> On such view, *Congleton v. Pattison* is not to be supported, since it is the lessor and not his assignee who is suing,<sup>27</sup> while a case such as *Webb v. Russell*,<sup>28</sup> where a covenant to repair made by the defendant lessee with a stranger was held not to run with the reversion, would be correct.<sup>29</sup>

This point is of particular importance in connection with covenants with fees, since, if burden and benefit are not to be tested separately, no covenants with fees which are in gross can run. If A, who holds no interest in Blackacre, promises B or receives a promise from B as to the use of Blackacre, A has nothing with which a covenant may run. Hence, if both benefit and burden must run together, it is impossible for B's assigns (of Blackacre) to be affected by the covenant. Only where the condition of "dominancy" and "serviency" exists—where

<sup>24</sup> On the other hand, in *Clegg v. Hands* (1890) L. R. 44 Ch. Div. 503, 518, 523, a covenant to sell no ale except that purchased from the lessor was held to pass to an assignee of the lessor because it related to the manner of use of the leased premises. See also *White v. Southend Hotel Co.* [1897] 1 Ch. 767; *Manchester Brewery Co. v. Coombs* [1901] 2 Ch. 608. Cases such as those referred to in *supra* note 23 seem *contra* to *Congleton v. Pattison*.

<sup>25</sup> (1890) 42 La. Ann. 343, 7 So. 580.

<sup>26</sup> See Ames, *Lectures on Legal History* (1913) 388, accord. *Norman v. Wells* (1837, N. Y.) 17 Wend. 136, is perhaps the leading case for, and *Thomas v. Hayward* (1869) L. R. 4 Exch. 311, the leading case against, the view suggested. Cf. 2 *Tiffany, op. cit.* 1413, n. 38. It should be noted that the real objection to such covenants is the policy against monopolies, and not any policy with reference to real covenants as such.

<sup>27</sup> This is the view of Professor Bigelow, *loc. cit.*

<sup>28</sup> (1789) 3 T. R. 393.

<sup>29</sup> Of course the covenantee who was the mortgagor of the premises would hardly be considered a stranger at the present day. The case further held that on merger of a particular reversion in an ultimate reversion the covenants connected with the first reversion were gone.

Blackacre is bound to Whiteacre—can covenants run with fees. Now such is undoubtedly the usual situation, but there are certain covenants in gross which have been held to run, holdings with which, it seems, there should be rather general accord both on grounds of logic and of policy. Conspicuous are the covenants restricting competition. Thus, in *National Bank of Dover v. Segur*,<sup>30</sup> a vendor of land for a banking house agreed with the vendee to withdraw from the banking business and not to engage in such business in the same borough for ten years. This was held to be enforceable by the assignee of the vendee.<sup>31</sup> Covenants where the benefit is in gross perhaps are more doubtful both on principle and on authority, but it is suggested that they should follow the same course. Thus, an agreement by a land company to turn its business to a particular railroad has been enforced against an assignee of the land.<sup>32</sup>

There does not, however, seem to be general accord with this view. Sims in his definition of real covenants and generally throughout his discussion presupposes the existence of both a dominant and a servient tenement.<sup>33</sup> Mr. Justice Holmes, in an action against a guarantor of rent,<sup>34</sup> says that the "old cases, so far as we know, even the most extreme, are all cases of warranties or covenants by owners of the land" and quotes Lord St. Leonards approvingly that "there appears to be no direct authority that a stranger to the land can enter into covenants respecting it, which will run with the land in the hands of assignees."<sup>35</sup> And he then attempts to assimilate such covenants to covenants of title

<sup>30</sup> (1877) 39 N. J. L. 173. Cf. *Lewis v. Gollmer* (1891) 129 N. Y. 227, 29 N. E. 81. Covenants of warranty are also an example.

<sup>31</sup> For cases in accord, see 2 Tiffany, *op. cit.* 1413, n. 38. Cf. *supra* note 26. Similar cases are *Pakenham's Case* (1368) Y. B. 42 Edw. III, 3, pl. 14 (covenant to sing in a chapel); *Horne's Case* (1400) Y. B. 2 Hen. IV, 6, pl. 25. Cf. *Anon.* (1582, C. B.) Moore, 179, pl. 318 (covenant giving feoffee in fee privilege of distraining); *Allen v. Culver* (1846, N. Y.) 3 Denio, 284 (covenant guaranteeing rent).

<sup>32</sup> *Bald Eagle Valley Ry. v. Nittany Valley Ry.* (1895) 171 Pa. 284, 33 Atl. 239. A case such as *Wiggins Ferry Co. v. Ohio & Mississippi Ry.* (1879) 94 Ill. 83 (covenant by grantee of an easement always to employ the ferry company to transport its cars across the Mississippi River held unenforceable against assignee of the grantee) is not opposed since there the agreement was not one concerning the use of the land in question but was one concerning the grantee's entire business. Lord Brougham's famous conservative decision in *Keppell v. Bailey* (1834 Ch.) 2 Myd. & K. 517, is *contra*. See also *Berryman v. Hotel Savoy Co.* (1911) 160 Calif. 559, 117 Pac. 677, resting upon the Massachusetts doctrine of privity (see *infra* note 40) and *Los Angeles University v. Swarth* (1901, C. C. A. 9th) 107 Fed. 798, resting upon the equitable ground hereinafter discussed.

<sup>33</sup> Sims, *op. cit.* 17; also throughout the book.

<sup>34</sup> *Walsh v. Packard* (1896) 165 Mass. 189, 42 N. E. 577.

<sup>35</sup> Sugden, *Vendors and Purchasers* (8th Am. ed. 1873 from 14th Eng. ed. 1862) 587. See *contra*, Coke, Littleton, 384 b. Mr. Justice Holmes had already excluded the contrary decision in the famous *Pakenham's Case*, *supra* note 31, on his oft-repeated explanation of that decision as being made on the analogy of an easement. See the point discussed on page 139 *infra*.

which must be made by the *owner* of the land, that is, by the vendor.<sup>36</sup> But why is not the man who has sold his land as much a stranger to it thereafter as one who has not owned it? If there is any objection to a covenant in gross, it is not met by requiring such covenant to be created by a former owner of the land.<sup>37</sup> In another case dealing with an agreement for the covenantor *and his assigns* to pay to the covenantee the value of a party wall when used<sup>38</sup> the great jurist said: "But it is most unusual to see a covenant under which the rights are held in gross and burdens go with the land." He then suggested that it would be hard to find a case like a previous decision of his own,<sup>39</sup> where just such a combination of rights and burdens was enforced as a spurious easement, and then continued that where the burden of a covenant goes with the land it commonly creates or accompanies some interest "in the nature of a servitude, in favor of a neighboring parcel." Then he says: "But if the promise is personal on the side of the benefit, no reason whatever is shown for departing from the tradition of the law in order to make it follow the land with its burden." It should be noticed, however, that Mr. Justice Holmes' views really apply to his own jurisdiction of Massachusetts, and that they are quite in accord with the Massachusetts doctrine later discussed of "substituted privity of estate," or privity by way of tenure. Under that doctrine there must normally be a relation of dominancy and serviency in order for a covenant to run with a fee.<sup>40</sup> Where that doctrine is not applied, Mr. Justice Holmes' argument need not be considered persuasive.

