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THE LAW OF REAL COVENANTS: EXCEPTIONS TO THE RESTATEMENT OF THE SUBJECT BY THE AMERICAN LAW INSTITUTE

HENRY UPSON SIMS

It is unfortunate that the restatement of the law of covenants which run with land, the fifth and last chapter of the American Law Institute's Restatement of the Law of Property, should have reflected the particular views of the Reporter and a majority of his Advisers.¹ And it is more unfortunate that coming before the body of the Institute, as the subject did, on the last day, and almost at the last hour of the annual meeting, when it could not be adequately debated for lack of time, the vote of the house, though only seventeen sustaining the Reporter's position to seventeen against him, left the Reporter's views upon the historical approach and the legitimate development of the law of covenants at least legislatively sustained.

The vote was taken upon a motion to expunge from the introductory note to sections which are declared to restate the law with reference to the running of the burden of covenants, some ten pages which attempt to set out the origin and development of that law down to very modern times, and which lay the basis for declaratory sections greatly hampering and, it would appear, directed to checking the future running of the burden of covenants.

It is not the purpose of this article merely to debate the historical question presented to the meeting of the Institute by that motion to expunge. But it is necessary to review the history of real covenants as revealed by the books down to the separation of the flow of the law in England as compared to that in America, before attempting to prove what the law in America generally is, and what beneficent law can be developed therefrom if unhampered by the declaratory sections of the Restatement of the Institute.

It is the plan of this article, first, to give a resume of the origin and history of the law of real covenants, both as to the running of benefits and as to the running of burdens, down to the rejection by the English Courts of the running of burdens at law by the decision in *Webb v. Russell*,² and by that

¹The Reporter was Professor Oliver S. Rundell of the Law School of the University of Wisconsin.

²3 T. R. 393, 100 Eng. Repr. 639 (1789).

in *Keppell v. Bailey*,³ followed by the English invention of equitable restrictive covenants by Lord Cottenham in *Tulk v. Moxhay*.⁴ Secondly, it is proposed to show that the law in America has not followed the English rejection of the running of burdens at law; but that in America, in a large majority of the states where the question has been litigated, no substantial difference is made between the running of burdens and the running of benefits, so that with the exception of only two States, New Jersey and Virginia, the notion that the burdens of none but restrictive covenants can run, and that only in equity, has not been accepted. And thirdly, if it is found that the law of a majority of the states recognizes the running of covenants with land, both as to burdens and benefits, it is proposed to determine, in comparison with the Law Institute's Restatement of the law of real covenants, what requirements they must meet in order to be enforceable by and against assignees of the land with which they run.

This attempted demonstration will be followed by a discussion of a few cases in which usefulness of covenants rather than other devices for inter-party protection would seem apparent; cases which show that recognition of the running of covenants should be extended rather than checked, and that the English law enforcing only restrictive covenants is insufficient to meet the needs of society.

I. THE ORIGIN AND HISTORY OF REAL COVENANTS: ENGLISH CASES

The author of this article wrote an essay in 1900 devoted exclusively to the running of real covenants;⁵ and Professor Charles E. Clark, formerly of the Yale Law School, now Judge Clark of the United States Court of Appeals for the Second Circuit, wrote another in 1928;⁶ since which time no one has written fully on the subject, although such covenants have been partially covered by Mr. Herbert W. Tiffany in his work on Real Property, and several learned writers have elaborated part of the law in various law reviews, notably Professor Harry A. Bigelow,⁷ Professor Ralph W. Aigler,⁸ Professor Austin W. Scott,⁹ Professor Percy Bordwell,¹⁰ Professor George

³2 Myl. & K. 517, 39 Eng. Repr. 1042 (1834).

⁴2 Phil. 774, 41 Eng. Repr. 1143 (1848).

⁵SIMS, COVENANTS WHICH RUN WITH LAND, OTHER THAN COVENANTS FOR TITLE (1901).

⁶CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH LAND (1929).

⁷(1914) 12 MICH. L. REV. 651.

⁸(1911) 10 MICH. L. REV. 187.

⁹(1917) 17 COL. L. REV. 285.

¹⁰(1923) 33 YALE L. J. 292.

L. Clark,¹¹ and Dean Harlan F. Stone, now Chief Justice Stone of the Supreme Court of the United States.¹² Nothing else comprehensive, however, seems to have been written on the subject until the chapter on Covenants in Volume V of the Restatement of Property by the American Law Institute, completed and soon to be published.¹³

The writer and Judge Clark are not entirely in accord as to the origin of the running of covenants to successors to the title to lands affecting which the covenants were made. The writer believes that covenants ran by analogy to the running of express warranties, and that the running of express warranties was accepted because the implied warranties ran before implied warranties were rendered ineffective by the passage of the Statute of Quia Emptores, 18 Edward 1.¹⁴ Judge Clark, however, while not denying the possibility of this origin, considers such an explanation unproven, although he seems to be in full accord with the writer on the running of both burdens and benefits; and he recognizes that the running of covenants has nothing to do with the assignability *vel non* of choses in action in early law, the path by which the Institute's Restatement approaches the subject.¹⁵ Judge Clark and the writer have the support of eminent scholars for their view. Professor Holdsworth, writing on "Choses in Action in the Common Law" said, "Rights of action of a contractual kind must always be of a purely personal nature. . . . Therefore in early law the prohibition against their assignment was absolute. It is true that in most cases they became transmissible on death at a comparatively early date. It is true also that it was recognized that certain covenants might be so annexed to a particular estate in the land that successive holders of that estate could enforce them [referring to Volume Three of his "History of English Law," pp. 130-135]. But

¹¹(1917) 16 MICH. L. REV. 93.

¹²(1918) 18 COL. L. REV. 292.

¹³The writer has not access to MR. BEHAN'S discussion of COVENANTS AFFECTING LAND.

¹⁴SIMS, *op. cit. supra* note 5 at c. 3.

¹⁵CLARK, *op. cit. supra* note 6 at 99, as to the origin; and that covenants ran, both as to benefits and burdens, see CLARK, *op. cit. supra* note 6 at 73, and his recent article in (1943) 52 YALE L. J. 699.

In a recent letter to the writer of this article, Judge Clark expresses his view "that a more direct source of our modern law of covenants is the ancient proceeding to enforce a fine, which was usually by a writ *de fino facto* and which was essentially a real covenant in the modern sense." He has found a considerable number of cases from the Twelfth and Thirteenth Centuries where this writ was used at that early day to enforce a fine covering obligations other than warranty and of a character substantially similar to the burdens of modern real covenants; and he thinks this use a more likely origin for the use of covenants to enforce other obligations than the use of the writ of covenant to enforce a written warranty.

to the end the common law never in theory departed from its rule that rights of a contractual kind could not be assigned by an act of the parties to a contract."¹⁶

Professor James Barr Ames was more explanatory. Lecturing on "Covenant," he said:

When the Germans became familiar with Roman civilization it was natural to put the terms of the agreement into a written document, which was passed to the creditor along with the *wadia*; and in time the *wadia* itself was omitted. This document, adding the requirement of a seal to make it formal, is the English covenant.

The earliest covenants we find in the books seem to touch the land. The earliest instance of a covenant not relating to land is of the time of Edward III. The earliest covenants were regarded as grants, and suit could not be brought on the covenant itself. So a covenant to stand seised was a grant, and executed itself. The same is true of a covenant for the payment of money; it was a grant of the money, and executed itself. For failure to pay the money, debt would lie. Afterwards an action of covenant was allowed, so that today there is an option.¹⁷

Professor Ames also noted that the right to enforce a covenant of warranty went only to those who were expressly named.

As soon as covenants of warranty were introduced there was no difficulty if A made his covenant broad enough to cover the heirs and assigns of B; *i.e.*, if A made a covenant of warranty to B, his heirs and assigns, and B conveyed to C, C as assignee of B could sue A.¹⁸

He noted finally, that the obligation ran with the transfer of land.

It is absolutely essential to bring one within the words of a promise, but not to show that he is the grantee of the land. It is enough to show that he has whatever interest was conveyed. Thus if A makes a deed of land which he does not own to B, and B to C, C gets no title, but he can enforce the warranty against A. The law that a covenant could be sued on by an assignee was very ancient.

I believe also that covenants ran with the reversion at common law, though here the authority is not so clear. These instances which I have given relate to realty. I have been able to find no instance of a covenant to pay money being made to A and assigns.¹⁹

It is evident that covenants which run with land are just as much a concept or phase of the common law as is *seisin*. Whatever was the germ

¹⁶(1920) 33 HARV. L. REV. 1018.

¹⁷AMES, LECTURES ON LEGAL HISTORY (1913) 18.

¹⁸*Id.* at 100.

¹⁹*Id.* at 102.

from which they took their origin, they are *sui generis*, and in their development, as they have survived in modern law, they must not be assimilated to other concepts of the common law which have developed along other lines. Certainly they must not be treated as mere contracts, limited by notions of third party benefits, doctrines of consideration, or even the theories of trusts, including conscience-binding and notice. As said by Crawford Dawes Hening in speaking of another third party right, namely, the right to an accounting, "We err in attempting to analyze into constituent elements a substantive right which is itself primary and elemental."²⁰

Mr. Justice Holmes, in his collected lectures on the common law, published over sixty years ago, said that a covenant or contract under seal "was a promise of a distinct nature, for which a distinct form of action came to be provided."²¹ He traced the liability of an heir to make good his ancestor's covenant of warranty first to identity of ancestor and heir, as was also the right of the heir of the covenantee to claim the benefit of the covenant; and the right and liability respectively of the assignees of the first parties, he shows, was traceable to the quasi heirship of one's assigns.²² But always, as was said by Professor Ames, the heirs and assigns must have been mentioned in the covenant to obtain, or to be subject to relief.²³ "The assign, as in [common law] warranty, came in under the old covenant with the first covenantee, not by any new right of his own."²⁴ Thus only successors to the estate of the original parties to the covenant, and only those successors named therein under the term heirs and assigns could sue or be sued to make good the warranty.²⁵

At this point, however, Mr. Justice Holmes divides real covenants into two classes. Covenants of title he considers the true children of the covenants of warranty, which continue to privies in title alone, that is, they never run to disseisors nor to parties who do not base their rights on lawful succession. Active covenants, however, that is, covenants to do something affecting land, and restrictive or passive covenants, that is, covenants to refrain from doing something on the affected land, he believed traceable to certain spurious easements, or to incorporeal rights which might have been recognized as pure easements if they had been granted by the cove-

²⁰*History of the Beneficiary's Action in Assumpsit*, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1909) 339.

²¹HOLMES, THE COMMON LAW (1881) 272.

²²*Id.* at 373.

²³*Id.* at 374.

²⁴*Id.* at 379.

²⁵*Ibid.*

nantor as such. Mr. Justice Holmes worked out this theory with his usual scholarship and perspicacity in his lectures on the common law,²⁶ and later in his opinion in the case of *Norcross v. James*.²⁷ But, after all, it is a matter of the authority, and the old cases and accepted authorities do not really compel Mr. Justice Holmes' view.

He begins with the law of easements, both granted and acquired by prescription. From the early law they are attached to the land, and the dominant land holds the easement against the servient land.²⁸ After the easement has been granted or perfected, even a disseisor of the dominant tenement may exercise the easement.²⁹ But easements, being obligations of land rather than of persons, were of course passive obligations like the easement of a right of way over a servient tenement. All easements, involving obligations of land, are essentially passive only,³⁰ because land cannot be active like a person. But four early cases furnished Justice Holmes with a basis for concluding that land may be burdened with active obligations. In the first, *Pakenham's Case*,³¹ an action of covenant was brought by Pakenham as heir of his great-grandfather against a prior whose predecessor in charge of a convent had covenanted with the plaintiff's said ancestor to provide weekly singing in a chapel on what was, at the time, the plaintiff's manor. It cannot be said exactly what the judgment was, but privity of estate between the plaintiff and the covenantee, and the right of prescription were both argued by the counsel and by the judges.

The second case was *Horne's Case*,³² where the plaintiff alleged a covenant between his ancestor and the defendant's predecessor to sing in a certain chapel, and the action was allowed, although it does not clearly appear how the plaintiff recovered, as he probably did not own the chapel.

Next came the *Prior of Woburn's Case*,³³ where an action was allowed against the prior for ceasing to sing according to a custom in the plaintiff's chapel. And lastly came *Yielding v. Fay*,³⁴ which was a suit on an alleged obligation based on custom to furnish a bull and a boar for the use of the parish. Mr. Justice Holmes also relied upon the anciently recognized spuri-

²⁶*Id.* at 381-409.

²⁷140 Mass. 188 (1885).

²⁸HOLMES, *THE COMMON LAW* (1881) 385, *et seq.*

²⁹*Id.* at 386.

³⁰GALE, *ON EASEMENTS* (8th ed. by Reeve, 1908) 8.

³¹Y. B., 42 Edward III, 3, placitum 14.

³²Y. B., 2 Henry IV, 6.

³³Y. B., 22 Henry VI, 46, pl. 36. Y. B., 21 Edward I, 182, an earlier case may have been a decision.

