A Policy Analysis of Promises Respecting the Use of the Land

Lawrence Berger

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/1788

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
A Policy Analysis of Promises Respecting the Use of Land*

Lawrence Berger**

TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................................ 168
   A. Background and Early History ................................................................. 168
   B. Spencer’s Case—The Landmark—Touch and Concern, Intention and Privity .......... 172

II. INTENT OF THE PARTIES—NECESSITY FOR USE OF THE WORD “ASSIGNS” . 173

III. THE PRIVITY REQUIREMENT ........................................................................... 179
    A. The Growth of the Doctrine of Equitable Servitude ................................. 184
    B. Privity at Law and Equity—A Critical View ............................................ 187
       1. The Present Complexity ..................................................................... 187
          a. The Restrictive Covenant .............................................................. 188
          b. The Covenant to Pay an Annual Assessment ............................... 188
          c. The Covenant to Build and Keep in Repair a Sidewalk ................. 189
       2. The Requirement of Vertical Privity—A Critical View (Herein of the Distinction Between Affirmative and Negative Covenants and of the Rights and Liabilities of Adverse Possessors and Other Non-Privies) ...................... 190
       3. Privity Between Covenantor and Covenantee—A Critical View ............. 193
          a. Running of Burden ..................................................................... 193
          b. Running of Benefit .................................................................... 195
       4. The Running of Benefit Further Considered—Subsequent and Prior Grantees .... 195
          a. Subsequent Grantee Enforcement Against Prior Grantee ............... 196
          b. Prior Grantee Enforcement Against Subsequent Grantee ............. 197
             i. Common Scheme .................................................................. 198
             ii. No Common Scheme ......................................................... 202
       5. Privity of Estate and Contract in Landlord-Tenant Law—Liability of Tenant After Assignment and the Distinction Between Assignment and Sublease .............................................................. 203

* Copyright 1970, Lawrence Berger.
** Professor of Law, University of Nebraska.
IV. TOUCH AND CONCERN

A. The Policy and the Tests to Determine

B. Touch and Concern in Equity

C. The Relationship Between Intention and Touch and Concern

D. The Decided Cases and Theories Contrasted

1. Physical Acts on the Premises

2. Promises to Pay Money
   a. The Basic Problems
   b. The Problems of Greater Difficulty
     i. Tenants' Covenant to Insured Leased Property
     ii. Covenants to Pay Taxes on Adjoining Property
     iii. Grantees' Covenants to Pay for Future Assessments on Adjoining Property Retained by Grantor
     iv. Covenants to Pay or Assume Mortgage
     v. Grantees' Agreements to Pay for Future Maintenance of Common Areas
     vi. Grantees Agreements to Pay Grantors' Obligations for Existing Improvements
   c. Summary and Synthesis

3. Covenants Relating to Duration of a Leasehold Interest

V. CONCLUSION

I. INTRODUCTION

This article will attempt to articulate in a new fashion the policies underlying the problem of when the benefit and burden of covenants respecting use of land should run to remote parties. In the course of this discussion, it will be necessary both to trace the history of the development of the doctrines and to put them in the framework of their present utility in a modern land use control system. In addition, changes in the rules or in the proper approaches to them will be suggested.

A. BACKGROUND AND EARLY HISTORY

It was early apparent that unless agreements (contained in deeds or leases) respecting the use of land were binding not only upon the promisor (covenantor) who entered into them but also upon purchasers from him, such undertakings would be worthless, since otherwise they could be avoided by a mere transfer to a third party. It became imperative to set up rules which would somehow bind remote parties to undertakings they did not make. Likewise, unless such agreements could be enforced by a suc-
cessor to the one to whom the promise was made, the value of the undertaking would be little, for as soon as the promisee (covenantee) conveyed the property for whose benefit the covenant was extracted, the agreement would expire for the lack of anyone to enforce it. Thus, rules allowing enforcement by remote parties also had to be devised. A good part of the history of the law of covenants is made up of the development of the rules allowing enforcement by and against parties other than those who made the original agreement. This had to be done in the face of rules against assignment of rights and delegation of duties.\footnote{3 S. WILLISTON, CONTRACTS §§ 405, 411 (3d ed. 1960).} The terms “covenant running with the land at law,” “equitable servitude” or “restrictive covenant” came into usage to describe the kinds of interests that grew up in the English and American land law systems in a sort of haphazard gimcrack fashion in response to these old restrictive rules. The result was, as we shall see, an unnecessarily complicated, cumbersome and unpredictable complex of rules.

As noted above, the efficacy of covenants respecting the use of land would be greatly diminished if their burden could not “run with the land” to the successor of the covenantor and their benefit could not “run with the land” to the successor of the covenantee. The meaning of the terms “the benefit runs” and “the burden runs” can be shown in the following example: The A Development Corporation, owner of a large tract containing hundreds of parcels to be subdivided upon which houses are to be built, sells its first parcel to B. The Corporation plans to leave about 20 percent of the land for parks, bicycle ways and swimming and other recreational facilities for the common use of the residents of the tract. To support the maintenance of the common areas, the Corporation places a covenant in the deed to B that “the grantee his heirs and assigns agrees to pay for a period of 50 years an annual fee of $300 (or an amount later to be assessed by a prescribed procedure) for the purpose of supporting the various expenses of the areas of the subdivision designated for common use.” The A Corporation successively conveys properties to C, D, E, etc., with the same covenant extracted from each grantee. When it is said that the benefit of the covenant runs with the land of the promisee, it is meant that since by hypothesis the covenant given by B was for the benefit of the land still owned by the A Corporation, that anyone who subsequently purchases land which was still owned by the A Corporation when it originally conveyed to B may enforce that covenant
against B even though there is no express assignment of the right to do so. Thus, in this particular case, C, D, E or any person who purchases benefited property from the Corporation after B does can enforce the covenant.

On the other hand when it is said that the burden of the covenant runs with the land of B, it is meant that when B sells his land to Z, Z is personally liable for performance of the covenant to pay the annual $300, and if he refuses to do so, suit may be brought and judgment entered against him, with all his assets, including the real property in question, liable to execution in satisfaction of that judgment. In other words, Z would be liable for all obligations under the covenant arising during his period of ownership just as if he had entered into them himself. This liability in personam should be contrasted with merely imposing liability upon the land itself. As a practical matter what this latter concept means is the judicial imposition of a lien upon the real property leaving Z's other assets free from the obligation of the covenant. Presently, it will be explained how these two possibilities have been used and how they interrelate. For the moment, it is enough to say that the term "covenants running with the land at law" relates to the personal liability of Z upon a promise he did not make and did not agree expressly to assume.

As already noted, the rules that choses in action were not assignable nor duties under contracts delegable stood in the way of a system of running covenants. The first breach in these barriers came with respect to the running of benefits. Early in history before the statute Quia Emptores was passed, the very essence of the lord-vassal relationship required the lord to protect the title of the vassal. However, after the statute, when it was no longer possible to subinfeudate and thus create a tenurial relationship between the grantor and grantee of a fee simple, there was no implied warranty of title in a conveyance. Only if

---

2. Restatement of Property § 541 (1944) [hereinafter cited as Restatement]; 2 American Law of Property § 9.19 (Casner ed. 1952) [hereinafter cited as A.L.P.]
3. Restatement, Supra note 2, § 530; 2 A.L.P., supra note 2, § 9.18.
5. See text accompanying notes 56-58 infra.
7. For a general discussion see 3 Holdsworth, History of English Law 157-66 (3d ed. 1923) and 5 Restatement, supra note 2, at pp. 3153 et seq.
there was an express agreement between buyer and seller that seller warranted the title, did the buyer get relief. A logical question to follow was whether a purchaser from the original buyer was entitled to the benefit of the express warranties made to the original buyer. Could he sue the original warrantor, in spite of the fact that the warranty was not made to him? The courts held that a remote party could recover upon certain warranties from the original warrantor, but not upon the theory that the cause of action could be assigned; rather it was viewed as if the right to recover were somehow attached to the estate of the owner of the granted premises. This theory was adopted later with respect to covenants involving use of the premises. In Pak-enham's Case, the plaintiff as successor in title to the covenantee sued the defendant priest whose predecessor had covenanted to sing in the plaintiff's manor house once a week. The court held that the plaintiff could enforce the covenant even though the original agreement was not made with him. Thus the doctrine of running benefits was extended from warranties of title to covenants with respect to use of the land.

The running of the burden posed even more difficult problems analytically. There is a proper reluctance on the part of courts to impose personal liability to perform a promise upon a person who never made that promise. This reluctance continues to this day and is embodied in the rule of some states against an implied assumption of an assignor's duties by an assignee of a contract.

Historically, the burden of covenants was first allowed to run when the covenantor was a tenant in a landlord-tenant situation. Thus, for example, the assignee of the tenant was liable personally for performance of the tenant's covenant to pay rent. Developing along with that doctrine was the corollary that the assignee of the tenant could enforce any covenants of the landlord made for the benefit of the tenant. Neverthe-

9. See 4 A. Corbin, Contracts § 906 n.97 (1951). But the Restatement of Contracts § 164 adopted the rule that an assignment of "the contract" operates as a promise by the assignee to perform. See also Uniform Commercial Code § 2-210(4) (1962 Official Text) for the same rule.
less, although it was held that both the benefit and the burden of covenants ran with the interest of the lessee, there was apparently the opposite rule with respect to the running of benefit and burden attached to the landlord's interest. A statute was passed the effect of which was to make both the benefit and burden of covenants of the lessor run with the reversion.\textsuperscript{12} Thus by the end of the sixteenth century, a system of running benefits and burdens had developed as to both the landlord and the tenant.

B. \textit{Spencer's Case—The Landmark—Touch and Concern, Intention and Privity}

The most important case historically in the development of a system of running burdens and benefits is \textit{Spencer's Case}.\textsuperscript{13} Plaintiff Spencer, the landlord, had leased realty to a tenant, the latter covenanting for himself, his executors and administrators that he, his executors, administrators or assigns would build a brick wall on a part of the leased land. The tenant assigned his interest to \textit{J} who assigned to defendant. The defendant refused to build the wall and plaintiff landlord brought an action of covenant against defendant. The court held for defendant and in a broad series of dicta laid down general principles for the resolution of the issue of when a burden shall run with the land. First, the court said, when the covenant extends to a thing in being ("in esse"), the burden of the covenant shall run with the land and bind the assignee even if there are no express words in the instrument purporting to bind a later assignee. Second, and on the other hand, if the covenant has to do with a thing not in being, there must be express words evincing an intent to bind the assignee. Third, the covenant will run and bind the assignee only if it “touches and concerns” the lease property and is not merely “collateral.” And fourth, the covenant will run and bind only those in privity of estate with the lessor and lessee.

Apparently on the basis of the fact that the tenant covenanted for himself, his executors and administrators and did not in the very first instance mention the word “assigns,” the court held the covenant was not binding on the defendant, as the wall was not in being.

The decision left open many questions. For example: What

\textsuperscript{12} 32 Henry VIII, c. 34 (1540). The statute was passed after the redistribution of monastery lands, in order that the new grantees of the king could enforce covenants contained in the leases of tenants who occupied the land at the time of seizure.

\textsuperscript{13} 5 Co. Rep. 16a, 77 Eng. Rep. 72 (1583).
is the meaning of the distinction between those things in being and those not? Why should such a distinction be made? How other than through the use of the word "assigns" does one evince the intent that a covenant shall run? When does a covenant "touch and concern" the land and when is it merely "collateral?" Why should that distinction be made? What is meant by parties in privity of estate with the lessor and lessee? How does the rule requiring privity apply to a non-lease situation, e.g., one involving the conveyance of a fee simple? Why should only privies be bound? Why are not all persons in possession of the burdened property bound, e.g., adverse possessors? The balance of this article will be devoted to tracing the answers that history gave to these questions and in many cases suggesting more rational answers.