<sup>36</sup> Carrying out his suggested distinction between covenants analogous to easements and those analogous to warranties. In so doing he seems in effect to be reestablishing a doctrine of privity of estate (between covenantor and covenantee) the error of which, as is later explained, he has done so much to demonstrate.

<sup>37</sup> A guaranty of rent may perhaps well be considered as merely a collateral contract of indemnity and hence Mr. Justice Holmes' actual decision need not be criticized. But see *Allen v. Culver*, *supra* note 31.

<sup>38</sup> *Lincoln v. Burrage* (1901) 177 Mass. 378, 59 N. E. 67.

<sup>39</sup> *Middlefield v. Knitting Co.* (1894) 160 Mass. 267, 35 N. E. 780 (duty to repair a bridge owed to a town by the owner of land).

<sup>40</sup> As is later pointed out, under this requirement the covenantor and the covenantee must simultaneously have interests in the same land. The ordinary case is the covenant in aid of an easement, the dominant owner and the servient owner both having an interest in the land in question. Here the dominant tenement to the easement is in effect the dominant tenement to the covenant. The effect of the situation where the easement is in gross seems not to have been discussed in Massachusetts. Although there is here no dominant tenement it seems that the "substituted privity" exists. In *Barringer v. Virginia Trust Co.* (1903) 132 N. C. 409, 43 S. E. 910, it was held that an assignee of such an easement for a canal could not be sued on his covenant to keep up a dam since it was not the assignee of any land which was conveyed charged with such duty; but it is stated that compliance with this covenant is a term upon which the easement is held; that is, unless the defendant treats the easement as abandoned—which it may so far as the present suit shows—it must fulfill the covenant. Where easements in gross are non-assignable the benefit of such covenants should likewise be non-assignable.



Perhaps a more persuasive objection may appear by analogy with the enforcement of restrictive agreements in equity; for there it seems, by the weight of authority, that the plaintiff in order to obtain relief against one other than the original promisor, must own land in the neighborhood. In a leading case holding this view, *Formby v. Barker*,<sup>41</sup> it was stated directly that, for the running of a covenant with the land either at law or in equity, there must be a relation of "dominancy" and "serviency" of land. It would seem however that the case is more nearly analogous to the equitable doctrine that in order to obtain relief for fraud damage must be shown. The rule of *Formby v. Barker* seems to be adopted by the weight of authority and to be supported by commentators, though there is strong authority to the contrary.<sup>42</sup> The rule may be criticised, since it may often be desirable that the agreement should be enforced against a new purchaser and the promisee may be the only one with a clear right to enforcement. One's views are likely to be influenced by one's feelings as to whether such restrictions on ownership are desirable as improving the property or undesirable as encumbering the title. In view of the general social policy which very clearly upholds restrictions on use of property, it would seem proper that such agreements should be enforced without regard to the accident of the plaintiff's ownership of property in the vicinity. The cost of litigation will normally prevent the plaintiff from rushing into a groundless suit, but the social compulsion of his former neighbors may properly force him to sue. "What honor and good faith require a man to ask of a court of equity, for the profit of others, will not be refused without strong cause."<sup>43</sup> In any event the analogy of the rule as to equitable restrictions should not be strained to extend to real covenants.

<sup>41</sup> [1903, C. A.] 2 Ch. 539.

<sup>42</sup> *Van Sant v. Rose* (1913) 260 Ill. 401, 103 N. E. 194, criticised in (1915) 9 ILL. L. REV. 58, (1914) 27 HARV. L. REV. 493, and by G. L. Clark, *Equitable Servitudes* (1918) 16 MICH. L. REV. 90, 97. See 2 Tiffany, *op. cit.* 1441. A weighty criticism is based upon the rule that change in the condition of the dominant land marks the end of equitable restrictions, it being claimed that *a fortiori* where there is no dominant land the restrictions should not be enforced. Nevertheless it seems that the rule as to change in conditions in the neighborhood as marking the end of such restrictions may be applied even where there is technically no dominant tenement.

<sup>43</sup> *Brett v. Cooney* (1902) 75 Conn. 338, 53 Atl. 729 (a grantor may obtain rescission of a deed secured by false representations as to the proposed use of the premises even though he owns no land in the neighborhood. This was approved in NOTES (1903) 16 HARV. L. REV. 509, and followed in *Morrow v. Ursini* (1921) 96 Conn. 219, 113 Atl. 388. In *London County Council v. Allen* [1914, C. A.] 3 K. B. 642, where a restrictive covenant not to build across the end of a street without the plaintiff's consent, designed to facilitate an extension of the street of the plaintiff should he desire to do so, was not enforced under the English rule. The court, in the language of the Law Quarterly Review, (1914) 30 L. QUART. REV. 388, "followed the modern authorities with some reluctance"—an attitude not surprising in view of the great desirability of enforcing the

It would seem therefore that where a landowner's legal relations as such owner are increased and made more valuable by a covenant, the benefit of such covenant is of such a nature as may pass to his assigns and that where his legal relations as such owner are lessened and made of less value by a covenant, the burden of such covenant is of such a nature as may pass to his assigns, and that the running of benefit and the running of burden should be considered as separate and distinct questions.

Turning now to "privity of estate," we shall see that the term is used by different courts in three distinct senses: (1) succession to the estate of one of the parties to the covenant, which, it is submitted, is the only proper sense; (2) succession of estate also between covenantor and covenantee, an entirely unjustifiable meaning; and (3) mutual and simultaneous interests of the parties in the same land, a sense which is unjustified as a definition of this requirement, but which expresses a restriction perhaps justifiable from the standpoint of public policy. The second and third meanings are often—perhaps usually—confused under a general requirement of privity between covenantor and covenantee by either mutuality or succession of interest, but as they call for separate acts they should be kept distinct.

"Privity" is a word of fairly frequent occurrence in the law. It has a very broad content and hence its precise meaning tends to become vague and confused. Like many legal terms which lack precision because of very inclusiveness of meaning, the tendency in a particular case where it is used is to attempt to give it precision and thus vitality as a rule of limitation. Hence its meaning seems to vary according to the situation where it is employed. Its derivation is from the Latin through the French and its true meaning seems merely to be "connection of interest."<sup>44</sup> The kind or degree of connection is immaterial. "The term 'privity' denotes mutual or successive relationship to the same rights of property."<sup>45</sup> So privity of contract is connection of interest through the contract relation,<sup>46</sup> and privity of estate is such connection by means of estates in property. Such latter connection may be either mutual or successive. Thus tenants in common are in mutual relationship of estate, while grantor and grantee are in successive relationship of estate<sup>47</sup> and lessor and lessee are related in both respects.

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covenant in question. In *Ives v. Brown* [1919] 2 Ch. 314, an anomalous method of avoiding the rule by joining the personal representative and the devisee of the covenantee was discovered. See (1920) 18 MICH. L. REV. 435.