³⁴Cro. Eliz. 569, 78 Eng. Repr. 813.

ous easement of fencing,³⁵ which had already been recognized and enforced in the form of a covenant running with the land by the Massachusetts Court in *Bronson v. Coffin*.³⁶ In the various Registers of Writs, some of them dating from Glanvil's day, were certain writs directed to the enforcement of this and other spurious easements. Mr. F. W. Maitland noted, in a register which he attributed to the time of Richard II, the writ *de curia claudenda* (to enforce the duty to fence).³⁷ And in *Lawrence v. Jenkins*,³⁸ Archibald, J., speaking for the Court in rendering judgment for the plaintiff for damages resulting from a failure of the defendant to keep up a fence, said, "A party entitled by prescription to the benefits of the fence might formerly, by means of a writ *de curia claudenda* (Fitz. Nat. Brev. 127), have compelled the adjoining owner to repair it, and have recovered damages for the non-repair."

There was also an ancient writ *de reparatione facienda* by which a joint tenant, or a person owning a building, might compel the owner of an adjoining building to repair.³⁹ By a similar writ the owner of a subjacent portion of the building might compel the owner of the upper part to repair the roof, and the owner of the upper part could compel the owner of the lower part to repair the foundations of the structure.

But these writs may not have been much used to enforce active duties directly. Mr. Maitland says that the register of writs, "naturally includes all the common forms that are in daily use; but it includes, also, many forms of a highly specialized kind,—forms which set forth the facts of particular cases which have happened once, but are by no means likely to happen again."⁴⁰ It is by no means certain that these spurious easements, though binding upon land by prescription if they appeared in the form of covenants in a deed, were for that reason enforceable as such by any one in possession of the land to which the spurious obligation from the servient land was owed. As in *Horne's Case*,⁴¹ the action might well have been a case of *cessavit*, where "the demandant, in an action of this nature, hoped, by establishing his claims, to recover seisin of the lands in respect of which the services were due."⁴² And Mr. Charles James Gale said,

³⁵HOLMES, THE COMMON LAW (1881) 393, 402, *Norcross v. James*, 140 Mass. 188, 2 N. E. 946 (1885).

³⁶108 Mass. 175 (1871), Gray, J., writing the opinion for the court.

³⁷*The History of the Register of Original Writs*, 3 HARV. L. REV. (1890) 97, 167, 212, reprinted in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1908) 549, 592.

³⁸L. R. 8 Q. B. 274 (1873).

³⁹2 BOUVIER LAW DICT. 447; FITZHERVERT, NATURA BREVIVM No. 295.

⁴⁰MAITLAND, 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1908) 549, 557.

⁴¹See note 33 *supra*.

⁴²Pike, *An Action at Law in the Reign of Edward III*, 2 SELECT ESSAYS IN THE HISTORY OF ANGLO-AMERICAN LEGAL HISTORY (1908) 597; (1893) 7 HARV. L. REV. 266.

There may be a spurious kind of easement obliging an owner of land to keep his fences in a state of repair, not only sufficiently to restrain his own cattle within bounds, but also those of his neighbours; and rendering them liable for any injury which his neighbour's cattle may sustain in consequence of the non-repair of the fences,—which, unless an easement had been acquired, he clearly would not be.⁴³

Whether Mr. Justice Holmes' theory is sound or not—that the burden of such covenants when they affect certain lands for the benefit of other lands should still be enforceable by the benefited owner against any occupant of the burdened land—he clearly believed that the burdens of covenants as well as the benefits, could run with land to assigns and heirs alike, whether at law or equity, and that is sufficient for the discussion at hand.

One old case, the report of which is not confused like the two cases above referred to (*Pakenham's Case* and *Horne's Case*, which were evidently efforts to enforce a custom to furnish singing), is reported in Y. B. 4 Edw. III, 57, coming up again in Y. B. 7 Edw. III, 65. Though nearly forty years earlier than *Pakenham's Case*, and earlier still than *Horne's Case*, it definitely holds that heirs and successors to lands were bound by their ancestor's covenants and that they could enforce the benefits conferred on them and the burdens imposed on them if they were holders respectively of the affected lands.⁴⁴

⁴³GALE, ON EASEMENTS (8th ed. by Reeve, 1908) 465.

⁴⁴SIMS, *op. cit. supra* note 5 at 55, 56, where the case is abstracted as follows: ". . . N. Abbot de H. brings covenant against Robert de C. upon a covenant between the Abbot's predecessor and one Roger, the defendant's ancestor. Roger had granted a mill to the Abbot and his successors, and covenanted that neither Roger nor his heirs would build another mill on the same tenement without the Abbot's consent. After considerable argument it appeared that a mill had been built in the ancestor's time and the heirs had merely refused to tear it down. It was questioned whether an action could be brought by the successor against the heir and whether there could be judgment that the mill be torn down. Finally the court ordered the defendant to answer over, the defendant, however, calling for judgment on the count because it was sought to hold him to the ancestor's covenant without proving assets by descent.

"So in 7 EIII, 65, the case came up again, the Abbot asking judgment for time past and a destruction of the mill for the future. The defendant's counsel said 'You do not assign any tort . . . in our time; for you assign that the mill was built in time of your predecessors and our ancestors.' The Court replied, 'If it be law that the covenant is binding between the parties and the heirs of one party and the successors of the other party so that the covenant is perpetual, the covenant will first also hold against the heir of the party as against the party himself. So if he shall be able entirely to perform the covenant in its nature, he shall do it; and if not he shall do what he can. And if he be tenant of the mill he shall destroy the mill for the future,' etc.

"But that did not seem to satisfy all, for Shard replied, 'Sir, the record appears that Robert thus continued the tort which his ancestor did,' but he added, 'Still he is tenant of the mill, and so he can destroy the mill.' But the defendant said, 'The covenant is not made to destroy the mill, and more it is framed upon negative words which do not bind in law.' . . . citing the promise not to sow land as unenforceable. To which

Only one other reported case on the running of real covenants seems to have arisen between the above-referred to Year Book Cases and the enactment of the Statute of 32 Hen. VIII, c. 34. Brooke's Abridgment (Covenant No. 32), abstracts a case decided in 25 Hen. VIII in which a lease for years imposed a covenant on the lessee to repair, and the assignee of the lessee was held liable to the lessor on the covenant; Brooke adding that the assignee might also sue the lessor on covenants by the lessor, if there were any. At that time prior to the Statute, of course there was no essential difference between a covenant in a lease and one in the grant of a fee, except the later-called privity between the parties involved in leases. But that concept of privity was not emphasized until the Court of King's Bench did so in *Spencer's Case*,⁴⁵ and Lord Kenyon in *Webb v. Russell*.⁴⁶ So the case is an authority that the burden of a covenant will run to an assignee.

The Statute of 32 Hen. VIII, c. 34, was enacted, as recited in its preamble, because many lands which had been forfeited to the crown under the Statute of Mortmain of 27 Hen. VIII, and which had been granted or patented by the crown to strangers to the original holders, had been subject to leases containing covenants or conditions which could not be enforced against the lessees by the new holders. Therefore Parliament enacted that all grantees of the King, their heirs, successors or assigns, should have the same advantages against the *lessees*,⁴⁷ their executors, administrators or assigns for not performing "conditions, covenants, or agreements contained and expressed in the indentures of their leases . . . 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, in like manner and form as if the reversion of such lands . . . had not come into the hands" of the crown. The Statute included, however, not merely grantees of the King, but "also all other persons being grantees or assignees . . . to or by any other person or persons than the King's highness, and the heirs, executors, successors and assigns of every of them."

What this last clause means we do not know, nor do we know why it was inserted, unless to cover assignments of reversions made under duress to others than the crown. The Statute has never been carefully construed by the courts. But it has been made the basis of the assumption that voluntary

the Court said that would be so were there no covenant, but a covenant made it otherwise."

⁴⁵ Co. 16a, 77 Eng. Repr. 72 (1583). Coke was merely the reporter. There is no telling what the various judges really said.

⁴⁶3 T. R. 393, 100 Eng. Repr. 639 (1789).

⁴⁷Italics added.

assignees of reversions before the Statute did not have the right to enforce covenants in leases,⁴⁸ although, as we have seen, there is nothing in the early law to justify such a position.

The Statute of 32 Hen. VIII, c. 34, continued with a section providing that all lessees, their heirs, executors, administrators and assigns, shall have like action, advantage, and remedy against persons holding grants from the King, "or of any other person or persons," of the reversion of lands leased "for any condition covenant or agreement" contained in their leases which they might and should have had *against the lessors, "their heirs and successors,"*⁴⁹ except the benefits of warranties.

Lord St. Leonards thought that the second section was added to the statute merely to avoid appearing to give everything to the lords and nothing to the tenants.⁵⁰ And of course as far as voluntary assignments were concerned, there was privity between the lessee and the assignee of the reversion any way, so that the Statute was merely declaratory. But the language evidently gave rise to some doubt, first in the minds of the editors of the fifth edition of Williams' notes,⁵¹ and recently in the mind of the Reporter of the subject for the Institute's Restatement, whether the burden of covenants, even in leases ran with the reversion at Common Law.⁵²

But Section II of the Statute gave to lessees, holding thereafter under the King's grantees of reversions, the rights which the lessees had by common law against their original lessors, "their heirs and successors," but omitted to refer to the lessee's right at common law against the lessor's assigns.

The whole question therefore comes down to whether there was any difference at common law between the lessee's right to sue the heir or successor

⁴⁸See Sergeant Williams' note 3 to *Thursby v. Plant*, 1 Wms. Saunders 239, 240, 85 Eng. Repr. 268, 270, and note of John Wm. Smith, the editor of Smith's Leading Cases to *Spencer's Case*, 5 Co. 16, 77 Eng. Repr. 19 (1583). In Smith's Leading Cases 22, Smith gives no authority but Sergeant Williams, and Sergeant Williams gives only later cases.

⁴⁹Italics added.

⁵⁰SUGDEN, *VENDORS & PURCHASERS* (14th ed. 1873) 582.

⁵¹The editors of the 5th edition of Sergeant Williams' collection of notes and reprint of Saunders' Reports were John Patterson, later of the Queens Bench, and Edward Vaughan Williams, who, writing in 1824, said that *Walker's Case*, 3 Co. 24, 76 Eng. Repr. 676 (involving the question whether the Statute transferred the privity of estate or the privity of contract between the lessee and the lessor) might best be reconciled "by considering that at common law covenants ran with the land, but not with the reversion; therefore the assignee of the lessee was held to be liable in covenant, and to be entitled to bring covenant, but the assignee of the lessor was not." He then goes into the question whether the action is local or transitory.

This view of covenants was adopted by John William Smith in his note to *Spencer's Case* in Smith's Leading Cases.

⁵²RESTATEMENT, PROPERTY (Proposed Final Draft #2, 1944) 45, 46, Introductory Note.

of a lessor on the lessor's covenant, and his right to sue the lessor's assign. We have seen that if the assign was mentioned in the covenant there was no difference. Therefore the clear purpose of Section II of the Statute of 32 Hen. VIII, c. 34, was to give lessees or their assigns the right to sue grantees of lessors or their assigns on covenants in leases, whether the language of the covenant in the lease specified assigns or not.

Errors and hasty impressions of judges and writers on law, when they have earned the reputation of being erudite, often become engrafted in the law and produce irremediable confusion. Thus, the law of real covenants in England, first twisted by Sergeant Williams and John William Smith, has continued confused and historically inaccurate to the present time.

The course of the English law on the running of the benefits and burdens of covenants with fee estates, from the Statute of 32 Hen. VIII to the present time, can be learned by following comparatively few cases. The running of the benefit of covenants was generally accepted, and it was not always thought necessary that the covenant originate in the grant of a fee estate. In *Sharp v. Waterhouse*,⁵³ it was assumed that the devisee of land, benefited by a covenant in a deed which granted only an easement, might sue at law for the benefits of the covenant. But the notion, that the grant of an easement was enough to enable the benefit of a covenant to run, was checked in 1881, when the Queen's Bench Division⁵⁴ refused to allow a suit by the assignee of a rent to collect damages for breach of a covenant to repair by the grantee of the land, holding that Lord Ellenborough in *Milnes v. Branch*⁵⁵ had settled the law, that the benefit of a covenant to build and keep in repair would not run with the grant of a rent. There seems to be no case to change this holding, therefore, it is probably the present English law that neither the benefit nor the burden of a covenant will run with merely an incorporeal hereditament.⁵⁶

But while it has been often conceded by English courts, that the benefit of a covenant touching and concerning granted land will run with a granted fee estate to assignees of the covenantee, so that they can sue the covenantor personally in a law court on his covenant for breaches occurring during the plaintiff's ownership of the land,⁵⁷ there appears to be no actual English decision to that effect.

⁵³ E. & B. 816, 119 Eng. Repr. 1449 (1857).

⁵⁴ *Haywood v. Brunswick Bldg. Society*, 8 Q. B. D. 403 (1881).

⁵⁵ M. & S. 411, 105 Eng. Repr. 1101 (1816).

⁵⁶ See TIFFANY, REAL PROPERTY (2d ed. 1920) 1473-4.