II. INTENT OF THE PARTIES—NECESSITY FOR USE OF THE WORD "ASSIGNS"

The first and second rules of Spencer's Case dealt with the problem of what express evidence of intent was necessary in the instrument of conveyance before the burden could run to the covenan tor. The courts still universally state that before a covenant can run there must be an intention by the original parties that it shall run.14 Such an intent may be evinced by use of the word "assigns" or by a clause stating expressly that the burden and benefit of the covenant shall run with the land. On the other hand, many instruments are silent on the issue. This latter situation presents the court with a difficult construction problem. The solution of Spencer's Case was to require an express statement of intention when the covenant has to do with a thing in being and dispense with it when it did not. There is a salutary tendency on the part of most courts to ignore or overrule this old distinction.15 Indeed there seems to be no logical basis


15. Atlantic Coast Line R.R. v. Georgia, Ashburn, Sylvester & Camella Ry., 91 Ga. App. 698, 87 S.E.2d 92 (1955); Sexauer v. Wilson, 136 Iowa 357, 113 N.W. 941 (1907); Masury v. Southworth, 9 Ohio St. 340 (1859). This position is supported by Restatement, supra note 2, § 531, comment c at 3197. A few states still retain the distinction in Spencer's Case but these constitute a weak minority. See, e.g., Lowe v. Wilson, 194 Tenn. 287, 250 S.W.2d 366 (1952).
for it. The more modern approach is to infer intent by viewing the "entire instrument as a whole."\textsuperscript{4}

This article analyzes the above rules and deals with some broader problems as well. What is considered here, in addition, is whether and to what extent courts do, can and should look to the intent of the original parties to the transaction to determine if the covenant should run. And a further question may be asked: should these rules be the same for the running of benefits and burdens? As background for discussion of these issues it would be well to state some of the many ways in which one could manifest the intent that the benefit or burden shall or shall not run. The parties to the original transaction:

1. may neither have an oral understanding about the issue at all nor have evinced any unambiguous intent about it in writing;
2. may not have an oral understanding about the issue, but still the written instrument contains unambiguous words relevant to the question;
3. may have an oral understanding about the issue, but the written instrument contains clear language expressing a contrary intent;
4. may have an oral understanding about the issue with the written instrument completely silent or ambiguous about it;
5. may have an oral understanding which is unambiguously incorporated into the written instrument.

Where the parties have not thought about the issues at all and there is no unambiguous language in the instrument about it, the courts, having no evidence written or extrinsic of the intent of the parties, are left to inference. Where, by hypothesis, the parties have no intent upon the issue, any inference about it would be fictional.\textsuperscript{17} Nevertheless, courts often purport to handle the issue on the basis of what the intent of the parties was. The courts which ignore the "in being" test of Spencer's Case look at "the instrument as a whole" or the "circumstances surrounding the transaction." One of these circumstances might be,

\textsuperscript{16} Peters v. Stone, 193 Mass. 179, 79 N.E. 336 (1906). See also Thompson v. Squibb, 183 So. 2d 30 (Fla. 1966); Tower v. Mudd Realty Co., 317 P.2d 753 (Okla. 1957). California courts hold that, as to the running of the benefit, extraneous circumstances may not be considered and the intention must be specifically expressed in the instrument in order to run. Werner v. Graham, 181 Cal. 174, 183 P. 945 (1919).

\textsuperscript{17} If the foregoing suggests that it is not the meaning or intention of the party to the contract that is in fact given legal operation, but may be instead the meaning and intention that some imaginary reasonable, prudent, and intelligent man would have had (or, more realistically, the judge on the bench), we are not disposed to deny it.

3 A. Corbin, Contracts § 536 (1960).
for example, the existence of a common scheme. Parol evidence is admissible to show these circumstances.\textsuperscript{18} When courts attempt to define "intent," they are actually, in disguised form, making a policy decision affected by several factors: first, their general predisposition in favor of or against the running of burdens or benefits to remote parties; second, their determination of whether the particular benefit or burden being considered is normally thought to run,\textsuperscript{19} and third, whether other objective facts, such as a common scheme, which may tend to show an intent that the covenant run, are present.\textsuperscript{20} This matter will be further discussed hereinafter.\textsuperscript{21}

Where the parties have no understanding with respect to the issue of the running of the covenant, but the instrument contains an agreement stating an intent, the court would usually be bound by the writing, and contradictory parol evidence that there is no such understanding would ordinarily not be admitted. The same rule would apply where the parties have such an understanding but the written instrument contains clear language expressing a contrary intent. Whether expressed intent is and should be respected by the courts is considered in the next succeeding paragraphs.

Where the parties have an oral understanding on the issue of the running of the covenant that is unambiguously incorporated into the instrument, the problem of the legal relevance of intent is posed in bold relief. First, let us examine some fact patterns around which this issue may revolve, when there is express intent whether a benefit shall run. Suppose L leases Blackacre to T, T agreeing to pay a certain rental and to keep the premises in good repair. Suppose further that the lease says that the benefit of the covenants shall not run with the reversion. Of course, in the normal situation such covenants do run with the land to a new owner. Should A, the purchaser of Blackacre from L be able to recover the rent from T? It would


\textsuperscript{19} As we shall see, this really means whether the covenant touches and concerns the land. See text accompanying note 122 infra.

\textsuperscript{20} See 5 R. Powell, REAL PROPERTY \S 673 at 169, 170 (Recomp. 1968) for Professor Powell's review of what factors the courts consider in deciding the issue of intent. They include the retention or nonretention of adjacent land by the promisee-grantor and the fact that the benefit does or does not render more valuable the retained land.

\textsuperscript{21} See text accompanying notes 76--82 infra.
When A purchases the land from L, he should be held to be on notice (constructive or inquiry) of the terms of the lease and the fact that he will not be allowed to enforce the covenants. On the other hand, if there was merely an oral understanding and there was no hint of this understanding in the writing, parol evidence admitted to defeat the normal understanding of a buyer and thus vary the terms ought not be admitted as against innocent third parties. It is submitted that even in the case where there is an ambiguous attempt in the writing to defeat the normal expectations of the parties, parol evidence tending to do so ought not be admitted. In order for the parties to defeat these expectations there should be a requirement of an unequivocal and unambiguous writing to that effect.

Consider, now, the reverse situation. Assume T has agreed as part of the rent to pay off a note owed by L to M. The benefit of such an agreement would normally be deemed collateral and would not run with the land. Suppose further that L and T

22. I have found no case that involved in the instrument itself express language that the benefit of the covenant shall not run. There are many cases that say and hold that an intention that the benefit shall run is necessary, but the court is usually forced to infer intent from other circumstances and the matter then becomes a carbon copy of the court's process of deciding whether the covenant touches and concerns. Examples of such cases are: Clem v. Valentine, 155 Md. 19, 141 A. 710 (1928); Toothaker v. Pleasant, 315 Mo. 1239, 288 S.W. 38 (1926).

In Hudspeth v. Eastern Ore. Land Co., 247 Ore. 372, 430 P.2d 353 (1967), the court said the language in the conveyance itself indicated that the benefit of a covenant was not intended to run and the court refused to allow it to run though it related to the land. However, the only thing in the conveyance that evinced that intent was the fact that with respect to another covenant the parties had used the words "successors and assigns" but with respect to the covenant in litigation there was no such language.

23. The application of the parol evidence rule as against third parties is considered in 3 A. Corbin, CONTRACTS § 596 (1960). Professor Corbin noted that there were many cases that seemed to say that parol evidence might be inadmissible between the parties to a contract but admissible when offered for or against a third party—the exact opposite of the rule contended for here. Professor Corbin criticized that rule and contended that the parol evidence rule should be applied to the parties to the contract and third parties in the same way. However, he was dealing with the typical case in which the issue was the rights of the parties to the original contract in a litigation between one of those parties and a stranger to the contract. Here, however, the issue is the rights of third parties arising out of the contract. In this situation, the normal expectations of the third party ought not be defeated by the oral unexpected agreements of the original parties.

agree that the benefit shall run with the land and there is an unequivocal agreement to that effect in the lease. Now L sells Blackacre to X and the deed to X makes no mention of the note. Can X enforce the covenant? Can L enforce it? Admittedly the hypothetical has very little practical significance because there would, in this case, be very little reason for the parties to agree that the benefit would run. Nevertheless, there seems to be no reason why the benefit should not run with the land. There are cases, however, which hold that the covenant cannot run if the promise is collateral, even if the parties intended it to run.25

Intent with respect to the running of burdens should be separately analyzed. Using the landlord-tenant hypothetical, assume that the parties agree and the lease contains an unambiguous clause that the duty to keep the premises in repair shall not run with the land. In the usual circumstances, the burden of such a covenant would run; that is, the covenant touches and concerns. As to the original parties and the tenant's assignee this case poses no particular problems. Certainly the latter would not complain of being relieved of the burden and the original landlord having agreed expressly to the arrangement would obviously be bound by it. Even the landlord's assignee, who presumably took with knowledge of the contents of the lease, should be held to be bound. On the other hand, assume there were no clause to that effect or that there was an ambiguous one. Could the tenant's assignee bring in parol evidence of the understanding that the duty to repair shall not run? It would seem that he should be able to against the original landlord as long as it does not contradict any express terms of the agreement and as long as the court does not find that the lease was intended as a complete and exclusive statement of the terms of the agreement (that is, that this would not violate the parol evidence rule). However, in any event the oral agreement should not be binding against the landlord's assignee. Again, parol evidence should not be admitted against a person not party to an agreement which varies the normal expectations of individuals in the position of landlord or tenant, unless the unexpected term is unambiguously incorporated into the instrument of lease.


26. See cases collected in 41 A.L.R. 1371 (1928) and 1 H. TIFFANY, REAL PROPERTY § 128 n.57 (3d ed. 1939).
Lastly, let us assume a case where the parties by agreement attempt to make the burden run where it normally would not run with the land. L leases Blackacre to T and T agrees to keep L's property next door to the leased premises in good repair. The parties agree in the lease that the burden of the covenant shall run to any assignee of T. T assigns the lease to A, who refuses to keep the property next door in repair. May L or his assignee enforce against A? The standard principle stated by the courts is that a covenant cannot run with the land even if the parties so intend unless the other legal requirements (such as touch and concern) are met. Since the covenant does not touch and concern the demised premises, the burden would not run, and A would not be bound under the decided cases. Is this a sound result? If A is aware of the terms of the lease can he not be said to have assumed the obligations thereof, very much as the grantee of a deed containing covenants purporting to bind him has, by his acceptance of the instrument which he has not signed, signified acceptance of and agreement to those covenants? Courts which say that such covenants do not run are clearly emphasizing the enforcement of the "normal" undertakings of the usual parties over the specific undertakings of the parties before it. Perhaps the justification for this is a natural reluctance to impose burdens on parties who have not expressly agreed to undertake them. By imposing this limitation upon the effectuation of intent, the courts are refusing to bind a person to unusual undertakings unless he has expressly agreed to be bound. Perhaps the courts are correct in requiring that A expressly agree to the covenant before he is liable. The only result, after all, of holding that the covenant does not run is that A is not automatically bound; an express undertaking by A would still be enforced.

In summary, there is an oft-stated and often ignored requirement that there be an intent that the covenant shall run before it does run. Quite often, there is nothing in the instrument that indicates one way or the other whether the covenant shall run. In that situation some courts under the guise of dealing with intent really manufacture on other relevant policies, particularly, as we shall see, the policy underlying touch and concern. Also quite often, the only evidence of in-

27. Kettle River R. Co. v. Eastern Ry. Co., 41 Minn. 461, 43 N.W. 469 (1889); Louisville & N.R. Co. v. Webster, 106 Tenn. 586, 61 S.W. 1018 (1901); Blasser v. Cass, 158 Tex. 560, 314 S.W.2d 807 (1958); C. CLARK, supra note 4, at 96 n.10; H. TIFFANY, REAL PROPERTY § 854 nn. 84-85 (3d ed. 1939).
28. See Section IV, Part A infra.
tent is the clause binding heirs, administrators, executors and assigns. The use of the word "assigns" is the simplest way of evincing the intent that the covenant shall run. Intent becomes relevant where it is expressed in the instrument. If the expressed intent accords with the usual intent of parties in the situation, it will always be respected. On the other hand, if the expressed intent is contrary to what the courts view as the usual situation they will:

1. refuse to follow an intent that the benefit or burden shall run and
2. follow an intent that the benefit or burden shall not run.

Courts are generally on sound ground in following an intent that a benefit or burden shall not run, unless that intent is unexpressed or ambiguously expressed and innocent assignees' rights would thereby be defeated. It is difficult to justify a court's refusal to allow the benefit of a collateral covenant to run where the intent to have it do so is clearly expressed; but there are sound policy reasons in support of the general position against the running of the burden of such a covenant without the express undertaking of the party to assume the burden.

III. THE PRIVITY REQUIREMENT

It is universally agreed that "privity of estate" is necessary in order for the burden or the benefit of a covenant to run with the land at law. The first problem in this area is just defining what the term "privity" means. Over this there is a great deal of disagreement, which is more than just semantic. The varying views lead to rather profound differences in legal result. It is the purpose here to define the differing views, state their effect on practical affairs and then opine which if any of them commends itself to a modern system of conveyancing.

There are four different views of the definition of privity of estate. First, in a few of the states it is said that there must be a tenurial relationship between the original parties to the covenant and between the remote parties who are involved as plaintiff and defendant in a suit to enforce the covenant.  