<sup>44</sup> Taylor's *Law Glossary*; cf. Webster's *Dictionary*, "from privy . . . cf. F. *privauté*, extreme familiarity"; privy, "F. *privé*, fr. L. *privatus*."

<sup>45</sup> *Maddocks v. Gushee* (1921) 120 Me. 247, 113 Atl. 300, citing Greenleaf, *Evidence*, sec. 523; *Bigelow v. Old Dominion Copper Co.* (1912) 225 U. S. 111, 129, 32 Sup. Ct. 641, 643; Bouvier's *Law Dictionary*. "To the same rights of property" apparently means "in the same subject matter of property."

<sup>46</sup> Anson, *Contract* (Corbin's ed. 1919) sec. 284.

<sup>47</sup> *Walker's Case* (1587, Q. B.) 3 Coke, 22a; Coke, *Littleton*, 271a.

Hence privity of estate by succession is supplied through transfer or conveyance, and one who is thus in privity with another is one who has succeeded to substantially identical "rights of property" as such other formerly had.

It will thus be seen that the idea of privity is but the idea which, as well pointed out by Dean Pound,<sup>48</sup> is so prevalent in our law of the necessity of a relationship (a "jural nexus," as Mr. Kocourek would have it) between the parties to a suit in order that the plaintiff may recover. In the Hohfeld terminology, such relationship in a successful suit is invariably right-duty, and in our present case our problem is really to see how the right-duty relationship may exist upon a contract but between others than the parties thereto.

Now there is no definitional statement of the degree or kind of privity required in a particular case. Thus, in our case, must there be both mutual and *successive* relationship, or will one or the other or either alone suffice for privity of estate?<sup>49</sup> And will a succession by mere transfer of possession give the necessary connection, or must it be a closer connection as succession to the identical estate held by the one to whom relationship is necessary? Let us look to the reason of the requirement.

The development of the law of real covenants has been traced many times. One of the most valuable discussions is the famous chapter by Mr. Justice Holmes in *The Common Law*.<sup>50</sup> This he very briefly summarized in *Norcross v. James*.<sup>51</sup> It will be remembered that he starts with the thought that "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."<sup>52</sup> In modern times we of course recognize the comparatively free assignability of choses in action, but we still do not recognize the assignability of contract duties and obligations. In real property law, however, such benefits and obligations may both be assigned. Such assignability takes a different course in easements from what it does in real covenants. In easements by a fiction the rights and the duties are considered as inhering in the land. The dominant land has the benefit, the servient, the burden. Land is bound to land. Hence the succession occurs by merely having the land which owes or is owed the obligation. Real covenants, however, so he says, go back to the ancient warranty upon which an heir and later an assign could sue. Here, therefore,

<sup>48</sup> *The Spirit of the Common Law* (1921) ch. 1. See *infra* note 84.

<sup>49</sup> Thus the Massachusetts theory hereinafter discussed would apparently require both. In the law of waste, a remainderman could only bring the old writ of waste against one with whom he was in privity by mutual relationship, and hence he could not recover after assignment even for waste committed before assignment. Coke, *Littleton*, 53b.

<sup>50</sup> *Op. cit.* 371-409. See also Sims, *op. cit.*

<sup>51</sup> (1885) 140 Mass. 188, 2 N. E. 946.

<sup>52</sup> *Norcross v. James*, *supra* note 51. See also Holmes, *op. cit.* 340, 409.

there was an extension of the contract relation by succession to the estate; and such extension was developed through a shortening of the process of securing the remedy on the warranty. Thus, A would vouch his warrantor B and the latter his warrantor C, and so on. Hence A would in reality look to C or the person ultimately liable. "The right thus given to assigns only shortened up the old process by which, within certain limits, each purchaser looked in turn to his vendor to make good the warranty imported by sale."<sup>53</sup> And as Mr. Justice Holmes says: "But in order that an assignee should be so far identified in law with the original covenantee, he must have the same estate, that is, the same status of inheritance, and thus the same *persona*, quoad the contract. The privity of estate which is thus required is privity of estate with the original covenantee, not with the original covenantor; and this is the only privity of which there is anything said in the ancient books."<sup>54</sup>

Here it seems is the real explanation of the requirement of privity of estate in this connection. It is to justify the transfer of the covenant right or duty. If such right or duty is of the kind traditionally considered as an easement it will pass with the land to whoever has the land; if it is such a right or duty as was traditionally considered only a covenant, it will pass only by succession to the estate of one of the parties to the covenant. Succession to the interest of one of the parties to the covenant, not to both, is the necessary connecting link.<sup>55</sup> Hence, if A, the covenantor, assigns his estate to B, and X, the covenantee, assigns his estate to Y, the necessary privity is secured so that Y may sue B and no privity is needed between A and X except the original contract.<sup>56</sup>

<sup>53</sup> *Walsh v. Packard*, *supra* note 34. See also Holmes, *op. cit.* 372 *et seq.*

<sup>54</sup> *Norcross v. James*, *supra* note 51, citing (1293) Y. B. 21-22 Edw. I (Rolls ed.) 148 and (1523) Y. B. 14 Hen. VIII, 4, pl. 5, where the term is so used. See Brooke's *Abridgement*, *Monstrance de faits*, 61, 161. See also Holmes, *op. cit.* 403, 404. Abbott, *op. cit.* 131, carries the analogy over into the field of so-called "equitable easements," that is, restrictions on the use of land which are enforced in a court of equity by applying the equitable doctrine of notice, by suggesting that such cases rest upon the "equitable principle of privity of conscience." Quoted and approved in *Rosen v. Wolff* (1922, Ga.) 110 S. E. 877, 880. That the modern covenant may also be descended from the fine enforced in the action *de fine facto*, see *infra* note 80.

<sup>55</sup> Holmes, *op. cit.* 403, 404.

<sup>56</sup> See in accord: *Shaber v. St. Paul Water Co.* (1883) 30 Minn. 179, 14 N. W. 874; *Merchants' Union Trust Co. v. New Phila. Graphite Co.* (1912, Del. Ch.) 83 Atl. 520, 527; *Tucker v. McArthur* (1898) 103 Ga. 409, 30 S. E. 283; *Reidsville & S. E. Ry. v. Baxter* (1913) 13 Ga. App. 357, 363, 79 S. E. 187, 190; *Horn v. Miller* (1890) 136 Pa. 640, 20 Atl. 706; *Dickinson v. Hoome's Adm'r.* (1852, Va.) 8 Grat. 353, 375, 403-405; *Coleman v. Lucksinger* (1909) 224 Mo. 1, 123 S. W. 441; *Mott v. Oppenheimer* (1892) 135 N. Y. 312, 31 N. E. 1097; *Solberg v. Robinson* (1914) 34 S. D. 55, 147 N. W. 87; *Wead v. Larkin* (1870) 54 Ill. 489. Cf. *Hurxthal v. St. Lawrence Boom & Lumber Company* (1903) 53 W. Va. 87, 44 S. E. 520 (practically in accord in spite of the court's hesitation) and *Fresno Canal & Irrigation Co. v. Rowell* (1889) 80 Calif. 114, 22 Pac. 53,

There is, however, a widespread belief that something further is needed. Many learned commentators have stated that privity of estate in the sense of succession is necessary between A and B.<sup>57</sup> And if mere frequency of judicial statement is to govern, it must be admitted that such would seem to be the current rule of law. It is submitted, however, that such a requirement is justified neither by history nor on principle, that its apparently wide modern support consists largely of *dicta* or of cases where by some theory or another the required privity is discovered, and that the decisions actually applying the requirement to defeat a recovery are comparatively few.