⁵⁷ *Webb v. Russell*, 3 T. R. 393, 100 Eng. Repr. 639 (1789). *Rogers v. Hosegood*, [1900] 2 Ch. 388. John William Smith's note to *Spencer's Case*, 1 Smith's Leading Cases (5th Amer. ed., Hare & Wallace) 123.

It has also been said, ever since Lord Kenyon's remarks about the Statute of 32 Hen. VIII in *Webb v. Russell*,⁵⁸ fortified by the above quoted authority of Sergeant Williams' note to *Thursby v. Plant*,⁵⁹ and the note of John William Smith to *Spencer's Case*, that while the benefit may run, the burden of a covenant will not run with the land granted, and that neither the covenantee nor his assignee can sue the assignee of the covenantor for damages for breaches occurring during such assignee's ownership of the land.⁶⁰ Let us examine the authority for that. Here the holdings become illogical, in addition to being based on a mistaken notion of legal history.

Lord Brougham, in deciding *Keppell v. Bailey*,⁶¹ dissolved an *ex parte* injunction restraining the defendant from using any other railroad than the one which their vendor had covenanted to use in shipping the product of a certain mine acquired by the defendant, and held that the burden of the covenant did not run with the mine. His main reason for so holding was that there was no community of title between the original covenantor and the covenantees, since the covenant was merely a group arrangement between the incorporators (owners) of the benefited railroad and the owner of the mine who had been one of the incorporators. In short, there was no "privity of estate" between the parties. Lord Brougham⁶² recognized a community of interest in the land existing between a life tenant and a reversioner, and between a lessor and a lessee, and between the owner of an incorporeal hereditament and the owner of the other interests in the property. But he saw little community of interest between the grantor and the grantee of a fee, and said that "it must not be supposed that incidents of novel kind can be devised and attached to property at the fancy or caprice of the owner. . . . Great detriment would arise and much confusion of rights if the parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which would follow them into all hands, however remote." He then reviewed the cases and held that the burden of the covenant did not run with the land to subject assignees to an injunction not to disregard it. He also said that the fact that the assignee had notice of the covenant afforded no reason to burden him with it, if it was not a charge upon the

⁵⁸3 T. R. 393, 100 Eng. Repr. 639 (1789). *Brewster v. Kidgill*, 12 Mod. 166, 88 Eng. Repr. 1239. *Brewster v. Kitchin*, 1 *Id.* Raym. 317, 91 Eng. Repr. 1108, is too uncertainly reported to be taken as an authority on the point.

⁵⁹1 Wms. Saunders, 237, 241, 85 Eng. Repr. 268, 271-275.

⁶⁰*Keppell v. Bailey*, 2 Myl. & K. 517, 39 Eng. Repr. 1042 (1834); *Rogers v. Hosegood* [1900] 2 Ch. 388.

⁶¹2 Myl. & K. 517, 39 Eng. Repr. 1042 (1834).

⁶²2 Myl. & K. 534-5, 39 Eng. Repr. 1042, 1048 (1834).

land at law, thus forestalling the doctrine to the contrary soon to be declared in *Tulk v. Moxhay*.⁶³

Keppell v. Bailey would thus exclude both the benefits and burdens of practically all covenants from running with the affected lands to assigns, which is logical enough. In the same volume of reports (2 Myl. & K.) is the report of the case of *The Duke of Bedford v. The Trustees of the British Museum*,⁶⁴ decided twelve years earlier and referred to in *Keppell v. Bailey*, in which Lord Eldon had refused to enforce a restrictive covenant, because it was not enforceable at law. The Duke of Bedford had probably placed himself in the position of losing his right to sue at law, but Lord Eldon's view was, "The question . . . is not whether the party can bring an action but whether he can come into equity for relief and thereby render an action for compensation unnecessary."⁶⁵ The old notion was, it will be recalled, that no injunction should be made permanent until the plaintiff had recovered a judgment at law establishing his legal rights.⁶⁶

Omitting discussion, for the moment, of the equitable doctrine of *Tulk v. Moxhay*, let us note that the Chancery Division in *Cooke v. Chilcott*⁶⁷ held that the assignee of a grantee of land to which the grantor had annexed in his deed a covenant to supply water was entitled to an order against the assignee of the covenantor placing him in contempt if he should not supply the water, the Court, Vice Chancellor Malins, holding that the burden of the covenant ran with the land.

Cooke v. Chilcott was later disapproved by the Court of Appeal in *Haywood v. Brunswick Building Society*,⁶⁸ although the question involved was the running of the burden of a covenant with merely an incorporeal hereditament, but Lord Justice Lindley said, "I should be sorry to overrule that case [*Cooke v. Chilcott*], and prefer to leave it to be reconsidered on some future occasion."⁶⁹

It did come up again in *Rogers v. Hosegood*,⁷⁰ but involving restrictive covenants only, where the divisional court through Farwell, J., said: "I see no difficulty in holding that the benefit of a covenant runs with the land of the covenantee, while the burden of the same covenant does not run with the

⁶³2 Phil. 774, 41 Eng. Repr. 1143 (1848).

⁶⁴2 Myl. & K. 552, 39 Eng. Repr. 1055 (1822).

⁶⁵*Id.* at 564, 39 Eng. Repr. at 1060.

⁶⁶This will appear from the language of Lord Eldon *arguendo*. *Id.* at 570, 39 Eng. Repr. at 1062.

⁶⁷Ch. D. 694 (1877).

⁶⁸Q. B. D., 403 (1881).

⁶⁹*Id.* at 411.

⁷⁰[1900] 2 Ch. 388.

land of the covenantor."⁷¹ And proceeding, he said. "It is true that in many of the cases decided by the Court of Chancery expressions are found to the effect that the defendants are bound in equity, whether the covenant in strictness run with the land or not. But I think such expressions are due to the reluctance of the Vice Chancellors to express any opinion on points of common law, and, for the reason I have already stated, I cannot see how such a covenant can run in equity if it did not run at law."⁷² The Court granted an injunction against threatened infringement, and the Court of Appeal affirmed its decree on this point in an opinion which did not state whether the burden of the covenant ran at law or whether it did not.

Prior to the case of *Rogers v. Hosegood* the Court of Appeal had a discussion on the question of the running of a covenant to bear the expense of repairing a road,⁷³ and while the Court (Cotton, Lindley, and Fry, L. JJ.) denied the plaintiff relief on different grounds, Lord Justice Cotton declared it his opinion that the benefit of a covenant might be annexed to land so as to be enforced by assigns, but that the burden of a covenant could not be so annexed.

Since *Rogers v. Hosegood* the only case involving the running of a covenant seems to be *Forster v. Elvet Colliery Company* in the Queen's Bench Division and the Court of Appeal,⁷⁴ but that involved merely the running of the benefit of a covenant in a lease. The case does not mention the Statute of 32 Hen. VIII, but appears to have been decided on a later Statute of 1881. It was held that the heirs of the owner of the surface could enforce the covenant.

This leaves us only the much discussed case of *Tulk v. Moxhay*.⁷⁵ The plaintiff was the owner in fee of a vacant piece of ground in London, together with several residences adjoining it. He sold the piece of ground to one Ems in fee, the deed to Ems containing a covenant by Ems, his heirs and assigns, with the plaintiff, his heirs, executors and administrators to keep and maintain the piece of ground as a pleasure ground, and that the plaintiff's tenants might enjoy it at a reasonable rent. The piece of ground came by mesne conveyances to the defendant (whose deeds did not contain the covenant, but who had notice of the covenant), and the defendant having asserted the right to build upon the lot, the plaintiff, who still owned the houses, sought an injunction to restrain him from building.

⁷¹[1900] 2 Ch. p. 395.

⁷²*Id.* at 398.

⁷³*Austerberry v. Corporation of Oldham*, 29 Ch. D. 750 (1884).

⁷⁴77 L. J. REP. N. S. 520, (1908).

⁷⁵2 Phil. 774, 41 Eng. Repr. 1143 (1848).

The Court (Lord Cottenham) said that the case did not depend upon whether the covenant ran with the land, but upon the defendant's having notice of the covenant when he bought, "for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." Lord Cottenham continued: "With respect to the observations of Lord Brougham in *Keppell v. Bailey*, he never could have meant to lay down that this Court would not enforce an equity attached to land by the owner, unless under such circumstances as would support an action at law. If that be the result of his observations, I can only say that I cannot coincide with it."

Efforts were made in many later cases to extend the doctrine of *Tulk v. Moxhay* to other than restrictive covenants, but the English Courts have always declined to do so.⁷⁶

The holding in *Tulk v. Moxhay* has been definitely followed, however, in enough English decisions to make it the law of England beyond question when a purely restrictive covenant is inserted in a deed conveying a fee and the covenantor has assigned the land restricted by the covenant to another who has notice of the covenant before or at the time of acquiring the land the use of which is so restricted.⁷⁷ Sometimes the restriction has been called an equitable charge upon the land,⁷⁸ although as shown by Lord Brougham and Lord Eldon,⁷⁹ there should be allowed no equitable charge which would not have been a legal charge if properly created. Sometimes the restriction has been called a trust,⁸⁰ although there is no res of which such a trust can consist. Sometimes the restriction has been called an equitable easement,⁸¹ although it is not comparable with any easement recognized by the common law of England or by the law of Rome. It cannot even be assimilated to the spurious easements recognized by Mr. Justice Holmes, since they were created by active covenants, and the doctrine of *Tulk v. Moxhay* has been applied to passive covenants only.

In some cases the restrictive covenant seems not even to conform to the requirement of *Spencer's Case*, that for a covenant to run it must "touch

⁷⁶London & S. W. Ry. v. Gomm, 20 Ch. D. 562, 583 (Jessel, M.R., 1881); Haywood v. Brunswick Soc., 8 Q. B. D. 403, 408 (Brett, L.J., 1881); Austerberry v. Corp. of Oldham, 29 Ch. D. 750 (Lindley and Fry, L.JJ., 1884).

⁷⁷Coles v. Sims, Kay 56, 69 Eng. Repr. 25 (1853); Mann v. Stephens, 15 Sim. 377, 60 Eng. Repr. 665 (1846); Luke v. Dennis, 7 Ch. D. 227, 236 (1877).

⁷⁸Per Jessel, M.R. in L. & S. W. Ry. v. Gomm, 20 Ch. D. 562, 583 (1882).

⁷⁹See quotations from them on pp. 12 and 13, *supra*.

⁸⁰It has been called a trust by American courts only, never by English courts.

⁸¹Per Jessel, M.R. in L. & S. W. Ry. v. Gomm, 20 Ch. D. 562, 583 (1882).

and concern" the land. Can it be said that a covenant not to sell alcoholic drinks on the premises touches and concerns the land?⁸²

The only unqualified requirement for a restrictive covenant to run, both as to benefit and burden, is that it be negative in character, and that the assignee held subject to it have notice of its having been imposed upon the land. Indeed the English courts have pushed the theory so far that in *Re Nisbit & Potts' Contract*,⁸³ they have held a disseisor, the assignee of a squatter who transferred an adverse possession title, bound by a restrictive covenant because he had notice of it when he acquired his possession of the land. Even a disseisor of a trustee would not be charged with the trust after the running of the Statute of Limitations in his favor, unless of course he was in collusion with the trustee.⁸⁴

To sum up the English law then we can say:

1. The benefit of a covenant in a deed conveying a fee interest in land, if the covenant was intended to be annexed to the land and is not merely personal, and is such as affects the use of the land conveyed, that is to say, if it "touches and concerns" the land as explained in *Spencer's Case* and the later decisions,⁸⁵ will run to assignees of the covenantee both at law and in equity.⁸⁶ The fact that the relief sought is an injunction is immaterial, but no actual decision seems to have been rendered giving the assignee of the covenantor compensation and damages at law for a breach of a running covenant within the last one hundred years.

2. The burden of such a covenant does not bind the assignee of the covenantor, either to pay compensation or to perform a positive act on the affected land, since the decision requiring the assignee to perform the covenant in *Cooke v. Chilcott*⁸⁷ has been repeatedly disapproved, as we have seen, although no directly contrary decision has been rendered.

3. The burden of a restrictive covenant binds the affected land in the hands of any subsequent claimant of the land, if he has notice of the making of the covenant at or before acquiring his claim to the land.

Apparently for the running of the burden of a restrictive covenant so as

⁸²*Wilson v. Hart*, L. R. 1 Ch. 463 (1866).

⁸³*Re Nisbit & Potts' Contract*, [1905] 1 Ch. 391.

⁸⁴See *Lewin on Trusts*, 8th Eng. Ed. 250.

⁸⁵Co. 16a, 77 Eng. Repr. 72 (1583); *Vernon v. Smith*, 5 B. & Ald. 1, 106 Eng. Repr. 1094 (1821); *Keppell v. Bailey*, 2 Myl. & K. 517, 39 Eng. Repr. 1042 (1834); *Williams v. Earle*, L. R. 3 Q. B. 739 (1868).

⁸⁶This seems to have been actually held last in *Rogers v. Hosegood*, L. R. [1900] 2 Ch. 388.