29. The doctrine of "touch and concern," we shall see, is the underlying policy which gives effect to community understanding and expectation or the usual intent. See text infra at pp. 206-07.
30. See generally 5 R. Powell, Real Property ¶ 674 (Recomp. 1968).
Hereafter this will be denominated "tenurial privity." The practical effect of this requirement is to confine enforcement at law of covenants by and against remote parties to cases involving landlord-tenant or life tenant-reversioner relationships and their assignees. This, the most restrictive view, eliminates from the possibility of running to remote parties, covenants extracted in the conveyance of a fee simple in the sale of real property. The rule has its basis in English history. Spencer's Case, the ancient decision on the running of covenants, involved a landlord-tenant relationship and laid down a requirement of a privity without defining what it meant. Two hundred years later in Webb v. Russell the court said, "It is not sufficient that a covenant is concerning the land, but in order to make it run with the land, there must be privity of estate between the covenanting parties." Again this statement was ambiguous because, involving as it did a landlord-tenant relationship, it was not clear whether privity of estate meant a continuing tenurial relationship or an instantaneous relationship such as occurs in the conveyance of a fee. The English view as it was later amplified was that only a tenurial relationship sufficed. Thus, in England there was no doctrine of running burdens at law with respect to conveyances in fee, though benefits were allowed to run. This English view was too restrictive in its practical operation and necessitated the invention of the "equitable servitude" to allow the running of the benefits and burdens of restrictive or negative covenants regulating the use to which land conveyed could be put. This development will be traced more extensively later.

As an alternative to the first, the second or "simultaneous interest" view of privity is only slightly less restrictive. Massachusetts follows this rule requiring that the covenantor and covenantee have a continuing and simultaneous interest in the same piece of property. Thus, the tenurial relationship of landlord and tenant would, as in the first view, satisfy the requirement. However, in addition, the conveyance or reservation of an

---

e.g., 165 Broadway Building, Inc. v. City Investing Co., 120 F.2d 813 (2d Cir. 1941) (dictum); National Union Bank v. Segur, 39 N.J.L. 173 (1877). See also Restatement, supra note 2, §§ 534, 548; Annot., 68 A.L.R.2d 1022 (1959).
35. See text accompanying notes 48-58 infra.
easement would provide the necessary privity for the running of benefit or burden to remote parties. Thus, if A conveys Blackacre to B also conveying to B a right of way over Whiteacre, A's retained premises adjoining, and in the same instrument B his heirs and assigns agree to pay A his heirs and assigns a perpetual rent of $100 per year as rental for the easement, the burden of the covenant would run with Blackacre to B's successors in interest and the benefit of the covenant would run with Whiteacre to A's successors in interest. If the simultaneous interest view is followed strictly, conveyances in fee unaccompanied by the creation of an easement could not give rise to a covenant binding upon or benefiting persons not party to the original conveyances. The Massachusetts courts, feeling somewhat limited by their own doctrines of privity have, it has been pointed out, rather freely resorted to the doctrine of spurious easements to fill the gap.37 The state of acceptance of this rule in the few states that have cited the Massachusetts rule with approval is in doubt because there has not been much recent litigation upon the issue.38

In yet a third group of states it is sufficient that the original covenantor and covenantee are connected in a mere instantaneous grantor-grantee relationship. A, owner of Whiteacre and Blackacre, adjoining tracts, conveys Blackacre to B and extracts a covenant that B shall pay an annual fee to A and his assigns for maintenance of common areas. Under this view the successor of A can enforce the covenant against the successor of B. This we shall call the "instantaneous horizontal privity" approach. Of course, in such states, the requirements of privity are also fulfilled if there is the requisite tenure or mutual relation as defined in the first and second group of states. The vast majority of states seem to favor this third approach,39 though it has been severely criticized.40

The fourth view requires no relationship between the cove-


38. See 5 R. POWELL, REAL PROPERTY ¶ 674 n.14 (Recomp. 1968). Professor Powell lists Alabama, California, Colorado, Illinois, Indiana, New Mexico, North Carolina, Rhode Island and Texas as in varying degrees following the Massachusetts approach.

39. See 5 R. POWELL, REAL PROPERTY ¶ 674 n.16 (Recomp. 1968) for a collection of the cases.

40. Judge Clark criticized the rule as the requirement of a barren formality which could be evaded by the simple expedient of a conveyance to a straw man and back. The criticism is obviously a valid one. See C. CLARK, supra note 4, at 116-21.
nantor and covenantee other than the contract itself. The only requirements are that there be privity of estate between the covenator and the person against whom enforcement is sought and likewise between the covenantee and the party seeking enforcement. This is the so-called “vertical privity” requirement. The practical effect of this view is to dispense with the requirement of a conveyance between the original parties. Thus, assume that A and B are next-door neighbors and that they sign a contract in which each agrees to pay the expenses of the maintenance of a dam which controls the flow of water through both their properties. Assume further that A sells his property to X and that B sells his property to Y. Under this fourth view, X and Y can enforce the covenant against each other in spite of the fact that there was no privity of estate between A and B.

Is there any situation in which this fourth requirement of privity will prevent the running of a burden or benefit? Assume that X in the above hypothetical acquired title from A by adverse possession rather than by deed and all other facts are the same. X could neither enforce the covenant against Y nor could Y enforce it against X. There are other cases that fall in the gray area between the two extremes of a conveyance in fee from A to X and the acquisition of title by adverse possession by X. Suppose X gets title through purchase at a foreclosure sale of the interest of A. Or, what if X is the heir, devisee or mortgagee of A? Should X then be bound personally upon the engagements of A? In the first three examples, courts have generally held that X is personally bound. The courts tend to view the case of the mortgagee differently, depending upon whether it is from a lien or title jurisdiction, holding no liability in the former and liability in the latter, but only after the mortgagee has the right to possession.

41. Shaber v. St. Paul Water Co., 30 Minn. 179, 14 N.W. 874 (1883); Horn v. Miller, 136 Pa. 640, 20 A. 706 (1890). This is the view favored by Judge Clark. See C. CLARK, supra note 4, at 131-37. The Restatement adopts this view with respect to the running of the benefit only. See RESTATEMENT, supra note 2, §§ 547, 548.

42. The authority for this proposition is sparse, though it is generally accepted to be the rule. The issue is discussed in Bordwell, Disseisin and Adverse Possession, 33 YALE L.J. 285, 291-92; C. CLARK, supra note 4, at 136; O. HOLMES, COMMON LAW 403 (1881). The Restatement accepts the rule. RESTATEMENT, supra note 2, § 547, comment d, § 535.

43. Dodd v. Rotterman, 330 Ill. 382, 161 N.E. 756 (1928) (liability of original covenantor's devisee); Lake Erie & W. R.R. v. Priest, 131 Ind. 413, 31 N.E. 77 (1892) (liability of covenantor's successors through purchase at foreclosure sale); Morse v. Aldrich, 19 Pick. 449 (Mass. 1937) (liability of covenantor's heirs).

44. Merchants’ Union Trust Co. v. New Philadelphia Graphite Co.,
In addition, the requirement of privity between the covenantor and his successor has great vitality in the landlord-tenant situation. That is, if the tenant-covenantor has subleased rather than assigned his interest to a successor the requisite privity between the landlord-covenantee and subtenant is not present. This is on the theory that the subtenant has a tenurial relationship to the tenant, who in turn has such a relationship with the landlord, there being no tenurial relationship between landlord and subtenant. This distinction will be discussed in a later section.45

It should be noted that the requirement of the fourth view—that of succession between the covenantor and the party sought to be sued and of succession between the covenantee and the party seeking to enforce—applies as well to those states following any of the more restrictive views. Thus, assume the following facts arising in a state following the third theory (which requires a conveyance between covenantee and covenantor). A conveys Blackacre to B and includes in the conveyance an agreement by B to build a wall separating Blackacre from Whiteacre, which are premises retained by A. X gets title to Whiteacre by adverse possession and Y gets title to Blackacre by the same means. The benefit of the covenant does not run to X nor does the burden of the covenant run to Y so as to impose personal liability upon him. In other words, the mere fact that there was the requisite privity between the covenantor and covenantee is not sufficient. There must likewise be privity between the original parties and the parties to the suit, normally through the succession of conveyances.

Another variable to the privity problem should be noted here with respect to the running of benefits. It has become rather typical in the case of the planned unit development to have common areas such as walkways, parks and swimming facilities for the exclusive use of and solely supported by the owners of the land in the developments. In order to have the funds for the maintenance of these facilities, a covenant is inserted in the deed to each owner that he will pay a yearly charge to an association to be formed for the purpose of caring for

10 Del. Ch. 18, 83 A. 520 (1912), involving a lien jurisdiction, where the mortgagee does not become liable until he purchases at a foreclosure sale; Williams v. Safe Deposit & Trust Co., 167 Md. 499, 175 A. 331 (1934), involving a title jurisdiction, where the mortgagee becomes liable only after default by mortgagor. See generally RESTATEMENT, supra note 2, § 535, comment d.

45. See Section III, Part B, Subsection 5 infra.
these areas. The rules of privity are an obvious barrier in the way of enforcement; clearly the association has no ownership interest in any piece of land. However, in recognition of the fact that enforcement of a money obligation for the benefit of all is impractical, there have been a few cases that have recognized the utility of such a device in promoting effective land use and allowed the association to enforce in spite of its lack of privity of estate. Of course, where the association has already been formed and it is expressly given the right to enforce in the deed, the court could allow it to prevail on a third party beneficiary theory.

A. The Growth of the Doctrine of Equitable Servitudes

As was noted earlier, application of the strict English view of privity requiring a tenurial relationship between the parties posed serious practical problems. The fact that burdens could not run at law in conveyances in fee to parties remote from the agreement would have effectively prevented use of the covenant to set up a consensual system of land use control. This was also apparent to the Lord Chancellor of England, who, in 1848 in the famous case of *Tulk v. Moxhay*, effectively avoided the privity hurdle in certain kinds of cases by casting the issue in different terms. Plaintiff was the owner of certain property and sold a piece of it to one Elms. The deed contained a covenant that Elms would not use the property for any other purpose than as a square garden. Elms sold the property and it passed by mesne conveyances into the hands of the defendant. Defendant's deed contained no such covenant but he admitted that he had notice of the covenant when he purchased the property. Plaintiff sued to enjoin defendant from building upon the land in violation of the covenant. In holding that plaintiff was entitled to his injunction the court said:

> It is said that, the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in the manner inconsistent with the contract entered into by his vendor, and with notice

---


47. *RESTATEMENT*, *supra* note 2, § 541, comment c.

of which he purchased.49

The court thus framed the issue not as a running covenant problem but as whether a court of equity will permit someone who buys land with notice of a restriction upon it to violate that restriction.

The effect of this decision was to initiate a system of running benefits and burdens in equity, counterpart to the one already existing at law. At law, the inflexible requirements of form, intention, touch and concern and privity applied. But in the court of equity some of the rules concerning formalities50 and all of the requirements of privity51 were, as the rules evolved, deemed inapplicable.52 This was not the only difference, however; there was also a difference in remedy. As mentioned above, the effect of saying that the burden runs with the land at law was that a successor in privity with the covenantor was bound personally to perform the covenant, that is, to pay the assessment or build the fence, etc. If he did not do so, he was personally liable for damages just as if he himself had made the promise. This was not true in equity. Historically the equitable servitude first announced in *Tulk v. Moxhay* evolved around the so-called restrictive covenant, a promise that the land shall be used only in a certain way, e.g., for residence purposes. The Chancellor did not have to impose personal liability in damages to protect the covenantee or his successor. Instead, he used a remedy traditional to his jurisdiction, the injunction. He merely enjoined the defendant from using the property in violation of the covenant. Thus, in fiction if not in fact, the courts of equity avoided imposing liability as a promisor on remote parties. All they said they were doing was enjoining the violation of an agreement by a remote party who had notice thereof when he purchased. Hence, after some vacillation the rule developed in England that the doctrine of equitable servitudes applied only to negative and

49. *Id.* at 1144.

50. For example, in some states the requirement of a writing complying with the statute of frauds has been deemed inapplicable on the theory that equitable servitudes are contractual interests rather than property interests. See 2 A.L.F., *supra* note 2, § 9.25 at 406 and cases at n.8 therein.

51. That no privity is necessary in equity between the original covenantor and covenantee see 2 A.L.F., *supra* note 2, § 9.26. That no privity is necessary between covenantee and his successor see *id.*, § 9.27. That no privity is necessary between covenantor and his successor, see *id.*, § 9.31.

52. The manner in which equity dealt with the touch and concern problem will be treated in a later section. See text accompanying notes 118–21 *infra*. 
not to affirmative covenants.\textsuperscript{53} In this country, the courts are split, some courts holding that affirmative covenants may run in equity and some holding not.\textsuperscript{54} Needless to say, a distinction between affirmative and negative agreements can break down in the gray area between the two. Would there always be a substantial difference between an agreement not to build for commercial or industrial uses and a promise to erect a residence, and a residence only, sometime within the next fifty years? More importantly, should the rules about the devolution of these agreements be different? The usefulness of the distinction between affirmative and negative agreements will be discussed in a later section.\textsuperscript{55}

Parenthetically, one point should be emphasized. The English doctrine of equitable servitudes was based on notice. In that country (which had no recording system) notice had to mean principally actual notice. In this country which has had a well-developed recording system since its beginning, the record was deemed to be notice to the subsequent purchaser, and thus so long as the agreement was recorded, it was a stable and sure way to bind subsequent parties to private land use arrangements.