On principle and reason the requirement seems an anomaly. The requirement of privity is to furnish a connecting link between the parties. That is already supplied between covenantor and covenantee by the promise itself. The need is to justify the transfer of the right or duty created by the promise, not to justify the promise itself.<sup>58</sup> The practical effect of requiring such a privity is that there should be a conveyance between covenantor and covenantee at the time of making the covenant. This amounts to a barren formality akin to that formerly required for the transfer from husband to wife through the instrumen-

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where the obligation was enforced as a lien on the land but not as a personal obligation. See also in accord Holmes' notes to 4 Kent, *Commentaries* (13th ed. 1884) 480, n. 1; Pollock, *Principles of Contract* (9th ed. 1922) 254 (stating "*contra* Sugd. V. & P. 584-5 but alone among modern writers"); Rawle, *Covenants for Title* (5th ed. 1887) 294, n. 2; Judge Hare's notes to 1 Smith's *Leading Cases* (8th ed. 1872) 174 (at least as to the benefit). It is sometimes suggested that cases of this kind may be distinguished on the ground that this rule applies only to the running of the burden and not to the running of the benefit. In criticism of such suggestion, see *infra* note 91. See also the doubt suggested by Sugden, *op. cit.* 581, as to the applicability of such a requirement to covenants by a *vendor*, and his reference to *Third Report of English Real Property Comrs.* p. 52. As to covenants of title, see *infra* note 66.

<sup>57</sup> 2 Tiffany, *op. cit.* 1407; Aigler, *Running of Party Wall Agreements* (1912) 10 MICH. L. REV. 187; 4 Kent, *op. cit.* \*480, n. 1; 2 Washburn, *Real Property* (6th ed. 1902) 258; 66 L. R. A. 682, note; 15 C. J. 1242; NOTES (1910) 23 HARV. L. REV. 298; Sugden, *op. cit.* 581 *et seq.*; McFee, *Privity of Estate* (1886) 20 AM. L. REV. 389; Sims, *op. cit.* 17, 18, 28, 54, 61, 63, 65, 68, 70, 195-202, 215, 218. At page 28 Sims states "a similar requirement, though not so well established," namely, that the grant should be a part of land the remainder of which is retained by the grantor, that the land burdened and the land benefited should be contiguous or nearly so. Sims adds clarity to his discussion by carefully distinguishing privity by succession between covenantor and covenantee from privity by succession to the estate of one of the parties to the covenant. It seems, however, that he confuses the former kind of privity with that under the Massachusetts doctrine of *mutual* relationship hereinafter discussed.

<sup>58</sup> The privity of the contract follows the estate of the land." *Walker's Case*, *supra* note 47; Holmes, *op. cit.* 391. After assignment by the covenantee his privity of contract is gone so that he may not sue for breaches thereafter occurring. *Stoddard v. Emery* (1889) 128 Pa. 436, 18 Atl. 339. This is criticized by Sims, *op. cit.* 91, but is in accord with the old authorities. *Brett v. Cumberland* (1619, K. B.) 2 Rolle, 63. It is explained in *Walker's Case*, *supra* note 47.

tality of a third person. Let X transfer to A and then A transfer back to X while giving the covenant and the formality is supplied. No policy, such as preventing encumbrances on titles, is affected in the least. Under our recording systems notice of a covenant is as easily acquired as notice of a conveyance. The government may obtain some revenue from a stamp tax on deeds, the draftsman and recording officer may collect fees, but no other result is served. If it is desirable to get rid of such covenants some rule having a real connection with the purpose in view should be applied, not one which operates merely through the chance of compliance or noncompliance with a barren formality. In *Wheeler v. Schad*<sup>59</sup> where the parties neglected to insert their covenant in the deed of conveyance but drew it up six days later, it could not be enforced. Such a decision surely cannot be justified.

As Mr. Justice Holmes shows,<sup>60</sup> no such requirement is stated in the old books. The statement by Lord Kenyon in *Webb v. Russell*<sup>61</sup> in 1789 is generally cited as the precedent for the rule. In that case, as shown above, the real question was whether the covenant (there made to a mortgagor by the lessee in a lease made by mortgagor and mortgagee) was collateral because made to a stranger to the legal title.<sup>62</sup> In holding that such a contract was collateral, that is, that it did not touch or concern the land, Lord Kenyon, without citing any authority, added: "It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties." He then went on to say that the mortgagor had no interest in the land of which a court of law could take notice. This seems, in the first place, to be but a variant or perhaps a test of the rule of *Spencer's Case* as to "touching and concerning" (a test criticised above); and, in the second place, to be a requirement of *mutual* relationship instead of successive relationship, and hence to be more in line with the third meaning of privity hereinafter referred to. Never-

<sup>59</sup> (1871) 7 Nev. 204, which also confuses this doctrine with that of privity by mutual relationship.

<sup>60</sup> See *supra* note 54.

<sup>61</sup> *Supra* note 28. There seems no earlier precedent for the rule. Many rent cases refer to privity of estate, but not in such a way as to justify this rule. Thus in *Humble v. Glover* (1594, Q. B.) Cro. Eliz. 328, holding a lessee not liable for rent, after his assignment to the assignee of the lessor, the statement that "there is no privity between the bargainee and lessee, but by reason of the privity of estate, which being gone, the lessee is not chargeable" might seem at first to require lessee and bargainee to be in privity of estate. The statement is, however, more guarded. There is in truth no privity except there is added to the privity of contract between lessor and lessee the privity of estate between bargainee and lessor. The court is not stating any further requirement. See also the explanation in *Walker's Case*, *supra* note 56, and *cf.* the cases holding the action local where based on privity of estate. Sims, *op. cit.* 84. In the oft-cited case of *Bally v. Wells*, *supra* note 1, the requirement that "there must always be a privity between the plaintiff and the defendant" is to the same effect.

<sup>62</sup> This is made clear by the opinions in the case holding that the original covenantee could sue. *Stokes v. Russell* (1790, K. B.) 3 T. R. 678, (1791, Exch.) 1 H. Bl. 562, 566.

theless it has been held to justify and require succession and hence a conveyance between the parties to the covenant.