⁸⁷3 Ch. Div. 694 (1877).

to bind assignees, a mere agreement between the original parties is sufficient, without any conveyance of land.⁸⁸

In this state of the English law the enactment of some Act of Parliament clarifying the situation would seem appropriate.⁸⁹

II. THE HISTORY OF REAL COVENANTS: AMERICAN CASES

Many early American cases held that both the benefits and burdens of covenants ran with the land to assignees thereof, when the covenants were intended to run and touched and concerned the land benefited and the land burdened,⁹⁰ although they generally held that there must be "privity of estate" between the original covenantor and the original covenantee to start the covenant as a running covenant.⁹¹

Apparently the first American case was *Dunbar v. Jumper*,⁹² decided by the Supreme Court of Pennsylvania in 1796. One Dunbar, Sr., sold to one Thompson a half acre of ground, required for the grantee's operation of his mill, Thompson covenanting that Dunbar might have ground, free at the mill, all the corn consumed by Dunbar in his home so long as the mill should stand. The suit was brought by Dunbar's son and heir against

⁸⁸*Renals v. Cowlshaw*, 9 Ch. Div. 125 (1878); 11 Ch. Div. 866 (1879).

⁸⁹Section 79(a) of the English Law of Property Act of 1925, 15 George V, c. 20, seems to be applicable. It is as follows:

"79(a)—(1) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself his successors in title and the persons deriving title under him or them, and, subject as aforesaid, shall have effect as if such successors and other persons were expressed.

"This subsection extends to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.

"(2) For the purposes of this section in connexion with covenants restrictive of the user of land 'successors in title' shall be deemed to include the owners and occupiers for the time being of such land.

"(3) This section applies only to covenants made after the commencement of this Act."

There seems to be some doubt, however, that the English Courts will construe the above Act as changing the law. See CLARK, *op. cit. supra* note 3 at 146, n. 84.

⁹⁰*Dunbar v. Jumper*, 2 Yeates (Pa.) 74 (1796); *Herbaugh v. Zentmyer*, 2 Rawle 159 (Pa. 1828); *Morse v. Aldrich*, 19 Pick. 449 (Mass. 1837); *Savage v. Mason*, 3 Cush. 500 (Mass. 1849), probably the first American party wall agreement; *Carley v. Lewis*, 24 Ind. 23 (1865); *Maine v. Cumston*, 98 Mass. 317 (1867); *National Bank at Dover v. Segur*, 39 N. J. L. 173 (1877), which applied to benefits only however; *Dorsey v. St. L. A. & T. Ry.*, 58 Ill., 65 (1871). In the Illinois case Justice Walker held that burdens of covenants were carried to assignees by analogy to warranties, the exact theory of the author of this article. Justice Walker held that the Statute of 32 Henry VIII, c. 34, was enacted to enlarge the remedy. In *Wooliscroft v. Norton*, 15 Wis. 217 (1862) the court referred to the note in Smith's Leading Cases, and then held that the burden of the covenant ran with the fee.

⁹¹*E.g.* *Hurd v. Curtis*, 19 Pick. 459 (1837); *Cole v. Hughes*, 54 N. Y. 444 (1873).

⁹²2 Yeates 74 (Pa. 1871).

Thompson's assignee for a breach of the covenant, and the court held that the burden of the covenant ran with the mill property, and that the assignee was liable. There seems to have been no doubt in the mind of the court that the burden of a covenant could run to assigns.

The next case, *Herbaugh v. Zentmyer*,⁹³ also in the Pennsylvania Supreme Court, was decided in 1828. Zentmyer conveyed a piece of land to his son, the son agreeing in writing, for himself and his assigns, to deliver to his father certain produce of the land annually. The son assigned the land and the assignee defaulted. The court held that the assignee was bound as he would be to pay rent, which ran like a covenant.

The next case seems to have been *Morse v. Aldrich*,⁹⁴ decided in Massachusetts in 1837. C conveyed to H thirteen acres of ground, including a part of the grantor's mill-pond. H conveyed to the plaintiff. C and the plaintiff, some ten years later, made an agreement, under seal, by which C covenanted to drain the pond annually, if demanded by the plaintiff, to enable the plaintiff to obtain mud as fertilizer from the bottom of the pond. C's land was inherited by the defendant. The court held that the burden of the covenant ran with the land to the heir, though not mentioned in the covenant as bound, being of the opinion that "privity of estate" existed between the original parties.

It is interesting to note that the Pennsylvania court did not cite any English authorities questioning the running of burdens, and while the Massachusetts court cited the three famous English cases which started the English courts away from allowing burdens to run, namely, *Spencer's Case*,⁹⁵ *Webb v. Russell*,⁹⁶ and *Keppell v. Bailey*,⁹⁷ the Massachusetts court regarded them as requiring merely privity of estate between the covenantor and the covenantee. The truth is that *Spencer's Case* did not say anything about the running of covenants with fees. Only the note of John William Smith, in his collection of "Leading Cases," gives *Spencer's Case* that quirk, supported by Sergeant Williams' note to *Thursby v. Plant*.⁹⁸ And Lord Kenyon in deciding *Webb v. Russell*, after saying, "It is extremely well settled at common law, without referring to the Statute 32 Hen. VIII, Ch. 34, that covenants which run with the land will pass to the person to whom the land descends," adds that the Statute was enacted for the benefit of grantees of

⁹³2 Rawle 159 (Pa. 1828).

⁹⁴19 Pick. 449 (Mass. 1837).

⁹⁵5 Coke 16a, 77 Eng. Repr. 72 (1583).

⁹⁶3 T. R. 393, 402, 100 Eng. Repr. 639, 644 (1789).

⁹⁷2 Myl. & K. 517, 39 Eng. Repr. 1042 (1834).

⁹⁸1 Wms. Saunders 237, 240.

reversions, and to give lessees rights against them. So it is only an implication, that Lord Kenyon thought the burden of covenants did not run at common law to assigns.

Lord Brougham's well worked out opinion in *Keppell v. Bailey* is the first clear statement of the English courts that the burden of a covenant cannot bind assignees of the covenantors, and his reason for so stating was that there is no privity of estate attendant upon the transfer of a fee from a grantor to a grantee, as exists between a lessor and a lessee. That is to say, there is no continuing community of interest inherent in the transfer from one owner to another of an estate in fee.

After *Morse v. Aldrich* and several other early American cases⁹⁹ took the position that there is privity of estate between the grantor and the grantee when the granted land is a part of the land retained, or when the pieces are interrelated in some way, and that the burden of a covenant can run to and against assigns of these affiliated pieces, either at law or in equity, it was not easy to persuade any American court to hold otherwise merely because the editor of Smith's *Leading Cases* and later English decisions took a different course. So when Lord Cottenham's theory of equitable restrictive agreements binding land in the hands of assignees with notice, was applied in 1848 in *Tulk v. Moxhay*¹⁰⁰ it became, in America, merely an additional device for holding as binding, restrictive covenants which would have been binding in equity or at law as running covenants anyway, provided of course they touch and concern the affected land.¹⁰¹ Certain types of restrictions upon the use of property have been enforced on the *Tulk v. Moxhay* theory which would probably not have been held to run otherwise. But they would seem rather personal obligations than covenants touching and concerning the land.¹⁰²

As the question before the Law Institute however was whether modern American law limits the running of burdens of covenants to restrictive covenants only, it is best to run through the list of states alphabetically, and so far as the question has been recently before the courts for decision, to

⁹⁹See footnote 90.

¹⁰⁰2 Phil. 774, 41 Eng. Repr. 1143 (1848).

¹⁰¹National Bank at Dover v. Segur, 39 N. J. L. 173 (1877).

¹⁰²Cf. *Mosbey v. Roche*, 233 Ala. 280, 171 So. 351 (1936), a covenant not to allow bathing parties on the land. In *Norcross v. James*, 140 Mass. 188, 2 N. E. 946 (1885) Holmes, J., held that a covenant not to mine limerock on the land was a purely personal obligation. It may well be doubted whether any covenant not to maintain an alcoholic drinking store, or many other specific businesses, touches and concerns the land. An agreement not to engage in any mercantile business in competition with the business of the vendor on the land he retained, was held unenforceable in *Tardy v. Creasy*, 81 Va. 553 (1886).

refer to the late cases which seem to settle the law upon the question in the respective states.

1. *Alabama*. In Alabama it has been accepted as law ever since *Robbins v. Webb*, decided in 1880,¹⁰³ that both the benefits and burdens of covenants can run with land either at law or in equity, and all sorts of covenants both active and restrictive have been considered since that time, ending with *Virgin v. Garrett*,¹⁰⁴ and *Moseby v. Roche*,¹⁰⁵ both decided by the same judges at the same term of court in 1936. Each was a suit for an injunction to enforce a restrictive covenant. The restriction in *Virgin v. Garrett* could have been enforced either in equity or at law under *Robbins v. Webb*. The restriction in *Moseby v. Roche* probably could not have been. The fact that the court called each an equitable easement would seem unimportant, as the court did not say that they were unenforceable by injunction only. It would seem therefore that in Alabama a covenant can run at law or in equity on the theory that it is a common law right, or if restrictive, it can run in equity against assignees with notice on the equitable easement theory.

2. *Arkansas*. *Bank of Hoxie v. Meriweather*¹⁰⁶ held that the burden of an agreement to pay part of the cost of a party wall, when used, creates an equitable lien on the land. *Rugg v. Lemment*¹⁰⁷ had already held that the benefit of a party wall agreement runs with the land.

3. *California*. Many California cases may be found on the subject of running covenants, but a statute authorizes the running of benefits only when contained in a grant. While the burdens of certain covenants not contained in grants seem to run,¹⁰⁸ it seems best to omit California law from the general classification of the American law.

4. *Colorado*. *Farmers' High Line Canal and Reservation Co. v. New Hampshire Real Estate Co.*,¹⁰⁹ was a suit for damages against an irrigation company for failure to furnish water as required by a covenant supporting an easement to run water through a ditch owned by the plaintiff's assignor. The court held that the benefit of the covenant ran with the land at law, and the burden was attached to the defendant's easement in the ditch.

5. *Connecticut*. *Baker v. Lunde*¹¹⁰ held that where land was sold with a covenant to build only residences upon it, and the intention was that all

¹⁰³68 Ala. 393 (1880).

¹⁰⁴233 Ala. 34, 170 So. 75 (1936).

¹⁰⁵233 Ala. 280, 171 So. 351 (1936).

¹⁰⁶166 Ark. 39, 265 S. W. 642 (1924).

¹⁰⁷78 Ark. 65, 93 S. W. 570 (1906).

¹⁰⁸*Marra v. Etna Construction Co.*, 15 Cal. (2d) 375, 101 P. (2d) 490 (1940).

¹⁰⁹40 Colo. 467, 92 Pac. 290 (1907).

¹¹⁰96 Conn. 530, 114 Atl. 673 (1921).

sub-vendees should benefit, assignees of the various subdivisions could enforce the covenant against each other. The court called it "an equitable right appurtenant to all the land" in the plot, but did not say that it ran only in equity.

6. *Delaware. Jackson v. Richards*¹¹¹ held that a partly built bottling plant, begun in disregard of a restriction against business use of a lot, could be ordered demolished at the suit of the assignee of one lot against the assignee of the other. The court said that the restriction must be in writing, but as the case came up on demurrer to a bill in equity, the agreement was assumed to have been written. The opinion did not say that the agreement would not have run at law, nor that damages could not have been recovered for its breach.

7. *Florida. Osius v. Barton*¹¹² held a bill to enforce a restrictive covenant good if the plaintiff was among the intended beneficiaries. The same was held in *Mercer v. Kenton*.¹¹³ Neither case said that the covenant would not run at law.

8. *Georgia. Muscogee Manufacturing Co. v. Eagle and Phoenix Mills*¹¹⁴ recognized that covenants run with land, although the case turned on riparian rights to water. But in *Atlanta, Knoxville & Northern Railway v. McKinney*¹¹⁵ the court gave damages for breach of a covenant by defendant's predecessor.

9. *Illinois. Natural Products Co. v. Dolese & Shepard Co.*¹¹⁶ held that the burden of a covenant not to quarry stone runs with the land. The court said that a covenant which can run, will run, but that a covenant which cannot run, cannot be made by agreement to do so. *Gerlinger v. Lain*¹¹⁷ already had held that covenants run.

10. *Indiana. Milliken v. Hunter*¹¹⁸ was an action for damages for failure to carry out a purchase of land, the question being whether the burden of a building restriction was an encumbrance, and the court held that the burden ran with the land.

11. *Iowa. Sexauer v. Wilson*¹¹⁹ held that the burden of a covenant to fence runs with the land.

¹¹¹27 A. (2d) 857 (Del. 1942).

¹¹²109 Fla. 556, 147 So. 862 (1933).

¹¹³99 Fla. 914, 127 So. 859 (1930).

¹¹⁴126 Ga. 710, 54 S. E. 1028 (1906).

¹¹⁵124 Ga. 929, 53 S. E. 701 (1906).

¹¹⁶309 Ill. 230, 140 N. E. 84 (1923).

¹¹⁷269 Ill. 337, 149 N. E. 972 (1915).