Besides the injunction, the court of equity has a second remedy at its disposal—the lien. If the covenant to pay money does not run with the land at law because of a failure of privity as locally defined, or because of the absence of the locally required seal or signature by the grantee, the court, instead of imposing personal liability to make payment upon a remote party, may decree a lien upon the land which may be foreclosed in equity.\textsuperscript{56} This does not involve the liability of an individual for

\textsuperscript{53} Cooke v. Chilcott, 3 Ch. D. 694 (1876) allowed affirmative covenants to run in equity. Haywood v. Brunswick Bldg. Soc., 8 Q.B.D. 403 (1881) held to the contrary.

\textsuperscript{54} The old rule proclaiming the non-enforcement of affirmative covenants in law or equity was established in Miller v. Clary, 210 N.Y. 127, 103 N.E. 1114 (1913). This holding still has some support, as in Furness v. Sinquett, 60 N.J. Super. 410, 159 A.2d 455 (1960) (dictum), but the weight of modern authority is in favor of equitable enforcement of affirmative covenants. See Adaman Mut. Water Co. v. United States, 278 F.2d 842 (9th Cir. 1960); Fitzstephens v. Watson, 218 Ore. 185, 344 P.2d 221 (1959). See also \textit{Restatement of Property} § 528, comment a (1944) [hereinafter cited as \textit{Restatement}].

\textsuperscript{55} See Section III, Part B, Subsection 2 infra.

a promise he did not make; rather it is the attachment of an obligation to the property burdened. Where the deed contains an express provision for a lien or a statement that the land is bound, there seems ample reason to allow this mode of enforcement. But where there is no such express provision, there is the obvious question of whether the court ought to impose an implied lien on the land in order partially to circumvent the strict and outmoded requirements of local law and thus allow the covenantee some relief. There is authority that does imply a lien under those circumstances. There is also some authority which allows both a lien and personal liability where all the requirements for the running of an affirmative covenant are met and there is an express provision binding the burdened land as well.

B. PRIVITY AT LAW AND EQUITY—A CRITICAL VIEW

1. The Present Complexity

The total effect of the historical development just outlined was to create two parallel systems of running benefits and burdens, one at law and one in equity. The problems did not disappear with the merger of the courts of law and equity. Rather the merged courts administered the two systems together under one roof. Before making a critical evaluation of the duality, it would be well to state more precisely in summary the practical effects of the present system. An example will help clarify the complexities. Assume A Corporation, a residential developer, sells Blackacre, a house and lot which is part of a large development, to B and extracts in the deed to B the following covenants:

(1) that B shall use the premises for residence purposes only;
(2) that B shall build and keep in good repair a sidewalk along the street which abuts Blackacre, and
(3) that B shall pay to the privity (semblance); University Gardens Property Owners Ass'n v. Steinberg, 40 Misc. 2d 816, 244 N.Y.S.2d 208 (Dist. Ct. 1963) (failure of privity).


58. Burton-Jones Development, Inc. v. Flake, 368 Mich. 122, 117 N.W.2d 110 (1962). One court has even implied a lien where there was an express enforceable covenant held binding upon subsequent parties as well. Mendrop v. Harrell, 233 Miss. 679, 103 So. 2d 418 (1958).
A Corporation $200 per year for the creation and maintenance of common parks and swimming facilities for the development. The deed further provides that the burden of all the above covenants shall run with the land conveyed. A sells other parcels in the tract to purchasers subsequent to B, viz., to C, D, E, F, G, etc. through W, with the identical covenants. Assume alternatively that B later sells Blackacre to X or that X acquires Blackacre by adverse possession. X refuses to build a sidewalk or pay the assessment and plans to build a greenhouse on Blackacre. Now A Corporation and C sue X (as grantee or adverse possessor) to enforce each of the above covenants. The complexity of the legal situation may be summarized as follows:

a. The Restrictive Covenant

(1) In a suit by C against X to enforce the covenant that the premises be used for residence purposes only, C may clearly get an injunction in equity against construction of the greenhouse whether X is in privity with B by having taken a deed or is just an adverse possessor. There is no necessity of privity in equity.

(2) If X has already built the greenhouse, A Corporation or C may recover damages at law as a means of enforcing the covenant assuming X is in privity. Whether X is in privity depends on the view of the jurisdiction involved. In no state would an adverse possessor be deemed to be in privity. But even if X had purchased the property from B, he would not be deemed to be in privity if the state follows either the tenurial or the simultaneous interest view; on the other hand, if the state follows the instantaneous horizontal privity view, X would be in privity—and therefore liable for damages.

If X is an adverse possessor and therefore not in privity, most courts would refuse to give damages because the covenant is enforceable only in equity where that remedy is not available, except as ancillary to an injunction. Here injunction is not available because of plaintiff's laches.

(3) The lien theory would be unavailable against X on breach of the restrictive covenant. The lien is viewed as appropriate only if the promise is for the payment of money.

b. The Covenant to Pay an Annual Assessment

(4) If X is a grantee and A Corporation sues to recover the annual assessment, A would recover in those states following the two more liberal views of privity outlined above. In the states
following either of the more restrictive views, X would not be liable at all. If, on the other hand, X is an adverse possessor, A Corporation could not recover at law because of the failure of privity.

(5) If A Corporation sues to recover the money in equity where the defense of lack of privity would be unavailing, even to an adverse possessor, he would be met by yet another defense, viz., that equity will enforce only a negative covenant and that enforcement of affirmative covenants such as a promise to pay money is restricted to the courts of law. This view is accepted in some states and rejected in others.

(6) A Corporation can also sue in equity to foreclose a lien which it would argue the court of equity should imply from the promise to pay money. Again it can be seen that the argument of a lien in equity would be a device to avoid the requirements of privity at law. And that is precisely the argument that X would pose against recognition of the lien. That is, the privity requirements at law should not be circumvented by a fictitious implication of lien in a court of equity. As noted above, there is some authority for the implication of a lien. The cases upholding a lien, however, involve for the most part an express reservation thereof.

c. The Covenant to Build and Keep in Repair a Sidewalk

(7) If C sues X at law to enforce the covenant to build a sidewalk, his relief would, of course, be in damages, the measure of which would appropriately be discussed elsewhere. The privity problems as in (2) and (4) above would present the same substantial barriers.

(8) If C sues in equity, his relief would normally be a mandatory injunction, an order compelling X to perform the agreement, that is, build the sidewalk upon pain of contempt. Again, C could be met with the same problems as in (5). Though lack of privity is not a defense in equity, X could successfully raise in some jurisdictions the defense that equity will not enforce an affirmative covenant.

(9) A lien theory would be unavailing to C because the promise is not to pay money.

Needless to say, legal complexity is necessary and defensible only when the human affairs being regulated are themselves so interwoven with complex underlying facts and interests that application of a simple set of rules to them would often result in
substantial injustice. It would be useful to analyze whether the intricacy of the above described rules serves any useful purpose other than that of keeping lawyers profitably employed.

2. The Requirement of Vertical Privity—A Critical View
(Herein of the Distinction Between Affirmative and Negative Covenants and of the Rights and Liabilities of Adverse Possessors and Other Non-Privies).

The question for discussion here is the soundness of the requirement at law that in order for enforcement to be had by or against parties remote to the original agreement there must be "privity" between that remote party and his predecessor in interest. As a practical matter this means that adverse possessors and mortgagees are treated differently in law than in equity with respect to their rights and liabilities under covenants. It is worth pausing to examine this difference in treatment to see if there is any justification for it. First, consider the enforcement of the burden of covenants against an adverse possessor. If an injunction is available in equity against an adverse possessor to prevent his use of land in a way which is prohibited by a negative covenant of which he has actual or constructive notice, then why should he not be bound at law by a promise to perform an affirmative act where he has similar notice? Aside from any historical or technical reasons, is there any policy of the law that would tend toward these at least superficially inconsistent results? A justification that might be posed is a salutary reluctance to impose personal liability to perform a promise upon one who has not made that promise and has no consensual arrangement with one who has. But why then should one not be similarly reluctant to enforce a promise not to do something? A possible answer is that the remedies present a different kind of magnitude of burden. It is one thing to forbid a person from doing a prohibited act and it is another to force him to commit an affirmative one. But this argument is somewhat specious. It is really the economic cost of the burden that normally measures its onerousness. Would an adverse possessor be more burdened by a promise to restrict land to residential uses than by a promise

59. It has been noted, note 48 supra, that the privity requirements have not been applied in equity. That an adverse possessor is bound to a restrictive covenant in equity see In re Nisbet and Pott's Contract, 1 Ch. 391 (1905), aff'd, 1 Ch. 386 (1906); Restatement, supra note 54, § 539, comment c.
60. See C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 210-12 (2d ed. 1947).
to pay a small sum of money annually or to keep certain sidewalks in repair? The answer to that question would of course depend upon the use to which he desired the land to be put. If he desired to build a plant upon the premises, then he would concede that an affirmative promise might run with the land to an adverse possessor but a negative promise should not—the exact opposite of the actual state of the law. In answer to that it might be said that in the usual case the burden of an affirmative promise would be greater and that the law is merely taking into account the normal situation. Proof or disproof of this contention is in the realm of speculation, but probably the opposite would turn out to be true both in terms of frequency of occurrence and economic impact upon the situation. Therefore, unless some other policy can be articulated to justify a different treatment of the two types of covenants with respect to the adverse possessor, the rules about them should be assimilated.

Another justification for the distinction is that covenants tend to clog the title to property and thereby hamper its alienability. Therefore, any rule which prevents its running to remote parties is beneficial in that it tends toward termination of the covenant. This argument proves too much, however. If it is allowable to have the burden of a covenant run to a purchaser-grantee, the normal situation, then why should it not run to an adverse possessor, who usually has paid no consideration for the property and is a comparatively rare bird anyway? A further flaw in this argument is the fact that restrictive covenants are just as much a clog on title as affirmative ones and they are permitted to run to adverse possessors. Therefore, affirmative covenants should also do so.

The answer to the last argument suggests another line of inquiry. Is there something in the nature of restrictive covenants that makes it more desirable from a policy standpoint to have them run to remote parties as compared to affirmative covenants? The function of the restrictive or negative covenant is to make relatively permanent arrangements, which can be relied upon, concerning the use to which land in a certain area can be put. From the perspective of neighboring landowners, enforcement of such a covenant is extremely important. Indeed, it could be argued that prospective enforcement of such covenants actually tends to make land more alienable because people would be unwilling to invest large sums in land construction unless they were reasonably sure that surrounding uses would be compatible. On the other hand, the affirmative covenant accompanying
a conveyance in fee also has great modern utility, in connection with cluster or planned residential development as well as in other cases. The modern developer often resorts to the use of an annual assessment to support common areas such as parks, swimming pools and golf courses which are for the exclusive use of the residents of the development. The use of such devices would be inhibited by rules limiting the running of burdens to successors of the covenantor. From the standpoint, then, of the modern utility of having the burden of affirmative or negative covenants run to remote parties, there seems to be little to choose between the two devices. A rule subjecting adverse possessors to personal liability for performance of all covenants of which he has notice, actual or constructive (record notice) would have the virtues of simplicity, ease of administration and sound policy.

On the other side of the coin, the rights of an adverse possessor who has taken over property benefited by a covenant ought to be considered. The distinction that appears to be tenuously established is that the adverse possessor may not enforce affirmative covenants at law because of the lack of vertical privity (privity between himself and the covenantee) but may enforce negative covenants in equity where the privity requirement is dispensed with. Again the same questions arise as in the burden analysis. Is there any policy reason that might be posed to justify the difference in treatment? Why should an adverse possessor be able to enforce a negative agreement benefiting his land but not an affirmative one? The problem is of course different here because we are inquiring about the rights of the wrongdoer, not his liabilities. In the burden inquiry it certainly made very little sense to worry too much about imposing an obligation upon a person who acted wrongfully in any case. But should the adverse possessor by his wrongdoing succeed to all

61. Judge Clark pointed out that affirmative covenants reported in the actual cases seemed to be almost entirely restricted to four types of promises: (1) to repair certain structures of the covenantee; (2) to adjust rights in party walls; (3) to adjust rights in water and for the payments of charges relating thereto, and (4) to pay assessments covering the above. Id. at 211. Certainly each of these devices has some social utility.

62. Taking this position were Bordwell, Disseisin and Adverse Possession, 33 YALE L.J. 285, 292 (1924) and C. Clark, supra note 60, at 136.