Sims argues that while the basis of the requirement is "chiefly historical" it "has been followed generally because it is salutary. It prevents too frequent exercise of the power to bind land, and restricts it to those cases only where the covenant figures in the general value of the land in a sale."<sup>63</sup> (Why is mere frequency of use a vice, and why is a covenant figuring merely in the general sale price of land more desirable than one bought and paid for separately?) But the only history to which the learned author can refer is that of the ancient implied warranty, from which as we have seen, the modern real covenant is supposed to have developed. Before the statute of *Quia Emptores* (1290) upon a conveyance in fee the grantee held of the grantor and not of the grantor's overlord. The implied warranty was simply the lord's protection to his vassal in return for the duties imposed upon him. In certain instances land would be surrendered to a powerful lord and then received back in tenure in order to secure such protection. As the statute of *Quia Emptores* abolished subinfeudation in fees, no implied warranty from the assignor would thereafter exist in a conveyance in fee, and hence the need thereafter of an express warranty.<sup>64</sup> This seems a rather tenuous background for such requirement since real covenants, no matter how completely descended from warranties, have become something quite different.<sup>65</sup> In the case of the implied warranty the conveyance was the basis for making the implication. In the case of the express covenant, however, we need no conveyance to furnish any implication, for we have the express words of the parties.<sup>66</sup> Moreover, the argument proves too much, for if we are to assimilate modern covenants so closely to warranties, ancient or modern, the burden of the covenant cannot pass since the warrantor's

<sup>63</sup> Sims, *op. cit.* 28. Cf. *supra* note 57. At page 196 he says that the absence of this requirement would allow the free creation of duties "utterly aloof from the equitable distribution of privileges which was thought to recommend them as an incident of grants" and he also attempts an argument from experience on the ground that covenants by "strangers" have not been common. In *Mygatt v. Coe* (1894) 142 N. Y. 78, 36 N. E. 870, there is a convincing argument in the dissenting opinion showing the desirability of upholding a running covenant of warranty of title made by a stranger thereto, such as the ordinary title guaranty company.

<sup>64</sup> Sims, *op. cit.* 33, 34, 41; Maitland, *Domesday Book and Beyond* (1897) 70, 71.

<sup>65</sup> As pointed out, *infra* note 80, the warranty seems to have been not the only ancestor of our modern covenant. The warranty furnished perhaps the idea of transferring an obligation; but the writ of covenant upon a fine was a *form of action* to enforce a *kind of obligation* more nearly in accord with our modern real covenant and its remedy than was the warranty and its remedy.

<sup>66</sup> An extraordinary rule has developed that covenants for title are not enforceable by a remote grantee when the covenantor had neither title nor possession. This, which is at variance with the old views of the effect of collateral warranties and with the modern rule of the operation of such covenants by way of estoppel, would, as Rawle says, "logically lead to the alarming consequence that when a purchaser, by reason of the total loss of the land, most needed the help of his

assigns are not bound.<sup>67</sup> Yet Sims has, with great care and learning, assembled cases from the Year Books to prove his thesis that the burden of real covenants did then pass to assigns.<sup>68</sup>

Again if the analogy to the warranty was to be pressed home it would be only the grantor in the conveyance who would be held to have promised. But the modern cases which attempt to apply this requirement hold that so long as there is a conveyance either grantor or grantee may be bound. And the requirement of a conveyance is reduced to mean the transfer of any interest in the land however slight, even mere possession, thus showing that actually it is honored more in the evasion than in literal compliance.<sup>69</sup>

Finally, there is difficulty with the authorities from the Year Books, since they contain no suggestion that a conveyance is required, and several cases are opposed to such an idea. Thus, in the famous *Pakenham's Case*,<sup>70</sup> covenant was allowed against a prior by an assignee of the covenantee on a covenant made by one of defendant's predecessors that the prior and convent should sing every week in a chapel in the covenantee's manor. Sims fairly admits that there was no grant between the parties, and that there was no basis for Lord St. Leonards' sugges-

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covenants for title, he would be utterly deprived of their aid." Rawle, *op. cit.* 341. Rawle traces this "curious result" to a pleading success of Coke in *Noke v. Awder* (1595, Q. B.) Cro. Eliz. 373, 436, and in suggesting that the English authorities are not in accord, states that it is certainly matter of regret "that that which was a mere professional triumph of Sir Edward Coke upon a question of pleading should have disturbed the courts of last resort upon both sides of the Atlantic for more than a century." Rawle, *op. cit.* 350. This rule is said however to be supported by the weight of authority in this country. *Bull v. Beiseker* (1907) 16 N. D. 290, 113 N. W. 870; 14 L. R. A. (N. S.) 314, note; *H. T. & C. Co. v. Whitehouse* (1916) 47 Utah 323, 154 Pac. 950; L. R. A. 1916D. 611, 613, note. There is, however, strong dissent. *Tucker v. McArthur*, *Dickinson v. Hoome's Admr.*, *Coleman v. Lucksinger*, *Solberg v. Robinson*, *Wead v. Larkin*, *supra* note 56. The rule was adopted in New York in *Mygatt v. Coe* (1891) 124 N. Y. 212, 26 N. E. 611, (1894) 142 N. Y. 78, 36 N. E. 870, (1895) 147 N. Y. 456, 42 N. E. 17, (1897) 152 N. Y. 457, 46 N. E. 949, against powerful dissent in each case except in 142 N. Y. 78, 36 N. E. 870, where the unanimous opinion ordering a new trial was favorable to a recovery. There are possible grounds for sustaining the result in part as applied to those covenants (of seisin, for right to convey, etc.) which currently are considered as broken immediately and do not run with the land, and again where a jurisdiction enforces the rule (now losing ground, see Bordwell, *Seisin and Disseisin* (1921) 34 HARV. L. REV. 717, 734 *et seq.*) that a deed made by one out of possession is wholly void. But if, as stated, the rule is broader, it is open to all the objections urged in the text against this view of privity. See a good discussion by Foster, *Covenants for Title in Nebraska* (1922) 1 NEB. L. BULL. 5, 40 *et seq.*

<sup>67</sup> "We may add that the burden of an ordinary warranty in fee did not fall upon assigns, although it might upon an heir, as representing the person of his ancestor. Y. B. 32-33 Ed. I, 516 (Rolls ed.);" Holmes, J., in *Norcross v. James* (1885) 140 Mass. 188, 189, 2 N. E. 946, 947.

<sup>68</sup> Sims, *op. cit.* 58-70, *cf.* 140 *et seq.*

<sup>69</sup> *Mygatt v. Coe*, *supra* notes 63 and 66; Rawle, *loc. cit.*, *supra* note 66.

<sup>70</sup> *Supra* note 31.



tion that there was some relation of interest between them.<sup>71</sup> This leads him to an interesting admission in connection with a criticism he makes of Mr. Justice Holmes' view of so called spurious easements—those where the servient owner has active duties to perform.

It will be recalled that Mr. Justice Holmes carries his development of the history of warranties as distinguished from easements to the point of showing a tendency of the law of covenants to depart from the law of warranties and tend towards the law of easements. He asserts a fairly wide variety of spurious or active easements and states that *Pakenham's Case* shows the judges hesitating between the two conceptions. In fact he explains this case as being based on the theory of easements—the right inhering in the land rather than in privity by succession of estate—and he rather suggests the possible desirability of a theory which would have assimilated covenants more closely to easements so that they would actually run with the land instead of merely with the estate in land.<sup>72</sup> And in his conclusion he attempts to divide covenants into two classes, those analogous to easements and those analogous to warranties, though, as he admits, there is but a shadowy division at best.<sup>73</sup> Sims argues, on the other hand, that there are no spurious easements, and that the supposed cases recognizing such are merely cases based upon local custom.<sup>74</sup> When, however, he comes to *Pakenham's Case* he rather reluctantly concedes its analogy to the spurious easement.<sup>75</sup>

Whatever may be the historical basis—and it seems somewhat slight—of Mr. Justice Holmes' suggested distinction between covenants analogous to warranties and covenants analogous to easements, it is apparent that no such distinction is followed in the modern cases.<sup>76</sup> The modern real covenant is as much descended from *Pakenham's Case* as from "pure covenants of title." And that case, though it may show the judges veering towards applying to covenants the same theory as that by which easement rights and duties are held transferable, yet is

<sup>71</sup> Sims, *op. cit.* 68, 196.