¹¹⁸180 Ind. 149, 100 N. E. 1041 (1913).

¹¹⁹136 Iowa 357, 113 N. W. 941 (1907).

12. *Kansas. Rives v. Morris*¹²⁰ held that restrictive covenants in deeds can be enforced between assignees. The court did not say that they would not run at law.

13. *Kentucky. Chicago M. & G. Ry. v. Dodds*¹²¹ was a suit for damages on a covenant to fence between the assignors of the plaintiff and defendant respectively, and the court held that the covenant ran with the land. *Stark v. Foley*,¹²² a later case, enforced between assignees a restrictive covenant as running with the land.

14. *Maine. Gilman v. Forgione*¹²³ was a suit by an assignee of a mortgagor on a covenant to release part of the land mortgaged, and the court said that while the burden of covenants ran with the land, the covenant in question was not intended to run.

15. *Maryland. Whalen v. Baltimore & Ohio Ry.*¹²⁴ was a suit by a covenantee's assignee to require the railroad to maintain a siding in conformity with a covenant made sixty years earlier, and the court, while refusing an injunction on account of the age of the covenant, said it would not decide whether the plaintiff was entitled to damages until he should sue for them. The running of the covenant was not questioned.

16. *Massachusetts. Lacentra v. Valeri*,¹²⁵ enforced a restrictive covenant for and against assignees of the parties. There was no limitation to equity. The old law, as we have seen, definitely supported running at law.

17. *Michigan. Mueller v. Banker's Trust Co.*,¹²⁶ held that the benefit and the burden of a covenant ran with the affected land, and gave damages for a breach.

18. *Minnesota. Pelser v. Gingold*,¹²⁷ sustained the position that the burden of a covenant runs at law, though the suit for damages was remanded for further proceedings.

19. *Missouri. Toothaker v. Pleasant*,¹²⁸ was a suit to enforce by injunction a restrictive covenant against occupancy of lots by Negroes. The plaintiff was not a successor of the grantor in the deed which imposed the restriction. The defendant was a remote assignee of the first grantee. It was held that the covenant could run, but that the plaintiff, not having privity of

¹²⁰155 Kan. 231, 124 P. (2d) 488 (1942).

¹²¹167 Ky. 624, 181 S. W. 666 (1916).

¹²²209 Ky. 332, 272 S. W. 890 (1920).

¹²³129 Me. 66, 149 Atl. 620 (1930).

¹²⁴108 Md. 11, 69 Atl. 390 (1908).

¹²⁵244 Mass. 404, 138 N. E. 388 (1923).

¹²⁶262 Mich. 53, 247 N. W. 103 (1933).

¹²⁷214 Minn. 281, 8 N. W. (2d) 36 (1943).

¹²⁸315 Mo. 1239, 288 S. W. 38 (1926).

estate with the first grantor, could not enforce it in equity. The court cited *Coughlin v. Barker*¹²⁹ based on the English decisions, but said nothing of running at law.

20. *Nebraska. Wright v. Pfrimmer*¹³⁰ held that a restrictive covenant as to the nature of buildings which might be erected on the land ran to assigns, benefit and burden, but that if the burdened land should be subdivided, the owner of one part of the land restricted could not enforce it against the owner of other parts, unless there was a general plan. Nothing was said about running at law.

21. *New Jersey. Brewer v. Marshall*,¹³¹ seems still to control in New Jersey. It involved a covenant not to sell marl from the granted land. The court held the covenant illegal, and referred to the note to *Spencer's Case*. This case was strengthened by *DeGray v. Mannouth Beach Club House Co.*,¹³² which adopted the *Tulk v. Moxhay* doctrine, adding the general plan theory. *Enderle v. Leslie Construction Co.*,¹³³ and *Speidel v. Weiner*,¹³⁴ recognize the general plan theory, but allow one assignee to enforce the restriction against another, apparently though each derives title from the same grantee. Thus New Jersey must be classed as following *Tulk v. Moxhay*.

22. *New Mexico. Rowe v. May*,¹³⁵ was on a bill by a purchaser of a lot who had no actual notice of a building restriction in an early deed imposed for the benefit of all purchasers and owners of lots in a given area. The court held that the title stood bound "with a right reposing in other lot owners adversely affected to enforce in equity the building restriction imposed by these covenants which run with the land." *Bolles v. Pecos Irrigation Co.*,¹³⁶ already held that the burden of a covenant ran at law. Therefore, in New Mexico, probably both theories of covenants are accepted.

23. *New York.* The present law as to the running of covenants in New York is determined by three cases, *Miller v. Clary*, decided in 1913,¹³⁷ *Guaranty Trust Co. of New York v. Queens County Railway Co.*, decided in 1930,¹³⁸ and *Neponsit Property Owners' Ass'n v. Emigrant Industrial*

¹²⁹46 Mo. App. 54 (1891).

¹³⁰99 Neb. 447, 156 N. W. 1060 (1916).

¹³¹19 N. J. Eq. 537 (1888).

¹³²50 N. J. Eq. 829, 24 Atl. 388 (1892).

¹³³102 N. J. Eq. 569, 141 Atl. 758 (1920).

¹³⁴129 N. J. Eq. 434, 19 A. (2d) 875 (1941).

¹³⁵44 N. Mex. 264, 101 P. (2d) 391 (1940).

¹³⁶167 P. 280 (1917). Cf. also *Murphy v. Kerr*, 5 F. (2d) 908 (1925).

¹³⁷210 N. Y. 127, 103 N. E. 1114 (1914).

¹³⁸253 N. Y. 190, 170 N. E. 887 (1930).

Savings Bank, decided in 1938.¹³⁹ The first case held that the assignee of land benefited by a covenant to build a shaft to a wheel generating electric power purchased along with a piece of land, could require the furnishing of the power, but could not compel the assignee of the mill to construct the shaft, as a positive covenant cannot run. The second case, the opinion being written by Judge Cardozo, contained his terse statement, "there is now in this State a settled rule of law, that a covenant to do an affirmative act, as distinguished from a covenant merely negative in effect, does not run with land so as to charge the burden of performance on a subsequent grantee." The covenant not enforced was to include after-acquired property in a prior mortgage. The last case involved a covenant in a deed that the property should be charged with an annual payment of money to build roads and sewers. The court (Judge Lehman) held that the burdens of the covenants were intended to run, touched and concerned the land, and were enforceable against assignees. Thus New York is approaching the position that benefits and burdens of covenants can run with the land.

24. *North Carolina*. It was decided in *Herring v. Wallace Lumber Company*,¹⁴⁰ that the burden of a covenant to build a railroad runs with land, or an easement over land, to assignees of the covenantor. The opinion cited the conclusive case of *Norfleet v. Cromwell*.¹⁴¹ Four recent cases, however, recognize a restrictive covenant as an interest in land in the nature of an easement, enforceable in equity against an assignee, without regard to whether the covenant is construed to run with the land¹⁴² or not. So in North Carolina both theories of covenants seem to be accepted.

25. *Ohio*. *Maher v. Cleveland Union Stock-yards Co.*,¹⁴³ a recent case in the Ohio Court of Appeals, held that the burden of a covenant for a money charge runs to an assignee of the land charged. The Ohio Supreme Court held in *Hichey v. Lake Shore & Michigan Central Ry.*, in 1894,¹⁴⁴ that the burden of a covenant to fence runs to an assignee, and there seems to have been nothing since discrediting that case. So covenants probably run at law or equity in Ohio.

26. *Oklahoma*. In *Local Federal Savings & Loan Assn. v. Eckroat*,¹⁴⁵

¹³⁹278 N. Y. 248, 15 N. E. (2d) 793 (1938).

¹⁴⁰163 N. C. 481, 79 S. E. 876 (1913).

¹⁴¹70 N. C. 634 (1874).

¹⁴²*Sheets v. Dillon*, 221 N. C. 426, 20 S. E. (2d) 344 (1942); *Turner v. Glenn*, 220 N. C. 620, 18 S. E. (2d) 197 (1941); *Brenziger v. Stephens*, 220 N. C. 395, 17 S. E. (2d) 471 (1941); *Davis v. Robinson*, 189 N. C. 509, 127 S. E. 697 (1925).

¹⁴³55 Ohio App. 412, 9 N. E. (2d) 995 (1936).

¹⁴⁴51 Ohio St. 40, 36 N. E. 672 (1894).

¹⁴⁵186 Okla. 656, 100 P. (2d) 260 (1940).

the court held that the assignees of the reversion might recover, on a covenant of the lessee, an extra percentage on the value of the oil taken out under the lease. The court said nothing to distinguish the running of covenants in leases from that of covenants in fees. It held that the clause in the lease providing for payment to the lessor of a part of the proceeds of the oil reserved to the lessee was a covenant running with the land, and that "the lessors' deed conveying the leased premises will pass the benefits not yet due or the burdens of such covenant to a grantee, in the absence of a reservation thereof." A later case, *Williamson v. Needles*,¹⁴⁶ enforced restrictive covenants in equity. It would seem that in Oklahoma, both theories of the running of covenants obtain.

27. *Oregon*. In *Guild v. Wallis*¹⁴⁷ the court held that a covenant by the grantee in a deed to keep a ditch open runs against the assignee of the land, and may be enforced by a mandatory injunction, regardless of whether the plaintiff had a remedy at law. The court cited an earlier case, *Ford v. Oregon Electric Ry Co.*¹⁴⁸ Between the two cases, the court enforced a restrictive covenant, saying that such covenants were enforceable "though such conditions do not, in law, constitute easements or covenants running with the land."¹⁴⁹ Evidently in Oregon both theories of running covenants are accepted.

28. *Pennsylvania*. *Goldberg v. Nicola*,¹⁵⁰ enforced by injunction a restrictive covenant, holding that it ran with the land. Nothing was said about its being able to run at law. But as *Bald Eagle Valley Railroad v. Nittany Valley Railroad*,¹⁵¹ decided that covenants intended to run will run with land and are enforceable in equity by injunction when that relief is appropriate, there seems to be no reason to doubt the continuance of the early Pennsylvania law of *Dunbar v. Jumper*¹⁵² that covenants run by the common law.

29. *South Carolina*. *Epting v. Lexington Water Power Co.*,¹⁵³ held that the burden of a covenant can run with land.

30. *South Dakota*. *Hill v. City of Huron*,¹⁵⁴ held that the burden of a party wall covenant ran with the land.

¹⁴⁶191 Okla. 560, 133 P. (2d) 211 (1942).

¹⁴⁷130 Ore. 278, 279 Pac. 546 (1925).

¹⁴⁸60 Ore. 278, 117 Pac. 809 (1911).

¹⁴⁹*Doester v. Alvin*, 74 Ore. 544, 145 Pac. 660 (1915).

¹⁵⁰309 Pa. 183, 178 Atl. 809 (1935).

¹⁵¹171 Pa. 284, 33 Atl. 239 (1895).

¹⁵² *Yeates* 74 (Pa. 1796).

¹⁵³177 S. C. 308, 181 S. E. 66 (1935).

¹⁵⁴39 S. D. 530, 165 N. W. 534 (1917).

31. *Tennessee. Carnegie Realty Co. v. Carolina, C. & O. Ry.*¹⁵⁵ held that damages could be recovered for breach of a covenant to build and maintain a depot. The burden was held to run, though the assignee was not liable for the breach.

32. *Texas.* In *Panhandle & S. F. Ry. v. Wiggins*,¹⁵⁶ the Court of Appeals held that the benefit of a party wall covenant will run to an assignee of the covenantee. *Jones v. Monroe*,¹⁵⁷ affirmed a holding of the lower court that the burden of a party wall covenant runs; and *Hines v. Parks*¹⁵⁸ held that a grantee's covenant to extend electric and water lines will run to his assignee. Thus, benefits and burdens of covenants both run in Texas.

33. *Virginia. Renn v. Whitehurst*,¹⁵⁹ and several other recent cases follow the *Tulk v. Moxhay* doctrine as distinct from running covenants, although the Virginia court had said in 1886 in *Tardy v. Creasy*,¹⁶⁰ that, "no end can be effected by a covenant which cannot be effected by a grant." The recent cases, however, require Virginia to be classed as following the *Tulk v. Moxhay* theory.

34. *Washington. Ellensburg Lodge v. Collins*,¹⁶¹ held that the burden of a party wall covenant runs with the land.

35. *West Virginia. Tennant v. Tennant*,¹⁶² held that the burden of a covenant runs with the land, but the covenant in question, to give a share of oil recovered, was held to be a personal covenant only.

36. *Wisconsin. Burden v. Doucette*,¹⁶³ involved a restrictive covenant, and the court held that restrictive covenants embraced in a general scheme would be enforced. The court said nothing of other covenants. But *Crawford v. Witherbee*¹⁶⁴ held that a covenant to pay one-eighth of the ore raised from a mine runs with the land and binds assigns, and the court in the latter case cited *Woodiscroft v. Norton*¹⁶⁵ that the burden of covenants runs. So it would seem that both theories of covenants hold in Wisconsin.

¹⁵⁵136 Tenn. 300, 189 S. W. 371 (1916).

¹⁵⁶161 S. W. (2d) 501 (Tex. Civ. App. 1942).