63. RESTATEMENT, supra note 54, § 547, comment d.

64. Norcross v. James, 140 Mass. 188, 190, 2 N.E. 946, 948 (1885) (dictum); RESTATEMENT, supra note 54, § 487, comment e; 2 A.L.P., supra note 57, § 9.27.
the rights of the party whose property he has taken? The requirement of privity at law does serve as a way of limiting how much the wrongdoer can acquire by his act. However, merely viewing the problem from the standpoint of the blameworthiness of the adverse possessor's acts is somewhat simplistic. First, most adverse possession cases do not involve situations where there is an outright attempt to "steal" the property from the owner. More typically they arise from a boundary dispute where the *mala fides* of the taker is much less obvious.

Second, even assuming the bad faith of the adverse possessor, one should look more deeply at the typical arrangements involving affirmative covenants before deciding whether, in justice, the benefit should run. Commonly, transactions involving an affirmative burden from one party to the other also involve reciprocal burdens on the other side. A hypothetical case will illustrate the point. *A,* owner of Blackacre, conveys the easterly part of it to *B.* There is a source of water on the westerly or retained part of the tract to which the conveyed piece has no access. In the deed to *B,* *A* agrees that he will supply so many gallons of water per day to *B* in return for a payment by *B* of $1,000 per year. *X* wrongfully occupies *A*'s tract for the statutory period and becomes owner. Should *X* be able to enforce the obligation to make annual payment against *B*? It would seem from what we have said above that the burden to supply the water should pass to *X* even though he is an adverse possessor. (The rule is, of course, the contrary.) If we go so far, then it would seem to follow that *X* ought to be able to enforce the reciprocal obligation which was given in exchange for the obligation that is binding upon him, or else *B,* by fortuity would escape from his obligation. If, on the other hand, the old rule is followed that *X* is not bound to supply the water, then of course he ought not to be able to enforce the obligation to pay. In the vast majority of cases of affirmative covenants there are such reciprocal arrangements and therefore this analysis should apply. Where the arrangement is not reciprocal, then a much better argument for non-enforceability could be made.

3. Privity Between Covenantor and Covenantee—A Critical View

a. Running of Burden

The rule in most states in the United States requires privity of estate between covenantor and covenantee (horizontal privity)
in order for the burden to run to remote parties at law. As noted above, some courts define this so as to require a tenurial relationship between the original parties, others require a simultaneous and continuing interest such as an easement in the same tract and still others require only a conveyance between covenantor and covenantee. In equity, however, no such requirement, however defined, has been imposed. No relationship between the original parties to the covenant other than the agreement itself is required. The next question appropriate to our inquiry is, which of the differing views in law or equity commends itself to a sound conveyancing system, and again whether or not the legal and equitable approaches ought to be assimilated.

What is the function of the rule at law that there must be a tenurial relationship between covenantor and covenantee before the burden can run? Its practical effect is to eliminate the running of affirmative agreements where there has been a conveyance in fee and confine them to the landlord-tenant situation. Such a rule has the virtue of ease of application but it is doubtful that it has any other. It can be defended on the theory that the burden of a covenant, if it were to run, would constitute a cloud on title and thereby tend to hamper the alienability of land. The answer to this has already been stated: restrictive covenants which are much more common also tend to cloud the title and no such privity is required to make their burden run. If this requirement of privity is unnecessary with respect to the more commonly used device then, a fortiori, it is unnecessary in the less common one. The same arguments and answers thereto may be stated with respect to the less restrictive views of privity at law. They are still less liberal than the "anything goes" view of equity and are difficult to justify as a means of preventing clouds on title. We have also shown above that both the affirmative covenant, commonly enforced only at law, and the negative one, commonly enforced in equity, have substantial utility in a modern conveyancing system. Among other things, that system has the goal of effectuating the intent of the parties to a transaction to the extent that such effectuation will not interfere with another policy of the law.

Finally, it can be urged that the concept of privity is just a response to the judicial instinct requiring a jural nexus, a connection between plaintiff and defendant before legal liability

65. See text accompanying notes 30-41 supra.
can be imposed. But the legal connection is found in the covenants respecting the land to which the parties agreed and with respect to remote parties in their possession of land known actually or constructively to be burdened. For these reasons it would appear that the requirements of privity between the original parties to the transaction have no sound basis in any recognizable legal policy and are really a mere survival of the technicalities of an outmoded era. A rule dispensing with all requirements of privity with respect to the running of burdens would be salutary. Liability should be premised on the taking of title to property with notice of the burden attached to it by its former owner.

b. Running of Benefit

There is even less reason to require privity of estate between the original parties (horizontal privity) for the running of benefits than there is for the running of burdens. There is a much weaker argument that the running of benefits hampers alienability more than does the running of burdens. On the contrary, the running of the benefit tends to make the property more desirable and therefore more readily acceptable in the market place (although, of course, it tends to make the burden on the other parcel last longer). It would seem, therefore, that the rule requiring horizontal privity for the running of benefits should be abolished, for the same reasons that were advanced for its abolition with respect to burdens. The case law still seems to require horizontal privity though there seems to be limited authority following the Restatement view that horizontal privity is required for the running of burdens but not for the running of benefits.67

4. The Running of the Benefit Further Considered—Subsequent and Prior Grantees

It would be profitable to return to a consideration of the subdivision development hypothetical in which the A Development Corporation successively conveys to B, C, D, . . . through W certain parcels in the same tract all subject to the same agreements by the grantees. The focal questions are two: under what circumstances can W enforce a covenant against B, and under what circumstances can B enforce a covenant against W?

66. See R. Pound, The Spirit of the Common Law 22 (1921); C. Clark, supra note 60, at 117.
a. Subsequent Grantee Enforcement Against Prior Grantee

When the A Corporation conveys the first parcel to B, one might well draw the inference that the covenant extracted from B was for the benefit of whoever owned, or in the future would own, the land that A Corporation retained when it made the conveyance. Thus W, a subsequent purchaser of A's retained land, should be able to enforce a covenant that touches and concerns his land against B. The courts have generally agreed but have imposed a requirement that there be shown an intent between the original parties to the transaction (A Corporation and B) that the covenant run. This intent may be shown in the instrument by use of the word "assigns" or by an express clause designating the benefited land. Or the intent may be shown by proof of extrinsic circumstances such as the uniform building plan (common scheme) or the fact that the retained land is benefited by enforcement of the covenant. To the extent that courts use the last approach they are, as will be seen, applying a touch and concern test and are being redundant. A few courts have reached the same kind of result by indulging in a presumption that the benefit is intended to run if it touches and concerns the retained land. It would seem that the courts ought to allow the benefit to run in any case where it touches and concerns the retained

68. For an excellent discussion of this point see Doerr v. Cobbs, 146 Mo. App. 342, 123 S.W. 547 (1909).
72. McFarland v. Hanley, 258 S.W.2d 3 (Ky. 1953). See also McRae v. Lois Grunow Mem. Clinic, 40 Ariz. 496, 14 P.2d 478 (1932); Renn v. Whitehurst, 181 Va. 360, 25 S.E.2d 276 (1943). However, the building plan must be in existence at the time the covenant was entered into to be evidentiary of the original intent of the parties. See 2 A.L.P., supra note 57, § 9.29 at 418 and nn. 15-19 therein.
74. Lawson v. Lewis, 205 Ga. 227, 52 S.E.2d 859 (1949); Watrous v. Allen, 57 Mich. 362, 24 N.W. 104 (1885). There are cases, however, to the exact contrary which create a presumption that the covenant was intended to be personal or impose a burden upon the person so asserting to show that the covenant was intended to run with the land. See, e.g., Hendlin v. Fairmont Const. Co., 8 N.J. Super. 310, 72 A.2d 541 (Ch. Div. 1950); Brehmer v. City of Kerrville, 320 S.W.2d 193 (Tex. Civ. App. 1959).
land unless there is a written agreement to the contrary. Otherwise, the normal expectations of a subsequent purchaser could be defeated by a parol understanding of which he could have no knowledge. The only reason to restrict the running to remote parties would be to cut down the number of enforceable covenants on the ground that they constitute a cloud on title. In view of our comprehensive system of running covenants, such a policy does not really fit in with the realities of prevalent practice.

Before we turn to that, however, one parenthetical point ought to be made. The classic analysis that there is an obvious distinction between the situation where a prior grantee is seeking enforcement against a subsequent one, and the reverse case, is stated almost invariably by the text writers. It is often true that courts refuse to put the cases in the neat theoretical categories that are devised by the writers and other judges. This is such a case. If one examines the cases carefully, he will find that the courts often do not mention the prior/subsequent distinction and, even more revealing, often state the facts in such a way that the reader cannot tell whether the plaintiff is in a prior or subsequent chain. It would seem that there is substantial authority (sub silentio) that the rules about prior and subsequent party enforcement are identical.

b. Prior Grantee Enforcement Against Subsequent Grantee

The more difficult problem for analysis is to determine under what circumstances a prior grantee or his successor in interest can enforce a covenant against a subsequent grantee or his successor. Using the hypothetical posed above, when can B enforce a covenant extracted from W by A Corporation, their common grantor? Under traditional analysis, the difficulty lies in the question of intent. When a common grantor extracts a covenant from his first grantee, there is, as mentioned above, a strong inference that he is doing it for the benefit of the nearby land he still owns, and therefore when he conveys to a second grantee, the courts find it relatively simple to say that the new owner of the land intended to be benefited can enforce the covenant. But an inference that the common grantor wanted to benefit the land owned by the plaintiff is more difficult to draw when the prior grantee seeks enforcement against the subsequent one, for the

obvious reason that at the time of the common grantor's later conveyance he did not own the allegedly protected land and would ordinarily have no particular desire to benefit it; ordinarily, that is, because if the common grantor is a subdivider who is attempting to promote the sale of a residential development, his intent likely would be to benefit all the land in the development so that it becomes more readily saleable. A discussion of the law can therefore be conveniently subdivided into two areas: first, the case where there is a subdivision development in which the covenant is more or less uniformly extracted by the developer from each buyer (the so-called common scheme) and second, a simple conveyance of two adjoining pieces in which no multi-tract development is involved.

i. Common Scheme

Several lines of authority have developed around the question of the extent to which the presence of a common scheme gives the prior (or subsequent) purchaser the right to enforce against all other grantees. The most liberal group of cases seems to hold that if there is a common scheme, any grantee may enforce the common covenant against any other grantee. A second group of decisions starts with the same rule but attaches to it an additional requirement, that the party seeking enforcement must prove the existence of the scheme by showing that the common grantor and purchasers intended to establish the scheme or to benefit all owners in the subdivision. The distinction between the first and second approaches is that in the former, no proof of intent is necessary; all that is apparently required is that the developer rather uniformly extract the covenants.

A third view is probably only a carbon copy of the second but is in form at least a different statement of the rule. The courts adhering to this view require both a scheme and an intent by the original owner and purchasers that the restrictions be for


the benefit of all other lots. In both approaches the requisite intent may be shown by the "language of the instruments, the conduct of the parties and the surrounding circumstances." It is apparent that the second and third approaches are essentially the same. Both impose an intent requirement—the former to establish the existence of the scheme, the latter in addition to it. The difference is really nominal because the basic idea underlying the scheme is to benefit all lots in any case.

The fourth and strictest view requires that the existence of the scheme be disclosed in the instruments of conveyance made by the common grantor. Under this view, it is not enough that all parties knew a common scheme was intended; rather the deeds themselves must provide for mutual enforcement.