<sup>72</sup> Such assimilation would result in a holding that everyone taking the land, even a disseisor, would be bound by the covenant, instead of only privies of the contracting parties. On the other hand, if there was complete assimilation to the easement, there would not be personal liability on the part of the landowner, but the land alone would be bound. Cf. Sims, *op. cit.* 178-182.

<sup>73</sup> See discussion in Holmes, *op. cit.* Lecture XI. In *Walsh v. Packard*, *supra* note 34, Mr. Justice Holmes attempts to place his decision upon such division.

<sup>74</sup> Sims, *op. cit.* 47-57.

<sup>75</sup> Sims, *op. cit.* 53, 54, 65, 70. But at page 68 he says that "it seems unavoidable to say that if the case is really the running of covenants, it does gainsay the idea of the necessity for a conveyance. . . ." See also pp. 196, 197.

<sup>76</sup> Mr. Justice Holmes' argument has, however, had an interesting result in his own jurisdiction of Massachusetts. There the operation of covenants is somewhat limited by the definition of privity as requiring a mutual relationship but the doctrine of spurious easements has been carried to extremes as by Mr. Justice Holmes in *Middlefield v. Knitting Co.*, *supra* note 39, finally resulting in the decision in *Whittenton Mfg. Co. v. Staples* (1895) 164 Mass. 319, 41 N. E. 441,

after all a case of a covenant. The action is in covenant,<sup>77</sup> there is no servient tenement upon which the burden may fall, and the court is looking for a theory to uphold a recovery upon the covenant.<sup>78</sup> The case seems clear authority that a grant between the parties is not essential to the enforcement of a covenant,<sup>79</sup> and it is supported by other cases of the time.<sup>80</sup>

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upholding a prescriptive obligation to pay part of the annual cost of keeping up a dam, a case going further than Mr. Justice Holmes himself was willing to go, and hence he dissented. See NOTES (1896) 9 HARV. L. REV. 352.

<sup>77</sup> According to Mr. Justice Holmes, the action of covenant was not, however, absolutely limited to actions upon promises. Holmes, *op. cit.* 400.

<sup>78</sup> This seems true even though the court states that he who has the land "by alienation or in other manner" shall have the action, for this is but making an analogy to the easement, and though the court suggests as a possible alternative ground of recovery the existence of a prescriptive duty.

<sup>79</sup> See explanation of the case in *Vyryan v. Arthur* (1823, K. B.) 1 Barn. & Cress. 410; *Spencer's Case*, *supra* note 6, and *Allen v. Culver*, *supra* note 27 (criticized by Mr. Justice Holmes in *Walsh v. Packard*, *supra* note 34). Its authority is said by McFee, *Privity of Estate* (1886) 20 AM. L. REV. 389, 404, to be overthrown by the investigations of Sugden and Washburn.

<sup>80</sup> *Horne's Case*, *supra* note 31; (1293) Y. B. 21-22 Edw. I (Rolls ed.) 136 (covenant to enfeoff of rent); Fitzherbert, *Natura Brevium* (9th ed. 1794) 145E, n. 9, citing (1220) Y. B. 4 Hen. III, 51 (covenant not to erect a mill). In (1329) Y. B. 4 Edw. III, 57, pl. 71, reheard in (1332) Y. B. 7 Edw. III, 65, pl. 67, there was a grant (as pointed out by Sims, *op. cit.* 63) but that fact apparently was of no importance. It is suggested that the development of warranties into covenants real is not as direct as indicated by Sims. It would seem more probable that in accord with the usual method of growth of the common law, other factors also helped to shape the modern rule. The normal method of enforcing the warranty was either through the writ of *warrantia chartae* or the process of vouching to warranty. Rawle, *op. cit.* sec. 113, who argues that covenant never lay upon a warranty which accompanied the transfer of a freehold; *cf.* Sims, *op. cit.* 45 *et seq.* Meanwhile there was developing the writ of real covenant to enforce a fine (*de fine facto*) and, possibly from that, the covenant to protect the interest of a termor. Such action was held to lie as between other persons than the original parties and to enforce various obligations and duties. See Bracton's *Note Book* (1222) plea 158, to enforce a fine for services; (1234) plea 1129, to enforce a covenant made between the fathers of the present parties that plaintiff may have a hundred pigs in a certain wood; (1219) plea 36, covenant by a father not to alienate apparently good even against purchasers from the father; (1233) plea 804, the benefit of a lessor's covenant held assignable; (1292) Y. B. 20-21 Edw. I (Rolls ed.) 244-249, again appearing in (1293) Y. B. 21-22 Edw. I (Rolls ed.) 112, covenant by an abbot on a fine made to his predecessor by the defendant's father providing *inter alia* that if the abbot's beasts entered defendant's lands they should not be detained, as the defendant had done; (1293) Y. B. 21-22 Edw. I (Rolls ed.) 136, covenant by assignee of covenantee against covenantor's heirs; (1292) Y. B. 20-21 Edw. I (Rolls ed.) 254; *ibid.* 278. Thus while warranties were enforced in a special manner, there had developed, from the proceedings to enforce fines, a procedure substantially that later followed throughout the law of real covenants by which obligations similar to our modern covenants were enforced. In respect to the form of remedy and the kind of obligation the analogy is really closer to the fine than to the warranty. Hence our modern law seems to have developed from the enforcement of fines as truly as from the enforcement of warranties, and

Of the modern cases, many repudiate the necessity of such privity.<sup>81</sup> Of those purporting to apply it, many are pure *dicta*, many find the requirement to exist, and many confuse the requirement with the third sense of privity by mutual relationship. Again other cases seem to consider the requirement as merely another view of the rule of "touching or concerning." The authority actually enforcing literal compliance is not large.<sup>82</sup> It is submitted that the rule should be altogether repudiated.

There remains the third view of privity, originated in Massachusetts, the so-called Massachusetts doctrine of "substituted privity" or privity by way of tenure, of which perhaps the most usual case is a covenant "in aid of an easement." Here to the requirement of relation by succession to the estate of a party to the covenant is added the requirement of mutual relationship between the covenanting parties. The covenantor and covenantee must at the time of making the covenant each have some interest in the land outside of the covenant. There are thus required simultaneous interests in the land by both parties. If one has an easement interest and the other general ownership such requirement is satisfied.

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therefore it seems unsound today to say that a peculiar restriction, justifiable only in connection with implied warranties, should limit the law of real covenants.