¹⁵⁷288 S. W. 802 (Tex. Comm. of App. 1926).

¹⁵⁸128 Tex. 289, 96 S. W. (2d) 970 (1936) *affirming* 68 S. W. (2d) 364 (Tex. Civ. App. 1934).

¹⁵⁹181 Va. 360, 25 S. E. (2d) 276 (1943).

¹⁶⁰81 Va. 553 (1886).

¹⁶¹68 Wash. 94, 122 Pac. 602 (1912). *Pioneer Sand & Gravel Co. v. Seattle Const. & Dry Dock Co.*, 102 Wash. 608, 173 Pac. 508 (1918), held that the burden of a covenant could attach to land to be acquired in future. This is in accord with *Lewis v. Golner*, 129 N. Y. 221, 29 N. E. 81 (1891).

¹⁶²69 W. Va. 28, 70 S. E. 851 (1911).

¹⁶³2 N. W. (2d) 204 (Wisc. 1942).

¹⁶⁴77 Wis. 419, 46 N. W. 545 (1890).

¹⁶⁵15 Wis. 198 (1862).

37. *Wyoming. Lingle Water Users' Ass'n v. Occidental Building & Loan Ass'n*,¹⁶⁶ rejects the law of *Tulk v. Moxhay* and later English decisions, and holds that benefits and burdens of appropriate covenants run to assigns at law or in equity.

It thus appears that, omitting California as stated above, twenty-eight States allow the running of the benefits and burdens of covenants to assigns without distinction between law and equity; but that six of these, Alabama, New Mexico, North Carolina, Oklahoma, Oregon, and Wisconsin, recognize the equitable easement theory as an additional device for allowing the burden of restrictive covenants to run. It appears that Connecticut, Delaware, Florida, Kansas, and Missouri allow restrictive covenants to be enforced in equity without ruling whether they or active covenants run at law or not. And lastly New Jersey and Virginia alone follow the *Tulk v. Moxhay* theory.

III. THE TOPIC OF COVENANTS AS SET FORTH IN THE RESTATEMENT

A. *The Running of the Burden*

The Law Institute's Restatement does not differentiate characteristics of covenants which run with land from requirements for their running. After the "Introductory Note" on "Promises Respecting the Use of Lands," in which the Reporter sets out his views on the background and history of real covenants (which, as we have seen, is a general acceptance of the note of Sergeant Williams to *Thursby v. Plant* and that of John William Smith to *Spencer's Case*), he states the requirement of an intention of the parties that a covenant should run, if it is to be allowed to do so (Section 79), and then says that for the burden of a covenant to run, the covenant must be in writing under seal (Section 80). Under this latter section Comment (a) says that the Statute of Frauds requires it to be in writing as creating an interest in the promisor's land.¹⁶⁷

A search for cases holding the Statute of Frauds applicable to unwritten agreements respecting the use of land reveals nine states which seem to support the Reporter's position, and of course others may be found by prolonged search. These states are: Alabama,¹⁶⁸ Kentucky,¹⁶⁹ Massachusetts,¹⁷⁰

¹⁶⁶43 Wyo. 41, 297 Pac. 385 (1931).

¹⁶⁷Comment a to Section 80 refers back to Section 70, which states the requirement more fully as applicable first between the original parties at the creation of the covenant.

¹⁶⁸*Sheuer v. Britt*, 217 Ala. 196, 115 So. 237 (1928).

¹⁶⁹*Starck v. Foley*, 209 Ky. 332, 272 S. W. 890 (1920).

¹⁷⁰*Sprague v. Kimball*, 213 Mass. 280, 100 N. E. 622 (1913). This case held an equitable interest not a covenant running with the land.

New Hampshire,¹⁷¹ New York,¹⁷² North Carolina,¹⁷³ Rhode Island,¹⁷⁴ Texas,¹⁷⁵ and Wisconsin;¹⁷⁶ but the New York cases, all in the lower courts, are of doubtful authority in view of the holding in *Lewis v. Golner* in the highest court.¹⁷⁷ The decisions in these nine states involve restrictive covenants, and are generally based on the ground that restrictive covenants create interests in land.

On the other hand, England and fourteen states hold that restrictive covenants do not create interests in land and are not affected by the Statute of Frauds requiring conveyances of land to be in writing. The fourteen states are Colorado, Connecticut, Idaho, Indiana, Iowa, Michigan, Minnesota, Mississippi, Nebraska, New York (based on *Lewis v. Golner*), Pennsylvania, Tennessee, Washington, and West Virginia.¹⁷⁸ Omitting New York on both sides, the count of the states is eight holding the Statute of Frauds applicable to covenants and thirteen holding that it is inapplicable.

Of course it makes little difference whether or not covenants not in writing are invalidated by the Statute of Frauds, because probably more than ninety per cent of covenants intended to be attached to land are in writing. It is only important to decide whether they are interests in land in contemplation of the Statutes of Frauds of the several states, for if they are interests in land, the courts generally call them easements, since easements are the only kind of incorporeal hereditaments with which they can be assimilated.

¹⁷¹*Tibbets v. Tibbets*, 66 N. H. 360, 20 Atl. 979 (1890).

¹⁷²*Wolfe v. Forst*, 4 Sandf. Ch. 72, 92 (N. Y. 1846); *Pitkin v. L. I. R.R. Co.*, 2 Barb. Ch. 221 (N. Y. 1847); *Day v. N. Y. Central Ry.*, 31 Barb. 548 (N. Y. 1860); *Norton v. Kain*, 121 App. Div. 497, 106 N. Y. S. 129 (1907).

¹⁷³*Davis v. Robinson*, 189 N. C. 589, 127 S. E. 697 (1925).

¹⁷⁴*Ham v. Massasoit Real Estate Co.*, 42 R. I. 293, 107 Atl. 205 (1919).

¹⁷⁵*Miller v. Babb*, Texas Commission of Appeals, § A., 263 S. W. 254 (1924).

¹⁷⁶*Florsheim v. Reinberger*, 173 Wis. 150, 179 N. W. 793 (1921). This case held that the oral agreement was unenforceable because of the Statute of Frauds, the restriction not being imposed under a general plan; but indicated that an oral restriction, if part of a general plan, might be enforced.

¹⁷⁷*Lewis v. Golner*, 129 N. Y. 227, 29 N. E. 81 (1891). This is distinguished, however, by *Gaynor, J.*, in *Ritter v. Kain*, 121 App. Div. 497, 106 N. Y. S. 129 (1907).

¹⁷⁸*Jamison v. Kinwell Bay Land Co.*, 47 The Times Law Reports 593 (Ct. of App. 1931); *Thornton v. Schobe*, 79 Colo. 25, 243 Pac. 617 (1925); *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876 (1892); *Tsuboi v. Cohn*, 40 Ida. 102, 231 Pac. 708 (1924); *State ex rel. Field v. Barket*, 182 Ind. 665, 108 N. E. 113 (1914); *Osgood v. Nann*, 191 Ia. 1227, 184 N. W. 331 (1921); *Dodder v. Snyder*, 110 Mich. 69, 67 N. W. 1101 (1896); *Youngman v. Ahrens*, 104 Minn. 531, 116 N. W. 1135 (1908); *Berry v. Jones*, 106 Miss. 115, 63 So. 341 (1913); *Meyer v. Perkins*, 89 Neb. 59, 130 N. W. 986 (1911); *McCloskey v. Kirk*, 243 Pa. 319, 90 Atl. 73 (1914); *Leinaw v. Smart*, 11 Hump. 308 (Tenn. 1850); *Hitchcock v. Tower*, 55 Vt. 60 (1883); *Johnson v. Mt. Baker Church*, 113 Wash. 448, 94 Pac. 536 (1920); *Henner v. Deveney*, 71 W. Va. 629, 77 S. E. 142 (1913). The Statute of Mississippi requires merely contracts for the sale of land to be in writing. See *Berry v. Jones*, 106 Miss. 115, 63 So. 341 (1913).

But the phrase, "interest in land," has a practical rather than a juristic significance. The juristic term is "interest with regard to land," the legal philosopher holding that all interests are merely relations between persons. It was only when the group first engaged in restating the law of property for the American Law Institute found that the theory of relations between persons could not be fitted easily to the universal conception of ownership of land that they invented the phrase "interest in land."¹⁷⁹

The phrase requires interpretation again in this Restatement in connection with the statutes requiring compensation for "interests" in land when taken under eminent domain. In Section 113 of Final Draft 2 covering the Restatement of Covenants, the annual meeting of the Institute adopted the form presented, representing the view of a majority of the advisers, Sub-section (2) of which is, "A promise respecting the use of land of the promisor creates an interest in such land within the meaning of this section and Section 114 in so far and only in so far as the promise creates an obligation binding upon the successors of the promisor." This entailed the adoption of Section 114, which requires compensation to every person entitled to the benefit of the promise, thereby making the taking for public use impracticable when there are many persons claiming the benefit of covenants attached to the taken land.

One Adviser, Judge J. Warren Madden, urged that the Institute take the position that covenants (except those secured by liens) do not create "interests in land" within the contemplation of the Statutes.

Moreover an interest in land under the Statute of Frauds may not be the same thing as an interest in land under the statutes awarding compensation under eminent domain. The applicability of the Statute of Frauds is a matter for each state to decide for itself under its own statute, and conformity to some usual Statute of Frauds should not be made a general requirement for the running of covenants in both law and equity.

After declaring that covenants with regard to land are subject to the provisions of the Statute of Frauds, the Reporter declares that "a promise by the grantee in a deed-poll, which promise is contained in the deed . . . is not subject to the provisions of the Statute of Frauds."¹⁸⁰

¹⁷⁹Comment *c* to § 5 of the RESTATEMENT OF PROPERTY is "*Interest in land or other thing*. There are rights, privileges, powers and immunities with regard to specific land or with regard to a thing other than land, which exist only in a particular person. By virtue of the fact that a person has these special interests, other than and in addition to those possessed by members of society in general, he occupies a peculiar and individual position with regard thereto. Interests of this type constitute the chief subject matter of this Restatement, and, when the affected thing is land, are designated herein as 'interests in land'."

¹⁸⁰RESTATEMENT, PROPERTY (Final Draft No. 1, 1943) § 70.

Undoubtedly the maxim, "Qui sentit commodum sentire debet et onus"¹⁸¹ was long ago applied to covenants imposed on the grantee in a deed-poll. Littleton applied the principle to a remainderman coming in after a life tenant who alone had signed an indenture with the grantor conveying a life estate to one with the remainder to another.¹⁸² Since deeds-poll are generally used as conveyances in America, even where they purport to impose covenants on the grantee, it must be accepted as law in America that covenants in deeds-poll run with the granted land. Sometimes, positive covenants so created have been enforced against assignees of the grantee,¹⁸³ and a much cited case based upon the maxim was *Atlantic Dock Co. v. Leavitt*,¹⁸⁴ which was a restrictive covenant.

The running of burdens imposed upon grantees and their successors in deeds-poll gives difficulties, however, and the explanation given in comment (c) that the grantor's signing and sealing is indicative of deliberation by the parties, and is therefore sufficient, is not found in the decisions. The reason given by the courts is usually that the assignee is bound by estoppel (as was the first grantee, of course), or that the imposed unsigned covenant creates a sort of easement binding in equity against assignees with notice, either actual or by the record.¹⁸⁵

The principle of estoppel would seem to be as effective to bind the assignee of the grantee-covenantor to perform an active covenant as to require him to observe a passive or restrictive one. Therefore, if we accept *ex necessitate* as law that a covenant in a deed-poll can run with the granted land and if we are in a state which does not accept the notion that a covenant creates an interest in land, we seem obliged to say that any promise, written or verbal, of which the assignee has notice, provided it touches and concerns the affected land, and is intended to run with it, should run with land, unless, of course, the land is conveyed by a written deed and the parole promise is inadmissible in evidence as an addition to the contract expressed by the deed; which is sometimes urged as a defense against such parole agreements.

That brings us to Section 82 of the Restatement of Covenants, of which Sub-section (a) requires that for a covenant to start running there must

¹⁸¹"He who derives the advantage should suffer the burden also." See BROOM, *LEGAL MAXIMS* 552.

¹⁸²LITTLETON, *TENURES* § 374, Co. Litt. 231. Coke quoted the maxim, and added "transit terra cum onere."

¹⁸³Ga. So. Ry. v. Reeves, 64 Ga. 492 (1880); Burbank v. Pillsbury, 48 N. H. 465 (1869).

¹⁸⁴50 Barb. 135 (N. Y. 1867).

¹⁸⁵McMahon v. Williams, 79 Ala. 288 (1885); Hill v. Weil, 202 Ala. 400, 80 So. 536 (1918).

be a transfer of land or of some recognized easement between the original promisor and the original promisee.