Which of these views commends itself to a sound system of running covenants? Surely none of them is ideal, although the first is probably the best. Perhaps a more thorough analysis will clarify the issues. What purpose does the intent requirement of the second and third approach serve? First, it may be said that it offers great flexibility, in that the court, in any case it wishes, in order to reach a just result, is free to hold that the intent requirement has or has not been met. This of course has its virtues, but where this approach is used to defeat the obvious understandings of the parties it is of doubtful worth. In many cases this seems to have been exactly what occurred. Second, and more importantly, it can be argued that the intent requirement tends to conform legal result to party expectations and thereby to prevent covenant enforcement against a person who reasonably does not expect it. Certainly it is unfair to enforce a covenant against a person who bought property reasonably believing that enforcement of a certain covenant could not be had against him except by the original grantor. What, then, is wrong with a properly administered intent requirement? The real difficulty seems to be that in the vast majority of development (or common scheme) cases everybody really understands that the covenants restricting use are contemplated as mutually enforceable by all owners in the subdivision. Therefore, it seems that the courts which require

79. Id. See also cases cited in note 72 supra.
affirmative proof of intent of mutual benefit are starting with the wrong presumption. Rather, the parties asserting that there was no such understanding should be forced to convince the trier of fact upon a preponderance of the evidence that it did not exist. And, if a successor to the prior grantee is involved as plaintiff, there should be a requirement that the original deed in the latter's chain of title contains clear language that the benefit of the covenant does not extend to lands then unsold by the common grantor. If this were not so, the plaintiff's normal expectations could be defeated by an agreement of which he likely would have no knowledge. The result of the application of such a rule would be very close to the rule followed by some courts giving automatic mutual enforcement where a common scheme has been shown. This is because in the usual case there will be no oral or written understanding that the owner of the prior granted land cannot enforce the covenant against a subsequent purchaser or his successor. In any case, the courts following the first view would probably take cognizance of an actual understanding of non-enforcibility if such a case were to arise.82

Consider the situation where there is a common scheme but in a few of the conveyances the common grantor has omitted to extract a covenant that has otherwise been uniformly extracted. Can the covenant be enforced against a person whose back title does not contain the promise, on the theory that he was put on notice of its existence by the uniform appearance of the neighborhood? In the leading case of Sanborn v. McLean,83 the court held that he was so bound. The court used the label "reciprocal negative easement" (or implied reciprocal servitude in the terminology of the American Law of Property) to reach that result. In language that is undoubtedly much too broad the court said:

If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold. For want of a better descriptive term this is styled a reciprocal negative easement.84

The court seemed to be saying that whenever A burdens granted land with a covenant in a conveyance to B, A's retained land nearby is similarly burdened. Such a doctrine has never been

84. Id. at 229-30, 206 N.W. at 497.
generally accepted and does not deserve to be. However, when read in the context of the facts the court was dealing with, that part of the opinion makes a great deal more sense because there was a common scheme involved. In the common scheme, there certainly is an implicit understanding that all the other lots under the control of the common grantor will be similarly burdened. This would not normally be true where an individual is just subdividing his lot.\[85\]

The more important issue raised by Sanborn is: assuming land in a common scheme can be subjected to a covenant where there is neither written nor oral undertaking to do so, should an innocent purchaser who buys such land be held to notice of the covenant by reason of the uniform physical appearance of the area and should he therefore be bound by the covenant even though it does not appear in his own back title. There are several other cases that have gone so far as to impose this liability,\[86\] but their propriety is doubtful. It appears that this doctrine places far too great a burden upon the buyer in a development. If other buyers in the development want to make sure that the covenants imposed upon them are also imposed upon others, they can insist that the deeds to them expressly impose the covenant upon land retained by the grantor, or they can demand the recording of a separate instrument that binds all the land owned by their grantor. What the Sanborn doctrine does is to impose a burden of search beyond the grantee's own back title and even beyond a search of other deeds not in the chain of title purporting to bind his property. It requires him to search the record for covenants which apparently have absolutely no connection with the very land with which he is involved or to sense the existence of the covenants by noting the uniform appearance of the area. To require the record search of other tracts is to place upon the searching process a great burden, which a little precaution by others could have avoided. To require the purchaser to sense the existence of the covenant by reason of uniform appearance is to ignore the reality of the situation. In the usual case it is the developer himself who is building the house. It is natural to expect that he will build according to some preconceived uniform plan,

\[85\] In Mission Covenant Church v. Nelson, 253 Minn. 230, 91 N.W. 2d 440 (1958), the court held that the doctrine of the Sanborn case implying a reciprocal obligation upon the grantor would be applied only where there is a common scheme.

whether filed or not. The burden should be upon the developer to insert the covenant into the record in a way that it can be easily found. Recording a declaration of covenants covering the entire area or filing a map which referred to the covenants would be sufficient. The integrity of the record would be better served by a rejection of this part of the *Sanborn* case. There is authority that takes this view.\(^7\)

**ii. No Common Scheme**

There is a line of authority which states that there can be no prior-purchaser enforcement at all without the existence of a common scheme.\(^8\) The *Restatement* takes a contrary view, as do some cases.\(^9\) It is submitted that the limitation of enforcement to cases where there is a common scheme is unduly restrictive. If the parties to the second transaction desire to make a covenant for the benefit of a prior party, there seems no reason to deny the latter enforcement on a third party beneficiary theory even without a common scheme. But consider the case where the parties in the second deal do not so agree, and the grantee in the prior transaction extracts an oral promise from the common grantor that the latter will insert a covenant similar to the one binding the grantee on any subsequent deal made. Where there has been a common scheme, the courts have generally not hesitated to impose the covenant on the subsequent grantee even where it was not inserted in the later deed through which the plaintiff claims. This has been done on the theory of the "implied reciprocal servitude" of which the grantee is deemed to have notice if the covenant has been inserted in most of the

---

\(^7\) Frisch v. Rutgers Village, 8 N.J. Super. 392, 73 A.2d 83 (Ch. Div. 1950) (semble); Hege v. Sellers, 241 N.C. 240, 84 S.E.2d 892 (1954). In the latter case, the court does say the grantee of a parcel with no covenant extracted would not be bound in the absence of knowledge or notice of the scheme on the part of the grantee in the deed for such omitted lot but does not really define what such knowledge or notice would consist of. From the facts of the case it appears, however, that the court would not have accepted the doctrine of notice from mere physical appearance of uniformity, for it seemed to reject as evidence of notice a brochure published by the developer which described some of the covenants relating to the land.


deeds and the development's appearance gave notice of the covenant's existence. This rule was criticized above. Where there is no scheme there is no similar difficulty. The rule ought to be that unless the subsequent party had actual notice of the existence of the oral agreement before he took, he should not be bound at the instance of the prior grantee. Almost every case involving the implied reciprocal servitude has involved a common scheme. The case of Rodgers v. Reimann\(^9\) has accepted the theory of implied reciprocal servitude with prior-party enforcement where there is no common scheme but with the proviso that the subsequent party must have notice of the oral agreement. This approach seems sound. There is no reason to inhibit prior-party enforcement which has been assented to by all parties involved.

One other point should be made. One of the difficulties in the area is the smoke-screen laid by all the terms and theories used by courts and text writers beclouding what is essentially a simple problem. The *American Law of Property*, for example, points to the incorporeal property or negative easement theory, the contract theory, the trustee theory, the third party beneficiary theory and the implied reciprocal servitude theory in trying to make sense and order out of prior-party enforcement.\(^9\) Rather, the issue should be looked at from the point of view of describing which combination of operative facts should result in allowing prior-grantee enforcement. So viewed, the rule should be that prior-grantee enforcement would be allowed when: (1) the subsequent grantee both received a deed containing the covenant sought to be enforced and had notice of the existence of a common scheme; or (2) the prior grantee and common grantor had an agreement providing for insertion of such covenant, of which agreement the subsequent grantee was aware, or (3) the subsequent grantee expressly agreed to such enforcement.

5. **Privity of Estate and Contract in Landlord-Tenant Law—Liability of Tenant after Assignment and The Distinction Between Assignment and Sublease**

As was noted earlier, the rule became established that when \(L\) leases Blackacre to \(T\), who promises to pay a certain rent and who then assigns his interest to \(A\), the latter is bound personally to pay that rent just as if he had promised to do so. This is on


the theory that the covenant “touches and concerns” the land and therefore “runs with the land” to remote parties who are in “privity of estate” with the original landlord. A question remains as to what happens to the liability of the original tenant after he assigns his interest to A. The courts hold that T is still liable using the following explanation: There are two relationships involved when a landlord leases property to a tenant. First, there is privity of estate, the tenurial estate relationship existing where the owner of the present interest holds of the owner of the future interest. When T assigns his interest to A, A is now in privity of estate with L and is liable to L on that theory with respect to covenants that run with the land. However, there is a second relationship created between L and T at the time of the original transaction—a contractual one. The courts describe this as “privity of contract.” Although privity of estate is terminated by T’s assignment, the privity of contract is not and T remains liable on his contractual arrangement with L unless L expressly releases T.92 (Of course, if T were forced to pay, he in turn would have a cause of action over against A for reimbursement.) Although this result is apparently reached through a rather mechanical application of legal concepts, it is sound in policy. When L contracted with T for T to pay rent for a certain period, L was relying upon the credit and standing of T. It would obviously be inequitable to allow T to shift the responsibility to another and perhaps less pecunious person for whose credit L did not bargain. Therefore, the law imposed responsibility upon both, but as between the two, A had to reimburse T.

Extending the analysis one step further, if A now reassigns his interest to B the latter would be in privity of estate and liable directly to L on that theory. A, however, in contradistinction to T, would not be liable to L for rents accruing after his assignment because A was never in privity of contract with L and now is no longer in privity of estate with him.93 In the policy terms


93. Cork-Oswalt, Inc. v. Hickory Hotel Co., 20 Ill. App. 406, 156 N.E.2d 259 (1959); Cohen v. Todd, 130 Minn. 227, 153 N.W. 531 (1915); Packard-Bamberger & Co. v. Maloof, 89 N.J. Super. 128, 214 A.2d 45 (App. Div. 1965). It should be noted that if the first assignee expressly assumed the obligations of the lease, a new privity of contract was said to be created, and the assignee was liable for future breaches after re-
here articulated, A should not be liable to L after he assigns his interest to B because L did not rely on A's credit at the time he made the lease and A is no longer benefiting from the occupancy since it is now in the hands of B.

The problems above described are complicated by the distinction between the assignment and the sublease. The classic doctrine stated that if T subleased, rather than assigned, to A, there would be no direct liability from A to L in the absence of an express undertaking by A to be so liable. The reason for the rule made sense in the medieval legal context in which the doctrine arose. Since in the case of a sublease A would be holding of T who in turn would be holding of L, there would be no privity of estate between L and A. Rather, there would be privity of estate between L and T and between T and A. And since there was also no privity of contract between L and A (no direct contractual relationship), there was no theory upon which the courts could posit liability from one to the other. Thus, the issue of remote party liability was made to depend upon whether the court characterized the transaction as an "assignment" or as a "sublease."

The distinction most courts made and continue to make is easy to state. If T transfers his interest for the entire remainder of the term, it is an assignment, and A is liable upon and may enforce covenants in the main lease that run with the land. If, on the other hand, T reserves even a day at the end of the term when he can come back into possession, the relationship created is one of sublease, and A is not liable under and cannot enforce the provisions of the main lease. Some courts have held, in addition, that if the instrument contained agreements different from those in the main lease or if the tenant reserved a right to assignment. See Bornel, Inc. v. City Products Corp., 432 P.2d 489 (Wyo. 1967).


re-enter on the transferee’s breach, these per se would render the transfer a sublease.98

The important question, obviously, is whether the assignment/sublease dichotomy, which was based upon ancient tenurial notions, has any reason for existence in a modern leasing system. Suppose L leases a house to T for a five year term at a rental of $2,400 per year and that T agrees to keep the premises in repair as well as to replace any appliances or fixtures that may wear out. Suppose further that T is a professor who annually goes to another school for summer teaching and that he regularly “sublets” the house each summer to anybody he can find who needs it for the period he is planning to be away. For the second summer of the five year term T sublets to S at a rental of $200 per month for three months payable to T. S enters into possession and soon thereafter the central air-conditioning, automatic dishwasher and washing machine all fail and need replacement. Before S has paid the first month’s rent, T goes insolvent and L demands that S pay the rent directly to L and that he replace the worn-out appliances in accordance with the main lease. Most people, surely, would find unjust a rule imposing liability upon S to replace the appliances. On the other hand, one would not find intrinsically offensive a rule requiring S to pay the rent directly to L. However, if S had not merely taken a three month portion of the term remaining, but instead had taken over the entire remainder of the term, the average person might well expect the law to impose remote party liability upon S for both land-related covenants. Thus, it appears that the assignment/sublease distinction rests for modern purposes upon the same policy considerations that we shall see underlie the touch and concern issue—giving effect to community understanding. The distinction properly applied would give effect to the normal or usual understandings of the community with respect to the remote-party liability issue and prevent unexpected and unexpected liability.

However, the addition of this variable into the weighing process makes the problem a bit more complicated. In the above example, the expectations of the community might well require S to pay rent to L but not to replace the appliances, though both covenants would normally be considered to “touch and concern” and thus run with the land if it were an assignment. Thus, the

98. Coles Trading Co. v. Spiegel, Inc., 187 F.2d 984 (9th Cir. 1951); Davis v. Vidal, 105 Tex. 444, 151 S.W. 290 (1912). But see per contra authorities collected in 51C C.J.S. Landlord and Tenant § 37(2) (1968).
question of whether S has taken over the rest of the term or a lesser period properly bears differently upon different covenants, with respect to the issue of whether they run. The analysis suggested here is not in accord with the decided cases where the test is an either/or proposition. If the transaction is an assignment, then all covenants touching and concerning run, and if it is a sublease, then none do. And in turn the question of whether the transaction is an assignment or a sublease turns on whether every last day of the remaining term has been set over. This can lead to the obviously undesirable result of insulating a person from liability by reason of a one-day difference. The approach suggested here would be to leave to the trier of fact the issue of whether, considering the nature of the covenant and the proportion of the time left in the lease, it would be the normal community expectation that this obligation would run to the remote party. So constructed the rule would make policy sense.

IV. TOUCH AND CONCERN

*Spencer's Case* established that the burden of a covenant does not run to an assignee unless it “touches and concerns” the leased property and is not merely “collateral.” Although *Spencer's Case* involved a landlord-tenant situation, the requirement was extended in the United States to cases involving conveyances in fee. It was also extended to the problem of the running of benefits: unless the agreement touches and concerns the estate to be benefited, the benefit does not run in the absence of an express assignment of the benefit. The main questions to be considered in this discussion are: what is meant by touch and concern; is there any formula or test which can be used to predict the result of the application of the requirement in a novel case; does the touch and concern test have a basis in sound policy or does it represent the mere survival of the technical rules of an obsolete era?