<sup>81</sup> See *supra* note 66. The case of party wall agreements (where a recovery is perhaps more generally upheld than elsewhere) seem opposed in spirit at least to such a requirement. This seems true notwithstanding the soundness of the suggestion that there is created by such an agreement a future interest analogous to a cross-easement. See the learned and acute article by Professor Aigler previously cited, *supra* note 57, and *cf.* NOTES (1908) 8 COL. L. REV. 121. So far as this requirement is concerned the explanation seems *post hoc* rather than *propter hoc*.

<sup>82</sup> Of the cases cited by Tiffany, *op. cit.* 1408, n. 18, to this point, *Gilmer v. Mobile & Montgomery Ry.* (1885) 79 Ala. 569; *Conduitt v. Ross* (1885) 102 Ind. 166, 26 N. E. 198; and *Louisville, etc. Ry. v. Baskett* (1909, Ky.) 121 S. W. 957, are cases applying the Massachusetts rule later discussed, and a recovery was allowed. *Indianapolis Water Co. v. Nulte* (1890) 126 Ind. 373, 26 N. E. 72, and *Louisville & N. Ry. v. Webster* (1901) 106 Tenn. 586, 61 S. W. 1018, apply this rule and the Massachusetts rule in the alternative; *Burbank v. Pillsbury* (1869) 48 N. H. 475, is only a *dictum*, while *Smith v. Kelley* (1868) 56 Me. 64, though somewhat obscure, seems to be authority for the point cited. In addition, the learned author cites two New York cases, *Harsha v. Reid* (1871) 45 N. Y. 415, and *Lawrence v. Whitney* (1889) 115 N. Y. 410, 22 N. E. 174, where the point seems rather confused with the Massachusetts rule. But in view of *Mygatt v. Coe*, *supra* note 66, the New York rule seems in accord, though *Mott v. Oppenheimer*, *supra* note 56, clearly went the other way, and now the New York rule is that the burden of covenants does not in general pass. Of the many cases cited in 15 C. J. 1242, to the point that privity of estate must exist between covenantor and covenantee, some, as *Tucker v. McArthur*, *supra* note 56, are clearly *contra*; many others, such as *Morse v. Aldrich* (1837, Mass.) 19 Pick. 449, are but applications of the Massachusetts rule, while of the few remaining, many, such as *Bull v. Beiseker*, *supra* note 66, apply the rule already discussed in the peculiar case of covenants of title, which may possibly be regarded as exceptional. The same criticism will apply to the cases cited by Sims, *op. cit.* 197. For the present New York rule, see *infra* note 93.

Now this theory has an understandable policy behind it. No covenant will be upheld under it unless the covenantee and his assigns already have an encumbrance on the land. In effect the argument is that covenants are undesirable encumbrances, but where the land is already encumbered, another encumbrance is not objectionable. It also calls for a dominant and a servient tenement, so that in effect land is bound to land and neither covenant rights nor duties are held in gross.<sup>83</sup> It operates as a real restriction upon such covenants in a manner which has some justification in a policy against encumbrances on title. That, however, is a different proposition from the historic requirement of succession which was to supply a means of transferring either right or duty. The two should not have been confused. If the policy against encumbrances is justifiable it deserves to be isolated and independently stated, not applied under cover of a doctrine which has an importance of its own.<sup>84</sup>

The origin of this requirement is obscure. It has been referred to privity by tenure, since tenure supplies the same kind of *mutual* relationship; and because there is not now technically tenure, it is often spoken of as "substituted privity."<sup>85</sup> Very likely there was also some thought of making an analogy to covenants with leaseholds which admittedly run and where there is the like mutual relationship. But there seems no direct suggestion of such a requirement until the case of *Morse v. Aldrich*<sup>86</sup> was decided in Massachusetts in 1837. In that case a covenant in aid of an easement was made fifteen years after the creation of the easement, and with different parties from those of the grant of the easement, thus showing, what has often been misunderstood, that there is no connection between this requirement and that (just discussed) of privity in the sense of a simultaneous conveyance or succession between the parties. The court stated that "to create a covenant which will run with the land, it is necessary that there should be a privity of estate between the covenantor and covenantee," citing *inter alia*, *Webb v. Russell*. It then pointed out that the usual situation is of a covenant between lessor and lessee; "but the same privity exists between the grantor and grantee, where a grant is made of any subordinate interest in land; the reversion or residue of the estate being

<sup>83</sup> As to whether the covenant may be in aid of an easement in gross, see *supra* note 40.

<sup>84</sup> Dean Pound in *The Spirit of the Common Law* (1921) 23, after stating that a relation between the parties is necessary to the enforcement of a covenant, and that, since the statute of *Quia Emptores*, there is no relation in the case of a conveyance in fee simple, says: "In the United States, when first we sought to extend the law as to the creation of legal servitudes by permitting such covenants to run, we did not break over the rule expressly, but our courts instead turned to the word "privity" which in its proper use refers to a relation, and thought the result justified by the conjuring up of a fictitious privity."

<sup>85</sup> As to its origin, see an interesting comment in (1915) 15 COL. L. REV. 55. Cf. also Pound, *op. cit.* 23; McFee, *loc. cit. supra* note 57.

<sup>86</sup> *Supra* note 82.

reserved by the grantor, all covenants in support of the grant, or in relation to the beneficial enjoyment of it, are real covenants and will bind the assignee." The connection of *Webb v. Russell* with this theory has already been adverted to.<sup>87</sup> The other cases cited by the court dealt rather with the question as to what covenants touched or concerned the land.<sup>88</sup> It would seem that the court took the analogy of a leasehold, where such mutual relationship exists and, applying it to a term whose meaning had been obscured, made use of the occasion to enforce its ideas of public policy. The rule has had a very considerable support, both in Massachusetts and elsewhere.<sup>89</sup>

It is submitted therefore that privity in the sense of succession to the estate of either party to the covenant is the only historically justifiable requirement, that privity in the sense of succession of interest between the parties to the covenant is unjustifiable as a requirement, and that privity in the sense of mutual relationship between such parties is to be justified only as expressing a policy against encumbrances which has little connection with the original basis for the requirement.

A question has arisen whether privity of estate is necessary in order that the benefit may run, it being argued that the benefit is not an encumbrance and should run anyway. It is asserted that the cases are about evenly divided on this point.<sup>90</sup> But it is obvious that privity in the first sense is necessary in order to secure the transfer of the covenant, which is not to be treated as an easement. So far as the other two

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<sup>87</sup> The case of *Hurd v. Curtis* (1837, Mass.) 19 Pick, 459, where the necessary privity was not found, is usually stated as authority for the requirement of a conveyance, but all it does hold is that there must be privity between covenantor and covenantee, and, in view of the fact that it was decided by the same judge at the same time as *Morse v. Aldrich*, it is but fair to assume that this means a mutual and not a successive relationship. *Plymouth v. Carver* (1834, Mass.) 16 Pick. 183, is cited as *contra* in *Smith v. Kelly*, *supra* note 82, but this seems doubtful; there was there a conveyance, and the court holds that the obligation was a condition and not a covenant.