That is a technical requirement, based on the origin of covenants in common law warranties,¹⁸⁶ but there has been much argument against it. Judge Charles E. Clark argues that it was never required in the old law, and that it is not necessary today.¹⁸⁷ Numerous cases involving party wall agreements seem not to have involved grants of land between the original parties, unless an easement in land is implied from the permission to build the party wall.¹⁸⁸

As a good many early American cases required a grant between the creating parties in order for a covenant to run,¹⁸⁹ an effort has been made to find the holdings in the last cases in all the states which have recently considered the question. The list is given in a footnote, in which the states which hold that a grant is necessary, or which assume that a grant is necessary, have been classed as supporting the position; whereas, those which hold that no grant is necessary, or which do not mention a grant in the opinion, are classed as against it. Seventeen states still seem to require a grant, and seven states seem not to do so.¹⁹⁰

¹⁸⁶See SIMS, *op. cit. supra* note 5 at c. 3.

¹⁸⁷(1942) 52 YALE L. J. 199. For the opinion of Mr. Justice Holmes see HOLMES, THE COMMON LAW (1881) 381-409.

¹⁸⁸*E.g.* Leek v. Meeks, 199 Ala. 89, 74 So. 31 (1917).

¹⁸⁹Morse v. Aldrich, 19 Pick. 449 (Mass. 1837); Savage v. Mason, 3 Cush. 500 (Mass. 1849); Lyon v. Parker, 45 Me. 474 (1858); Cole v. Hughes, 54 N. Y. 444 (1873); Fitch v. Johnson, 104 Ill. 111 (1882).

¹⁹⁰States requiring a grant between promisor and promisee to enable a covenant to run, whether benefits or burdens:

Alabama. Cummins v. Alexander, 233 Ala. 10, 169 So. 310 (1936). It was the evident view of the court that a covenant must originate in a grant. Moseby v. Roche, 233 Ala. 280, 171 So. 351 (1936), was a holding that a bill to enforce an agreement not in a deed was good on demurrer. The court found an easement; but it was a restrictive covenant.

Colorado. Farmers High Line Co. v. New Hampshire Real Estate Co., 40 Colo. 467, 92 Pac. 290 (1907). The court found a grant of an easement and evidently thought it necessary.

Georgia. A. K. & N. Ry. v. McKinney, 124 Ga. 929, 53 S. E. 701 (1906). The court found an easement and evidently assumed the necessity of a grant of something.

Iowa. Sexauer v. Wilson, 136 Iowa 357, 113 N. W. 941 (1937). The court speaks of privity of estate and evidently thought there must be a grant between the covenanting parties.

Indiana. Hazlett v. Sinclair, 76 Ind. 488, 492 (1881), held a grant was required. Stover v. Harlan, 87 Ind. App. 347, 154 N. E. 882 (1927), enforced a covenant in a deed but did not say that the deed was necessary.

Kentucky. Swiss Oil Corp. v. Dickey, 232 Ky. 298, 22 S. W. (2d) 912 (1929), held that a grant was necessary between the originating parties.

Maine. Smith v. Kelly, 56 Me. 64 (1870). The language of the court reveals that it thought a grant necessary.

Maryland. Levy v. Dundalk, 11 A. (2d) 476 (1940), held a grant necessary.

Nevada. Wheeler v. Schad, 7 Nev. 204 (1871), held a grant necessary.

New Mexico. Bolles v. Pecos Irrigation Co., 23 N. M. 32, 167 Pac. 280 (1917).

Thus, while a majority of the states which have recently acted upon the question seem to support Sub-section (a) of Section 82, this majority is only about one-third of the American states and territories. Sub-section (b), which seems to qualify Sub-section (a), is so difficult to construe that it might well have been omitted to save confusion of the question. The comments seem to reveal the intent of the Reporter to state merely that the existence of an easement against a piece of land prior to the creation of the covenant is sufficient to enable the newly created covenant to run, though there was no grant made at the date of the covenant. If, however, the transactions are distinct or the separate covenant is an afterthought, even though the parties are successors to the purchaser and promisee, to hold that the cove-

The court found an easement granted and followed *Sexauer v. Wilson*, 136 Iowa 357, 113 N. W. 941 (1907). Thus, it evidently thought an easement necessary.

New York. *Neponsit Property Owners Assn. v. Emigrant Industrial Savings Bank*, 278 N. Y. 248, 15 N. E. (2d) 793 (1938). The court said a grant was necessary between promisor and promisee. *Meadow Lawn Homes v. Westchester Lighting Co.*, 13 N. Y. S. (2d) 709 (1938), similar holding.

North Carolina. *Herring v. Wallace Lumber Co.*, 163 N. C. 481, 79 S. E. 876 (1913), grant held necessary. *Barringer v. Va. Trust Co.*, 132 N. C. 409, 43 S. E. 910 (1902), held a grant necessary.

South Carolina. *Epting v. Lexington Water Power Co.*, 177 S. C. 308, 181 S. E. 66 (1935), clearly considered a grant necessary.

Texas. *Panhandle & S. F. Ry. v. Wiggins*, 161 S. W. (2d) 501 (Tex. Civ. App. 1942), grant required. *Talley v. Howsley*, 170 S. W. (2d) 240 (Tex. Civ. App. 1942), grant required. But see *Jones v. Monroe*, 288 S. W. 802 (1926) *affirming* opinion in 285 S. W. 1015 (Tex. Comm. of App. 1924) which had sustained the running of a party wall agreement apparently without a grant.

West Virginia. *Horbert v. Hope Nat. Gas Co.*, 76 W. Va. 207, 84 S. E. 770 (1914). The court evidently thought a grant required.

Wisconsin. *Crawford v. Witherbee*, 77 Wis. 419, 46 N. W. 545 (1890). The court evidently thought a grant required.

Wyoming. *Lingle Water Users Co. v. Occidental B. & L. Assn.*, 43 Wyo. 41, 297 Pac. 385 (1930); grant required.

States not requiring a grant between promisor and promisee to enable covenants to run:

California. (Apart from Civil Code) *Martin v. Holm*, 197 Cal. 733, 746, 242 Pac. 718 (1925), a restrictive covenant. Held no grant required. See also *Marra v. Aetna Co.*, 15 Cal. (2d) 375, 101 Pac. (2d) 490 (1940).

Kansas. *Southworth v. Perring*, 71 Kan. 755, 82 Pac. 785 (1905), *rehearing* of 81 Pac. 481 (1905). The original opinion enforced an agreement not originating in a grant.

Michigan. *Mueller v. Bankers Trust Co. of Muskegan*, 262 Mich. 53, 247 N. W. 103 (1932). Agreement enforced, evidently not originating in a grant.

Minnesota. *Shaber v. St. Paul Water Co.*, 30 Minn. 179, 14 N. W. 874 (1883). No grant required. Later cases are not clear, but evidently do not change the law. *Pelser v. Gingold*, 214 Minn. 281, 8 N. W. (2d) 36 (1943).

Montana. *Heringstadt v. Hardrock Oil Co.*, 101 Mont. 22, 52 Pac. 1212 (1935), grant evidently not required.

Nebraska. *Loyal Mystic Legion v. Jones*, 73 Neb. 342, 102 N. W. 621 (1905), held a contract for a party wall ran, evidently not requiring a grant.

Pennsylvania. *Bald Eagle Valley R.R. v. Nittany Valley R.R.*, 171 Pa. 284, 33 Atl. 239 (1895), grant not required.

nant runs does not differ much from holding that a covenant can run if it touches and concerns the affected land when no grant is made between the parties.

Except for the history of real covenants, especially prior to the Statute of 32 Hen. VIII, c. 34, which gave rise to a distinction between the law of covenants in leases and that of covenants attached to fees (and there could hardly have been any difference theretofore), the only practical reason for requiring a grant between a covenantor and a covenantee for the covenant to run to their assigns, is to discourage the creation of ill-considered covenants. But if we consider the effective control over them obtained by the limitation set by the Queen's Bench in *Spencer's Case* in 1583, and elaborated since, namely, that in order to run they must "touch and concern" the land, there is little value in an additional requirement that a corporeal or incorporeal interest in land must pass between the parties. Of course there must be a privity of estate between the covenantor and his successor, else the covenant must needs be an easement, and we have seen that a restrictive covenant is in no sense an easement. It would likewise seem that there must be a privity of estate between the covenantee and his successor claiming the benefit of the covenant. Otherwise he would be a stranger to the covenant, whose rights, if any, would depend upon a named beneficiary's right to enforce a contract, a conception of very modern law.

Certainly, then, there is no reason why states which have already decided that a grant between the promisor and the promisee is unnecessary should change their position to conform to Section 82 of the Restatement. Jurisdictions which have not passed upon the point, as yet; apparently twenty-four states, and the District of Columbia, Alaska, Hawaii, and Porto Rico, might well disregard the requirement by judicial action, or adopt a statute similar to the English Statute of 1925,¹⁹¹ but drawn in such a way as not to be misconstrued.

Section 85 of the Restatement has caused much discussion. Its chief purpose seems to have been to express in concrete terms the requirement for real covenants that they "touch and concern" the affected land. The effort to avoid technical terms would seem commendable, but the result is unhappy. It is as follows:

Relation of Benefit and Burden.

The successors in title to land respecting the use of which the owner has made a promise can be bound as promisors only if

- (a) the performance of the promise will benefit the promisee or other

¹⁹¹See note 89 *supra*.

- beneficiary of the promise in the physical use or enjoyment of the land possessed by him, or
- (b) the consummation of the transaction of which the promise is a part will operate to benefit and is for the benefit of the promisor in the physical use or enjoyment of land possessed by him,

and the burden on the land of the promisor bears a reasonable relation to the benefit received by the person benefited.

Moreover, Sub-section (a) attempts to combine the law of covenants with the right of a third party beneficiary of a contract to claim the benefit intended for him. This makes unnecessary confusion, since the problem before us was merely to restate the law of real covenants. Anyone who claims rights as the beneficiary of a contract can look to the Restatement of Contracts to find what those rights are. So far as the right of an assignee of land benefited by a covenant to sue the covenantor or the assignee of the covenantor is concerned, it would seem better to say that the covenant must touch and concern the land, explaining in the comments the meaning of that phrase. Too much literature may be found upon the subject to abandon the use of "touch and concern." In addition to the old authorities cited above,¹⁹² Professor Harry A. Bigelow has contributed an exhaustive discussion of the subject, which leaves little to be added.¹⁹³

Of course, judges will differ as to whether a given covenant touches and concerns the land to which it is supposed to be annexed. Lord Brougham thought that a covenant to ship over a particular railroad the product of a particular mine, did not touch and concern the mine.¹⁹⁴ The Supreme Court of Pennsylvania evidently thought, in a similar case, that it did.¹⁹⁵ It is impossible to avoid such divergence of opinions by resorting to concrete definitions.¹⁹⁶

Sub-section (b) of Section 85 seems to be based on the notion that the land may be burdened by a covenant which may run to the covenantor's assigns, and at the same time benefit the covenantor's land alone. The Reporter evidently had in mind the irrigation contracts in the arid regions of

¹⁹²See note 85 *supra*.

¹⁹²(1914) 12 MICH. L. REV. 651.

¹⁹³Keppell v. Bailey, 2 Myl. & K. 517, 39 Eng. Repr. 1042 (1834).

¹⁹⁴Bald Eagle R.R. v. Nittany R.R., 171 Pa. 284, 33 Atl. 239 (1895).

¹⁹⁵Mr. Justice Holmes, in *Norcross v. James*, 140 Mass. 188, 2 N. E. 946 (1885), held that a covenant not to quarry stone did not touch and concern the land affected by the covenant. In *Natural Products Co. v. Dolese & Shepard Co.*, 309 Ill. 230, 140 N. E. 84 (1923) the Illinois Supreme Court held that a like covenant did touch and concern the land.

¹⁹⁶[1905] 1 Ch. 391.

the West. But if the original irrigation company is seeking to enforce the covenant, and there has been no assignment of the covenantee's property, the assignee of the burdened land is of course liable for water distributed after the assignment, and the fact that the burdened land is also benefited is immaterial. If, on the other hand, the irrigation company has assigned its plant, it has assigned the benefit of the covenantor's obligation.

It thus would seem that if one piece of land is burdened, another piece is benefited, whether the benefited land is assigned or not.

The last clause of the Section seems to be merely a statement of the ordinary result of unsuccessful litigation. Neither large damages nor an injunction will be granted beyond the plaintiff's just deserts. Though a truism, it is misleading as stated.

In Section 87 of the Restatement, the Reporter and his advisers have followed the *Tulk v. Moxhay* doctrine with evident delight. In Comment i they have also applied to American law the English decision of *Re Nisbitt & Potts' Contract*,¹⁹⁷ which held that a squatter's assignee, who had notice of a restrictive covenant, was bound by it in equity, even though a title to the land had been acquired under the English Statute of Limitations. This is equivalent to saying that while one can hold land adversely in America until he acquires title, he cannot hold it adversely to a restrictive covenant which has been imposed upon it.¹⁹⁸ No American case has taken such a position.