A. THE POLICY AND THE TESTS TO DETERMINE

Before discussing exactly how the complicated rules worked out historically, it would be well to state what policies governed and militated toward the results actually reached. With this background in mind, it will be easier to analyze and perhaps criticize the presently existing structure of rules.

The touch and concern requirement is a method of restricting kinds of promises that may devolve to remote parties. It is as if the law were saying, "It is not every kind of promise contained in a lease or deed which will run with the land to assignees of the original parties. Only those which 'touch and concern' the land itself will run to these subsequent holders." Why should the law take certain kinds of promises and say these shall run, while these others shall not? Perhaps the use of an extreme example will help to explain the underlying policies. Suppose L leases Blackacre to T and T agrees in the written instrument to (1) pay rent of $1,000 per year; (2) keep the premises in good repair, and (3) buy L's horse, Dobbin, for $10,000. Suppose further, that T assigns the lease to A, who refuses to perform any of the agreements in the lease. L now sues A to recover for breach of the three covenants. It is apparent that there is a difference in the nature of these undertakings. This can best be shown by thinking of the problem from A's point of view. When A studies the lease before taking the assignment, he is likely to assume that covenants (1) and (2) will be binding upon him because they have to do with the tenancy relationship and the duties of T as tenant, and he is also likely to assume that covenant (3) is not binding upon him for the reverse reason that the promise of T to buy L's horse bound T not as a tenant but as an individual. That promise had nothing to do with the lease at all and could just as well have been in a different instrument. The law says that covenants (1) and (2) touch and concern the land and run and that covenant (3) is collateral or personal and does not run. Therefore, A will be liable to perform (1) and (2) but not (3).

On the other hand, if one fact were changed in the above hypothetical, the situation takes on an entirely different cast. Assume that L is leasing a racing stable to T and that as part of the deal, L is selling Dobbin to T. In that case, A in taking the assignment might well expect that the agreement concerning Dobbin would accompany what really is in effect the purchase of a racing stable enterprise. Thus, A should be liable on that promise as well. The real policy, then, is to give effect to the intent that most people would probably have if they thought about the issue and thereby protect subsequent parties against unexpected and unexpectable liability. Touch and concern is a device for in-

100. See C. CLARK, supra note 60, at 99: "Where the parties, as laymen and not as lawyers, would naturally regard the covenant as intimately bound up with the land, aiding the promisee as landowner or hampering the promisor in similar capacity, the requirement [of touch
tent effectuation, through which the law conforms itself to the
normal, usual or probable understandings of the community.

As in the case of every legal distinction, those undertakings
that touch and concern and those that are merely collateral tend
to shade one into the other. In the gray areas, a decided case is
a much better guide to prediction of the actual outcome of pend-
ing litigation than "intuition" or "reasoning." A few hypotheti-
cals will be useful in illuminating the gray areas, how the courts
have dealt with them and whether perhaps there may be a
soonder way to approach them.

Assume that $L$, owner of Blackacre and Whiteacre, two ad-
joining tracts, operates a drug store on Blackacre. $L$ leases Black-
acre to $T$, who plans to continue the drug store under his own
management and ownership. In the lease, $L$ agrees not to open
a drug store in competition with $T$ within one mile of the leased
premises. $L$ sells Whiteacre to $P$, who opens a drug store there,
and $T$ assigns his lease to $A$. $L$ as tenant then leases Greenacre,
property across the street, and opens a drug store. $T$, having as-
signed to $A$, decides to lease a nearby store on Purpleacre where
he also operates a drug store.

Let us analyze first against whom the covenant may be en-
forced. Stated in legal terminology, the question is whether the
burden of the covenant runs with Blackacre, Whiteacre or is
personal to $L$. Looking at it from what would normally be in-
tended, clearly if it runs with any property at all, it runs with
Whiteacre. The commitment of $L$ is to refrain from using prop-
erty he controls in the described way. But is $L$ committing
Whiteacre, whoever owns it, or himself as an individual? Argu-
ably, $T$, at the time of the original lease was afraid that $L$, who
had an established business and goodwill, would take these with
him to an adjoining location and thereby defeat the purpose for
which $T$ leased the property. Therefore, is not the burden of the
covenant personal to $L$? On the other hand, it is also arguable

and concern] should be held fulfilled."
The test discussed here also has some judicial support. In Abbott
v. Bob's U-Drive, 222 Ore. 147, 352 P.2d 598 (1960), the court said:
In applying this test we believe that it is important not only to
consider how the original parties as laymen would naturally re-
gard the covenant, but how one taking a lease as assignee would
regard it. Assuming this to be a test to be judicially applied,
we believe that the average person accepting the assignment of
a lease containing a covenant to arbitrate questions relating
to the terms of the lease would normally assume that he was
bound by the covenant.

Id. at 160, 352 P.2d at 604. See also Hudspeth v. Eastern Ore. Land
that T wanted to prevent the opening of a drug store on the
premises next door; would not any subsequent party who took
an assignment of the lease reasonably think that the agreement
was meant to protect the tenant of Blackacre from competition on
adjoining Whiteacre? There is one point which suggests itself
from this discussion. Why is there not a category of promises
that both touch and concern and are personal? There seems
to be no suggestion of this approach in the literature on the
subject. The reason perhaps stems from a general misappre-
hension of the nature of the touch and concern requirement.

Traditionally, the touch and concern requirement has been
viewed as a matter of objective determinability. One of the old
formulations of the test is found in Mayor of Congleton v. Patti-
son, which stated that the covenant touched and concerned the
land if it “affected the nature, quality, or value of the thing de-
mised, independently of collateral circumstances; or if it affected
the mode of enjoying it.” Another traditional statement of the
test is “a covenant beneficial to the owner of the estate, and to
no one but the owner of the estate.” Both of these approaches
—the first from the point of view of the burden, and the second
from that of the benefit—are circular. The covenant will affect
the “nature of the thing demised” if we hold that the covenant
touches and concerns and therefore runs. Likewise, it will be
“beneficial to the owner of the estate” if we hold it touches and
concerns. It is foolishness to make identical the test of whether
X exists and the result of holding that it does. The famous for-
mulation of Professor Bigelow has a similar difficulty. He
suggested that courts ascertain the effect upon the legal relations

101. One must be very careful in using and defining the ideas that
the burden is personal or that it touches and concerns and therefore runs.
It is true that, with respect to affirmative promises, when a burden
touches and concerns and therefore runs, the original party bound is
still bound on the engagement on a privity of contract theory, even
after he assigns to an assignee who becomes bound on a privity of estate
theory. Thus, when Tenant who has agreed to pay rent assigns to As-
signee, Tenant is still bound to pay the rent if Assignee does not, even
though the burden of the covenant to pay rent touches and concerns and
concerns and runs to Assignee. In that sense the covenant to pay rent
is also personal to Tenant. The reason for the rule is that Landlord
looked to Tenant’s personal credit when he leased the property to him.
However, in the restrictive covenant area the same analysis would not
hold true. There, the courts’ tendency is to view it as binding either the
person or the land, but not both.
1821).
639 (1914).
of the parties and that if the promisor's legal relations with respect to the land are decreased in value then the covenant touches and concerns that land. Conversely if the promisee's legal relations with respect to the land are increased in value, then the benefit similarly touches and concerns that land. The infirmity of the Bigelow test also is its circularity. If we hold the burden of the covenant touches and concerns, then the promisor's legal relations with respect to the land will decrease in value. But the latter is the very question we ask to determine if it does touch and concern. Under this test we will still have the problem of determining whether the individual's relations are increased or decreased with respect to the land involved. And this latter phrase seems equally as meaningless as "touch and concern the land."

The great problem with finding a workable test for touch and concern has been the failure of courts and writers to take into account the policy behind the requirement. As has been noted, the requirement does serve the useful purpose of putting the normal expectations of society into effect unless an actual intent to the contrary is evinced. If this is so, then the test of touch and concern ought to be what the usual expectation of a well-informed layman would be in this instance. And if that is so, then it would appear that there are three forms which that expectation could assume. First, the normal expectation could be that the promise is bound up with an interest in the land; second, it could be that promise is personal, and third, and for the purpose of this discussion, most importantly, it could be that most people would assume that the promise is both personal and bound up with an interest in land. If there are such cases—and the last hypothetical seems to be one—then there are promises the burden or benefit of which both are personal and follow the land. The assumption that the covenant must either run with the land or be personal pervades all the previous discussion of this area and is based on an ostensibly logical but actually unsound policy foundation.

105. Such a criticism of the Bigelow test was made in Abbott v. Bob's U-Drive, 222 Ore. 147, 352 P.2d 598 (1960). See also C. Clark, supra note 60, at 90-111.

106. See text accompanying notes 19-20 supra.

This is not to say that in this hypothetical the burden would always run and be personal. Rather the question would have to be answered on a case-by-case basis depending on variables not yet herein fully explored. For example, if L leased the drug store to T with the idea that T was taking over L's enterprise and good will it would certainly appear as if the covenant were extracted to protect against the possibility that L would take his old customers with him to a new, nearby location. And as noted above, it may also be that T is attempting to bind L's land in the vicinity. On the other hand, if L is the owner of a shopping center who is not in the business which is the subject matter of the covenant, it may be that the only desire would be to bind the other land in that center to noncompetition. In such case, a decision that the burden is not personal but runs with the rest of the shopping center would be fully justified. At this point, the argument gives the illusion of having been subtly transformed, so as to be addressing what the intentions and desires of these particular parties were rather than society's understanding of what the arrangement should be held to be. But, in fact, the transformation has not really been made. When it is said that T and L "intended" something, what is meant is that we as reasonable men think they must have intended; this is really a statement of a societal understanding.

If, as suggested here, the normal expectations of society is the test and these depend on numerous possible variations in fact patterns, the jury, which at least theoretically represents the judgment and knowledge of the intelligent members of the community, would most appropriately be used to apply the standard where reasonable men could differ as to the result. A result more in consonance with the ideas and customs of the community perhaps would follow. Of course, this view is absolutely contrary to the uniformly followed rule that the question of touch and concern is a "question of law" for the judge's determination.

Let us now consider the running of the benefit in connection with the above hypothetical. May A, the assignee of the leased property enforce it, or may T in his new location? Or again is it possible that both may do so? When A received his assignment of the leasehold interest from T, he would naturally assume that the intent of the original parties would be that the right to enforce the covenant would belong to whoever was occupying Blackacre under the lease. Therefore, A could clearly enforce

the covenant against L himself if L were the one operating the drug store on Whiteacre. On the other hand, it would not appear as if T could enforce from his new location. The covenant, it may be assumed, was agreed to by L to protect T in his use of the premises which L was leasing. Again it would be possible to hypothesize a situation in which this was not the case. Perhaps T was extracting the covenant to get some long term protection from L's competition no matter where in the vicinity T might be located in the future. But this would be an atypical case. Where this kind of situation existed the question might well be for the jury. Otherwise, where there is no doubt as to normal intent, the judge could well decide the issue.

In connection with this last hypothetical, there is yet another problem arguably presented. Assume that the benefit runs with the land to A but that the burden is personal to L. Is there any reason in policy to prohibit a running benefit when the burden is personal? It would seem not. The fact that a benefit is appurtenant to an interest in land tends to make that interest more readily marketable, and since there is here no corresponding land burdened, which is thereby made less marketable, there appears to be no reason to prevent the running of such benefits.

Another issue raised by the covenant against competition is whether the benefit must be "physical" rather than "commercial" before it is said that it touches and concerns and therefore can run with the land. In the famous case of Norcross v. James, Justice Holmes was presented with the problem of whether the benefit of a covenant not to compete ran with the land benefited. In holding that it did not, he seemed to set down a rule that the benefit must be a physical one—one relating to what the senses can take in—rather than one merely enhancing its commercial value, before it can run with the land. "In what way does [the covenant] extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products." This rule which purports to

109. National Union Bank v. Segur, 39 N.J.L. 173 (Sup. Ct. 1877), allows the benefit to run. The Restatement is in accord. Restatement of Property § 543, comment e and Illustration 3 (1944) [hereinafter cited as Restatement]. See also C. CLARK, supra note 60, at 106.
110. 140 Mass. 188, 2 N.E. 946 (1885).
111. Id. at 192, 2 N.E. at 949. This same distinction between physical
limit the situations in which the benefit may run has been followed in at least two other Massachusetts cases, the latter of the two acknowledging that the rule probably is not relevant to a modern economy but refusing to overrule it because of the reliance of the bar upon a rule of real property.\textsuperscript{112} It is indeed difficult to articulate a policy justifying a distinction between physical and commercial enhancement, unless one relies upon the basic approach of the \textit{Restatement} that covenants in general serve to inhibit the alienation of land and are therefore undesirable.\textsuperscript{113} The other argument, that the running of covenants which inhibit free competition ought to be limited, seems fallacious. If the covenant is against the common law policy favoring competition, it ought to be invalid as between the original parties to the transaction, and not just unenforceable by subsequent parties. There is, of course, a body of law outside the scope of this paper that does deal with these covenants against competition and outlaws unreasonable restraints on trade. Looking at the problem from the viewpoint of the basic test proposed herein for touch and concern, the "normal intent" to have such an agreement run or not run, there seems little reason to make the distinction. As has been demonstrated herein, society's expectation may very well be to have such covenants run with the land. There is much authority opposed to the Holmesian view.\textsuperscript{114}

Assume now the following problem:


The \textit{Restatement} allows the benefit of such a covenant to run but not the burden. \textit{RESTATEMENT, supra} note 109, § 543(2)(b), comment \textit{e} and § 537, comment \textit{f}.