<sup>88</sup> The other cases cited by the court were *Spencer's case*, *supra* note 6; *Cole's Case* (1692, K. B.) 1 Salk. 196; 3 Wils. 29; *Keppell v. Bailey*, *supra* note 32; and *Vyvyan v. Arthur*, *supra* note 79. Those cases are discussed in the companion case of *Hurd v. Curtis*, *supra* note 87, and, as was there shown, what the court had in mind was whether the covenant touched or concerned the land, since it referred to examples of acts to be done on neighboring land (*cf. Cole's Case*) as cases where privity of estate is lacking. The cases cited deal with that subject rather than with a requirement of privity. In *Spencer's Case*, *Pakenham's Case* is referred to with apparent approval and the only reference to privity there is that it is lacking in the case of a lease of personal goods, which is "merely a thing in action."

<sup>89</sup> See *Norcross v. James*, *supra* note 51; *Fitch v. Johnson* (1882) 104 Ill. 111; *Berryman v. Hotel Savoy Co.*, *supra* note 32; *Norfleet v. Cromwell* (1870) 64 N. C. 1; *Gilmer v. Mobile & Montgomery Ry.* (1885) 79 Ala. 569, and cases *supra* note 82. See criticism of the view in *Burbank v. Pillsbury*, *supra* note 82; *Van Rensselaer v. Hays* (1859) 19 N. Y. 68; and by Darling, *Is a Sublease for the Residue of a Lessee's Term in Effect an Assignment?* (1882) 16 AM. L. REV. 16, 39.

<sup>90</sup> 2 Tiffany, *op. cit.* 1404.

meanings are enforced in a jurisdiction, the running of benefits at least might well be exempted therefrom, as not amounting to the creation of *encumbrances*.<sup>91</sup>

Even with such restrictions upon the running of covenants, it is the view of some courts that covenants create burdensome encumbrances upon title and that it is a preferable rule of policy that the burden should not be permitted to run in any event. This is the rule in England,<sup>92</sup> in New York,<sup>93</sup> and probably in other jurisdictions.<sup>94</sup> It should be noted that in New York it is pointed out that certain covenants, for example, for fencing, for party wall agreements, and the like, have become so well established that they must be upheld, and hence these must be treated as exceptions. This is stated also to be the English view.<sup>95</sup> Whatever the policy justifying this view, it is, to a certain extent at least, unfortunate if it must be broken in upon by exceptions of a more or less undefined character. The rule therefore lacks clearness and suggests some doubt as to the wisdom of the policy behind it. If certain of such covenants are to be upheld, why should not all be upheld?

A decision of the proper policy in this regard is not easy. Traditionally we argue in favor of unencumbered titles, and title-searchers and real estate men generally who desire free exchange of realty are in accord with such a view of policy. Yet apparently we are coming to see that in many ways permanency of development of land is desirable. Witness the prevalence of equitable restrictions, and the tendency towards zoning laws and towards building-line restrictions. A covenant such as one to repair may be of great service so far as concerns the actual value of the premises. In view of all the encumbrances which are being upheld it is perhaps questionable whether there is any unanimity of feeling in favor of a policy against upholding such covenants.

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<sup>91</sup> It is often urged, as by Judge Hare in his notes to Smith's *Leading Cases*, *supra* note 56, that *Pakenham's Case* and other cases can be explained on the basis that the requirement of privity between covenantor and covenantee exists only for the running of the burden. The difficulty with this is that not only do the old cases make no such distinction but also that there is apparently no authority before *Webb v. Russell* for such a requirement in case of either benefit or burden. If, as is sometimes argued, the English authorities have always been against the running of a burden of a covenant with a fee, there would be no occasion to consider the doctrine of privity in connection with the running of a burden. There is no logical reason for making a distinction here between benefit and burden; but if we are adopting a more or less "hit-or-miss" method of getting rid of burdensome covenants, perhaps we might well decide that it is unnecessary to apply such a method to the benefit of a covenant since this is not objectionable as an encumbrance.

<sup>92</sup> *Austerberry v. Oldham* (1885, C. A.) L. R. 29 Ch. Div. 750.

<sup>93</sup> *Miller v. Clary* (1913) 210 N. Y. 127, 103 N. E. 1114.

<sup>94</sup> *Cf.* (1899) 12 HARV. L. REV. 218. Sims gives New Jersey and Virginia as in accord with the English rule, while he says that in Ohio burdens are enforced only in equity. Sims, *op. cit.* 166, 167. As the event shows, however, he was in error as to New York. *Miller v. Clary*, *supra* note 93.

<sup>95</sup> See *Miller v. Clary*, *supra* note 93.

Such a view might lead one to accept the Massachusetts doctrine of substituted privity as a fair compromise between opposing views of policy. Yet even that may be questioned. The Massachusetts doctrine merely shuts out covenants of which either benefit or burden is held in gross. Yet where benefit or burden is held in gross it will, because of the necessity that covenants real must touch or concern the land, be unassignable and hence can last only a comparatively short time at best. The parties involved will always therefore be definitely ascertainable so that a valid release may be given at any time the parties are willing to do so. To a generation familiar with many forms of encumbrances, such burdens or titles would seem not improper.<sup>96</sup>

One other question may be referred to briefly. Assuming that privity of estate in the sense of succession to the estate is necessary, what succession is actually required? Must the assignee take the exact estate held by his assignor? Many interesting questions arise in this connection. For example, may a remainderman enforce a covenant entered into by a lessee with the life-tenant who has power to lease? Without attempting to classify the cases in detail it is suggested that in view of the analogy of easements and in view of the nature of the requirement—to secure transfer of contract rights and duties by transfer of land—the rule should be broad and untechnical. Wherever there is an assignment whereby the assignee for any length of time, no matter how limited, assumes in large measure legal relations with respect to the land which are similar to those which his grantor had, the necessary privity should be held to be supplied. Thus, in the case of a lease, an assignee of the reversion, though only for years, would comply with such requirement. And in the case of fees purchasers at mortgage sales, mortgagees, purchasers at tax sales, and the like, are privies.<sup>97</sup>

The conclusion may be put forth, therefore, that privity in the sense of succession to the estate of a party to the covenant is the only privity which should be required in the case of real covenants; that this requirement should not be applied technically so as to require succession to the identical estate of the assignor but merely to his general legal position as regards the specified land; that where such privity exists, and either benefit or burden is intended to run and "touches or concerns the land," it should be held to pass freely with the land, either alone or together with its accompanying burden or benefit where that too satisfies the necessary legal requisites; and that failure of one end of a covenant to run should not prevent the other end from passing to assignees of the land where otherwise it may properly be so transferred.

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<sup>96</sup> It is interesting that in Massachusetts with the comparative repression of covenants the doctrine of spurious easements assumes importance. See *supra* note 76.

<sup>97</sup> *Sims, op. cit.* 176, 177, *cf.* 101 *et seq.*; 66 L. R. A. 686, note. In *Merchant's Union Trust Co. v. New Philadelphia Graphite Co.*, *supra* note 56, a Pennsylvania mortgagee, having no title to the land nor estate in it before sale and entry, could not enforce covenants in a lease made by the mortgagor after the mortgage.