B. *The Running of the Benefit*

The Restatement treats the running of the benefits of covenants quite differently from the running of burdens. After restricting the running of burdens, as has been noted above, the introduction to the running of benefits says: "The benefit may, however, under modern law, by virtue of its recognition of the third party beneficiary doctrine, accrue in the first instance not merely to the promisee, but to others who are beneficiaries of the promise. . . . It has . . . come to be the prevailing view that beneficiaries of a promise other than the promisee can enforce the promise (See Restatement of Contracts, Chapter 6) even though the promise is not part of a general plan."¹⁹⁹ This makes the running to others than the promisee a matter of manifested intention, and Section 92, which prescribes that "the benefit of a promise respecting the use of land of the beneficiary of the

¹⁹⁷The Reporter implies that the adverse possessor of the restricted land can hold adversely against the beneficiary of the covenant. See § 87, Comment i, presumably by giving the beneficiary some form of express notice.

¹⁹⁸RESTATEMENT, PROPERTY (Proposed Final Draft No. 2, 1943) 281.

promise runs with the land only so far as it was intended by the parties to the promise that it should run," would seem tautological. Nevertheless Section 91 stipulates "(1) The benefit of a promise can run with land only if it is a promise respecting the use of land of the beneficiary of the promise," and in Sub-section (2), attempts to generalize the cases which are included under (1).

Section 94, Comment b, then says that a seal is not necessary for the benefit of a covenant to run to assigns, although Comment a says that the Statute of Frauds must be complied with.

Lastly, Section 95 states that the benefit of a covenant can run with the land only to one who succeeds to some interest of the first beneficiary in the land respecting the use of which the covenant was made. Section 96 states that no grant is necessary between the covenantor and covenantee to enable the benefit of a covenant to run.

C. Summary of the Restatement Position

To summarize, then, the declarations of the Restatement with regard to the running of benefits, there is no requirement for the benefit of a covenant to run to assigns of the covenantee but the intention of the parties that it should do so. Although, if the intention is not otherwise clearly manifested, the facts, that the covenant touches and concerns the land of the original beneficiary, and that the assignee seeking to enforce it is his lawful successor in title, would tend greatly to prove that the parties had such an intention. If, however, the existence of these circumstances as facts are requirements for the benefits of covenants to run, regardless of the original parties' intentions, then the Institute's requirements for the running of benefits of real covenants are not in conflict with the general American law, excepting those jurisdictions which require a grant between the parties when the covenant is created.

To summarize the requirements of the Restatement for the running of burdens on the other hand, the Restatement requires: (1) that the covenant be in writing in a deed executed under at least one party's seal, on the theory that the burden of the covenant creates an interest in land under the applicable Statute of Frauds; (2) that the covenant be incorporated in a grant of a corporeal or incorporeal interest in land between the covenantor and the covenantee; (3) that the covenant must touch and concern the land granted; and (4) that the covenant must be restrictive in nature only.

We have seen that only the third of these requirements is accepted without dispute by the American courts; that the second is of small practical value and has been extensively disregarded; that the first is based on a construc-

tion of the applicable statutes rather than legal history or philosophy, and, except as an interpretation of the statutes, cannot be sustained; and that the fourth is illogical as well as unsound legally, and is definitely law in only two of the states.

Compared with the Restatement's survey of the characteristics of real covenants, or the requirements with which they are supposed to comply if they are to run, benefit and burden respectively, with the affected lands, a large majority of the American decisions cited in Part II of this article seem to show that both benefits and burdens can run to respective assignees of the covenanting parties subject only to the requirements: (1) that the covenants were intended by the covenanting parties to run to such assignees; and (2) that the covenants "touch and concern," in reciprocal respects, both the benefited and the burdened lands, or to put it in the terms of the Restatement, concern "the physical use or enjoyment" by the assignees respectively of the affected lands. If there was a grant between the original parties, as there usually is, and the grant is an incorporeal hereditament, the incorporeal hereditament, by American law, may be one of the affected interests. But the law of too many states allows the running of agreements or covenants to assignees when there were actually no grants between the parties, to allow us to state as a requirement that there must be such a grant for the agreement to run. Certainly we should not say that a grant is required in a particular state which has not so ruled already.

A third characteristic or limitation is that only lawful successors in title of the covenanting parties can claim the benefits and must sustain the burdens of the covenants. This is declared as to burdens, by Section 83 of the Restatement, but it is later abandoned as to restrictive covenants in Section 87, Comment i by the declaration that adverse possessors, even after their adverse possessions have ripened into titles, are bound to observe the restrictions of which they had notice when first claiming the lands.

This article does not attempt to discuss the running of a burden when the benefit is retained by the first covenantee, nor the running of a benefit when the burden remains on the first covenantor, as those questions seem, to the writer, to depend so often upon principles of contract or estoppel that they should not be discussed here.

IV. THE USEFULNESS OF COVENANTS RATHER THAN OTHER DEVICES FOR INTER-PARTY PROTECTION

Let us now consider, finally, the usefulness of real covenants, to see whether they should be encouraged or discouraged in the future development of the law.

The covenants usually encountered in the early cases were covenants to pay rent and to repair (chiefly in leases), covenants to fence, to maintain dams and water levels, to clean ditches, to leave open air spaces and ways, to pay half the expense of party walls when used, and other more or less similar stipulations incident to the use of rural or provincial properties. Then came covenants by railroads to maintain conveniences in return for the grant of easements. Next came covenants restricting the uses of property, usually in connection with plans for developing residence and occupational zones in expanding cities and settlements. Lastly came covenants to pay for irrigation and other semi-public services, covenants to develop and pay royalties for mineral interests, and covenants to share in the expense of setting up and developing projects supposed to be beneficial to separately owned neighboring areas.

Covenants have always seemed the simplest device to obtain these desired benefits and to assure the performance by succeeding owners of continuing burdens necessary to the success of the particular projects. There is no reason why courts should repudiate such undertakings. If the communities in which they were instituted have so changed as to make their purpose no longer maintainable or beneficial, the reduction of damages for their breach to nominal amounts, and the power of courts of equity to withhold injunctions, make their ultimate harm to the communities negligible. The danger expressed by Lord Brougham in *Keppell v. Bailey*,¹⁰⁰ that such covenants if approved could "impress upon lands a peculiar character which should follow them into all hands, however remote," has never been realized.

There are many individual business agreements which, put in the form of covenants, and declared to be binding upon successors and assigns, would be carried out more fully and more honestly if the running of covenants is recognized than if dependent solely upon the law of contracts, even aided by the third party beneficiary extension on the benefit side and by the doctrine of estoppel on the burden side. The theory of equitable restrictive easements, if recognized, leaves unenforceable all active obligations, and so meets only one-half of the problem.

Let us consider a few cases.

In *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.*,²⁰⁰ trustees, holding iron ore lands and an incomplete ore furnace, made an agreement with the Lemont Railroad Company, the Bald Eagle Railroad Co., and the Penn-

¹⁰⁰2 Myl. & K. 517, 536, 39 Eng. Repr. 1042, 1048 (1834). Cf. the discussion by the Florida Supreme Court in refusing to enjoin the breach of an outmoded covenant in *Osius v. Barton*, 109 Fla. 556, 147 So. 862 (1933).

²⁰⁰171 Pa. 284, 33 Atl. 239 (1895).

sylvania Railroad Company, of which the first two were subsidiaries, under which agreement a bond issue secured by mortgage was floated by the trustees to complete the furnace and build the Nittany Valley Railroad to carry the products of the furnace to the tracks of the other railroads, the Lemont Railroad Company taking part of the bond issue. A covenant in writing was made in which the trustees and the Nittany Valley Railroad "agreed for themselves, their successors, lessees, and assigns, in the nature of a covenant to run with the title of the lands held by them, to give all the traffic" from the furnace and the lands to the other three railroads so long as they should observe the agreement on their part to take the traffic and carry it at rates charged like traffic, which the three railroads covenanted to do. The trustees and the Nittany Valley Company further covenanted that they would not seek the construction of another competing railroad to the properties. The furnace and the Nittany Valley Railroad were constructed on the property, and the other three railroads extended their lines of service. The agreement was observed until default was made on the bonds, when the mortgage was foreclosed and the property was bought in by the bondholders, and a new corporation was organized to operate it. The agreement was still observed for a time until another railroad was built to the property with the connivance of the owners, who threatened to give their traffic to the new railroad. The three railroads filed a bill in equity to enforce the covenant, and the lower court held the agreement not binding on the successor corporation, but the Supreme Court of Pennsylvania held that the agreement must be performed, and the defendants were enjoined from giving their traffic to the new railroad.

In *165 Broadway Building v. City Investing Co.*,²⁰¹ the owner of an uncompleted building in New York City entered into an agreement with a company operating the Sixth Avenue Elevated Railway to make openings in the building and build connections and platforms to enable its occupants and others, desiring to become passengers on the elevated railway, to go directly on to the railway platform. The owner of the building made large payments to the railroad company to cover the costs of construction to be done by the railroad company, and a further large sum to maintain a ticket seller at the entrance, all of which sums, upon discontinuance of the structure and entrance, were to be repaid "to the owner its successors or assigns."

The agreement, which was in writing, involved no grant, except easements of passage provided for, but it was "agreed by and between the parties hereto that this agreement shall apply to and bind their respective assigns

²⁰¹120 F. (2d) 813 (1941).

and successors in interest, and all subsequent owners and persons interested in the land affected thereby."

The building passed into the plaintiff's ownership, and the railroad was later taken under condemnation by the City of New York, which recognized, without litigation, the duty to refund the payments above referred to. The City Investing Company, which had acquired the rights, if any, of the original owner of the building, claimed that the benefit of the refunds did not run with the land. The lower court so ruled, but the United States Court of Appeals for the Second Circuit, before whom the appeal came, held that the covenant did run with the land to the assignee of the covenantee, who was entitled to the benefits of the obligation.

In *Consolidated Arizona Smelting Co. v. Hinchman*,²⁰² a corporation owned certain copper mining property and agreed to sell it to one *E* for a million dollars, \$10,000 of which was paid in cash, \$90,000 to be paid on delivery of the deed, and the balance \$900,000, to be paid out of the profits of the mines. *E* assigned the agreement to *B* corporation, which received the deed, paid the \$90,000, and executed a separate agreement with *A* corporation by which it covenanted to pay 25% of the net profits of the mine in quarterly payments until the \$900,000 should have been paid. The agreement stated that it should be binding upon and enure to the benefit of successors and assigns of the parties. The rights of *A* corporation to the payments passed by mesne conveyances to Hinchman, the plaintiff below. The mines, by mesne conveyances, passed to Consolidated Arizona Smelting Company, the defendant below, which claimed that the covenant was not binding upon it.

The lower court held that the benefit of the covenant passed to the plaintiff and touched and concerned the land, and that the burden ran with the land to the defendant. The United States Court of Appeals for the First Circuit reversed the decision and dismissed the plaintiff's suit for an accounting, a majority of the Court being of the opinion that the agreement did not touch and concern the land, and that it was, anyway, only a business venture.

Whether the conveyance of the mine and the covenant to pay a royalty were one transaction, as the lower court thought, it would seem that the covenant clearly touched and concerned the property, and as it was intended to run, it should have been allowed to do so.

Now to consider a supposititious case. *A* company is a corporation engaged in boring gas wells, collecting the gas, and distributing it by pipe lines at wholesale prices over a large area. *B* company is a local corporation

²⁰²212 Fed. 813 (1914) reversing 198 Fed. 907 (1912).

engaged in manufacturing and distributing gas to a large city and its inhabitants for illuminating and other commercial and domestic uses. *B* company, finding that it can accomplish a material saving in expense by ceasing to operate its manufacturing plant and purchasing natural gas from *A* company for distribution to its customers, entered into a written agreement and covenant with *A* company by which *A* company agrees to furnish to *B* company gas at a specified price at connection points agreed upon, each company making the necessary outlays to lay pipe to the delivery and reception points. The agreement is to last for fifty years, and recites that it is binding upon the parties, their successors and assigns. Considerable expense was incurred by each company and the arrangement was put into effect. At the end of five years *B* company sells its entire plant and distribution system to *C* company. Notice of the contradiction between *A* company and *B* company is admitted. Is *C* company bound by the covenant to continue the arrangement with *A* company?

None of the above four cases can be as justly decided on any other theory than the theory that the benefits and burdens of covenants both run to assignees of the parties when the agreements are clearly intended to run, and when they touch and concern the affected land. The covenants were all active covenants, so the doctrine of equitable restrictive covenants is inapplicable. It may be that the *165 Broadway Building* case could have been decided the same way on the third party beneficiary theory, but the identification of the third party beneficiary would be made only by the provision that the covenants should run to the assignee of the building benefited. The City of New York did not deny the running of the burden. The case is a typical one for judicial recognition of the running of covenants.

Why should the courts reject, in any appropriate case, such a simple principle of law? It is just, is historically founded, and is easily kept within safe limitations by the requirement of manifested intention and the requirement that the covenant must touch and concern the affected land. No principle of law can be more easily applied by the parties who desire to avail themselves of it, nor by the courts, either at law or in equity, when called upon to enforce it.

In the text of Mr. Sims' article at page 5 he quotes the explanation offered by Mr. Justice Holmes for the ability of the grantee of a covenantee to sue upon the covenant. For the exposition of another explanation, see Rabinowitz, *The Origin of the Common-Law Warranty of Real Property and the Inchoate Right of Dower*, *infra* this issue at page 32 *et seq.*—Ed.