Most cases allowing the benefit to run do not mention the distinction of Justice Holmes at all. \textit{See} cases collected in 97 A.L.R.2d 4, 72-75 (1964).
leases Blackacre to \( T \) with the covenant that \( T \) shall not use the leased premises as a liquor store. \( L \) sells Whiteacre to \( P \), who plans to continue operation of the store. \( L \) then buys Greenacre, a parcel across the street from the first two, and erects a building and begins operating a liquor store. Subsequently, \( T \) assigns his lease to \( A \), who opens a liquor store on Blackacre. Then \( T \) leases a store on Purpleacre, a tract nearby, and also opens a liquor store. \( L \) and \( P \) sue to enjoin \( A \)'s and \( T \)'s operation of the premises in violation of the restrictive covenant. Who, if anyone, is entitled to the injunction, and against whom? It may be said at the outset that the burden of the covenant clearly touches and concerns Blackacre in the sense that the average assignee of a tenant would assume it was originally intended that Blackacre could not be used for the sale of liquor whether \( T \) or someone else was the tenant in possession. Thus, \( A \) would be bound to comply with the covenant, assuming that we allow someone to enforce it at all. On the other hand, it would appear that \( T \) is not bound personally and that he could probably run the store on Purpleacre with impunity. His promise was not to use the leased premises in a certain way, and it would be a fair inference that he was binding himself with respect to his occupancy of those premises only. If, on the contrary, \( T \)'s promise had been not to compete as a liquor operator within a described radius of Blackacre, it could be said to be a personal covenant as well as running with the leased premises to bind \( A \).

A more difficult problem here is in the analysis of the benefit end. Does the benefit touch and concern any property and, if so, which? The answer is not perfectly clear. First, it may be said that if the benefit touches and concerns any property at all, it must be Whiteacre and not Blackacre. That is, the agreement that \( T \) shall not use Blackacre for a liquor store was not meant to benefit \( L \) in his ownership of Blackacre but rather in his ownership of Whiteacre, where the liquor store was located at the time of the making of the lease. If such a view were accepted, then only \( P \), the present owner of Whiteacre, could enforce the covenant. On the other hand, it could be argued that the agreement was extracted from \( T \) not for the benefit of \( L \)'s operation on Whiteacre but rather for the benefit of \( L \) as a liquor store operator who had a clientele in the neighborhood and that even after \( L \) sold Whiteacre he could enforce the covenant if he had an interest in so doing. If that view were accepted, then \( L \) alone could enforce the agreement, assuming there were no other impediments to enforcement, a matter we will presently consider.
Which one of these alternative views is more sound? Was the covenant more likely extracted for the benefit of the owner of Whiteacre, whoever he might be, or was it meant to benefit L personally, wherever in the neighborhood he might operate such a store? Or is the third alternative, that the benefit both is personal and runs with the land, the most likely? The correct solution is again to leave the question in the ambiguous cases to a representative cross section of the community, the jury. In this particular hypothetical it seems that the circumstances admit one interpretation just as easily as the other. It should also be noted that the case of the ambiguous running benefit does not present as severe a problem as the ambiguous burden. In the former case the question is really who can enforce a right conceded to exist in someone. In the latter case the question is whether there is a burden on a particular person at all.

One other difficulty is presented by the above case. Assume we take the view that the benefit is personal to L and that only he can enforce it and further that the burden touches and concerns Blackacre. An argument can be made that, as a general policy, the burden of these covenants in gross should not run into the hands of a purchaser of the burdened property because unless the burden represents some corresponding benefit in the use of some land it will inhibit land use, development and alienation.115 In answer, however, the words of Judge Clark seem appropriate: "In view of the general social policy which very clearly upholds restrictions on use of property, it would seem proper that such agreements should be enforced without regard to the accident of the plaintiff's ownership of property in the vicinity."116 The point often overlooked by the other side is that promises respecting the use of land also have great utility in promoting the ready transfer of land. Thus, for example, a promise to pay an annual assessment for the maintenance of common areas, though a burden on the land, also helps to increase its value with the utility of the common areas.

B. Touch and Concern in Equity

It was stated earlier that the privity of estate requirement applied at law for a covenant to run was not applied in the courts of equity.117 A related question is whether the touch and con-

115. Restatement, supra note 109, § 537, comment c.
116. C. Clark, Real Covenants and Interests Which "Run With Land" 110 (2d ed. 1947).
117. See text accompanying notes 48-52 supra.
cern requirement was similarly relaxed in equity. The answer is quite complex. In the statement of the rule first creating equitable servitudes in *Tulk v. Moxhay* the court said: "[T]he question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in the manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased." And later the court said, "[I]f 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."\(^\text{118}\) The emphasized words in the above clearly indicate the court's underlying (and perhaps unconscious) assumption that the covenant must be land-related or "touch and concern" the land before a subsequent purchaser would be bound not to disobey it.

Almost every case that has come down on the equity side has, like *Tulk*, involved negative covenants—promises with respect to how land shall not be used. Such promises clearly do touch and concern the land involved and so the courts of equity, for the most part, have not stated nor found it necessary to state touch and concern as a separate requirement. There are, however, some cases that have expressly dealt with the issue, mostly in the area of covenants against competition. Typical is the famous opinion of Justice Holmes in *Norcross v. James*. In that case, grantor conveyed to grantee premises which the latter planned to use as a quarry, the grantor covenanting not to use retained premises for that purpose. Plaintiff, successor of the grantee, sued defendant, successor of the grantor, to enjoin quarrying in violation of the covenant. Justice Holmes said: "The principle of policy applied to affirmative covenants applies also to negative ones. They must 'touch or concern,' or 'extend to the support of the thing' conveyed." The court held that the defendant could not be enjoined.

In what way does [the covenant] extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products.\(^\text{119}\)

---


119. 140 Mass. 188, 192, 2 N.E. 946, 949 (1885). *See also Kettle River Ry. v. Eastern Ry.*, 41 Minn. 461, 43 N.W. 469 (1889). In the latter case the court said, "In other words, equity follows the law in that it will not enforce a covenant as against the heir or assignee unless the obligation it imposes is one which attaches to or concerns the land or its use or mode of enjoyment." *Id.* at 475, 43 N.W. at 475.
It is apparent that Justice Holmes was applying the touch and concern test on the equity side. But there the clarity ends. It is impossible to tell from the opinion whether he was saying that the burden does not "touch and concern" grantor's land, or the benefit does not touch and concern grantee's land or both. He seemed, as mentioned in the preceding section, to set down as a requisite of touch and concern that the benefit be a physical one—one relating to what the senses can take in—rather than one merely enhancing its commercial value.

It seems perfectly clear that there is as much reason to apply the idea of touch and concern in equitable enforcement of promises as there is in legal. To take an extreme example, assume that L is owner of Blackacre and by occupation is a theatrical booking agent. Assume further that T is an actor who is desirous of leasing Blackacre and that L leases Blackacre to T for an agreed rental. In the lease T covenants for himself and his heirs and assigns that he will use L as his exclusive agent for negotiation of contracts for his acting talents and that he will not accept an acting contract unless L is acting as agent. Assume that T assigns the lease to A, another actor. A should not be bound to use L as his agent, nor should he be enjoined in equity from entering into contracts without using L. The same reason for the rule applies here as in the problem of legal enforcement. The court is giving effect to the normal expectations of the community.

On the other hand, it is not only when the agreement is said to touch and concern the land that the burden may run to remote parties. There are cases where the community might expect the burden to run even though it has no connection with the promisor in his capacity as owner of an interest in land. The case of Pratte v. Balatsos120 is apposite. There, plaintiff entered into an agreement with one Larochelle that plaintiff would install a coin operated record player in Larochelle's restaurant business for 14½ years with 40 percent of the proceeds going to the latter. Further it was agreed that "no similar equipment . . . will be installed or operated on [the] premises by anyone else." Larochelle, whose restaurant was occupied under a lease, sold his business to defendant and as part of the transaction assigned the lease to him. Defendant did not accept an assignment of the plaintiff's contract, nor did he expressly agree to perform it; but he admitted that he had notice of the contract when he took the

lease assignment. He also claimed, however, that he did not know that he was entitled to only 40 percent of the proceeds until after he closed the deal. Defendant notified plaintiff to remove the machine and plaintiff sued in equity to enjoin defendant from breaching.

Defendant contended inter alia that the covenant in question could not be enforced against him because it did not touch and concern or run with the land. Plaintiff contended on the other hand that it ran instead with the business and was therefore binding upon defendant. The court quoted with approval a statement by Pomeroy that a covenant can be enforced in equity by means of injunction "even when the covenants are not of the kind which technically run with the land." It held that if the defendant had such notice as to put him on inquiry of the terms of the contract he would be bound by it. The decision should not be read as dispensing completely with the touch and concern requirement. Rather, it rests (perhaps unconsciously) upon the policy underlying touch and concern, the effectuation of the normal understandings of the community. It is not only land-related agreements that the community might assume would run. It might also assume that the burden of a business-related agreement would run to the purchaser of the business. Thus, there is just as much reason to burden the subsequent party here as in the land-related case. This subject of equitable servitudes in non-land situations has received substantial treatment elsewhere.121

C. THE RELATIONSHIP BETWEEN INTENTION AND TOUCH AND CONCERN

It should be apparent from what has already been said that the requirements of Spencer's Case of intention and touch and concern have a very close relationship to each other. The intention requirement relates to the actual state of mind of the original parties to the transaction on the issue of whether they wanted this particular benefit or burden to run with ownership. The touch and concern requirement, on the other hand, pertains to what the normal expectations of society would be as to whether this particular benefit or burden so relates to the owner in his capacity as owner that the average person would assume that the law would decree that such benefit or burden would accompany

the ownership. In other words, the distinction is between the intentions of the immediate parties and the intentions and understandings of society in general. Quite often the intention of the original parties to the transaction is not stated at all or, if stated, is not clear. It would seem that when the courts in the face of this difficulty purport to deal with the intent of these parties, they are really dealing with their ideas of what most parties would expect or intend. They are thus unwittingly applying the same test twice to the issue, as this is the same inquiry that they apply (sometimes unconsciously) to determine whether the covenant touches and concerns.\textsuperscript{122}

D. The Decided Cases and the Theories Contrasted

It will now be profitable to look at the decided cases to see whether they accord in a rough way with the policy considerations outlined. It is convenient to divide the cases into three categories, those involving covenants (1) to do or not to do a physical act on the premises; (2) to pay money, and (3) respecting the duration of a leasehold.

1. Physical Acts on the Premises\textsuperscript{123}

The normal expectation of parties to a lease would be that covenants by either party promising the commission or noncommission of a physical act upon the premises are within that party's capacity as landlord or tenant and binding upon and enforceable by the successors to the original parties. The cases generally are in accord, holding these promises to touch and concern. Thus, the burden of the tenant's agreement to keep the property in good repair\textsuperscript{124} or to vacate upon sale of the premises\textsuperscript{125} would touch and concern and run to an assignee of the

\textsuperscript{122} A perfect example of this type of duplication is the case of Hudspeth v. Eastern Ore. Land Co., 247 Ore. 372, 430 P.2d 353 (1967) where the court said, "The intention of the original parties may be derived from the language used in the instrument or from the fact that the undertaking is one which because of business practice, custom, or the common understanding of the community is deemed to have been intended to benefit those who succeed to the promisee's land." \textit{Id.} at 379, 430 P.2d at 357.

\textsuperscript{123} For a detailed review of the authorities see Annot., 41 A.L.R. 1363 (1926); Annot., 102 A.L.R. 781 (1936); Annot., 118 A.L.R. 982 (1939) and Annot., 68 A.L.R.2d 1022 (1959), all dealing with affirmative covenants running with the land.

\textsuperscript{124} Herboth v. American Radiator Co., 145 Mo. App. 484, 123 S.W. 533 (1909); Magoon v. Eastman, 86 Vt. 261, 84 A. 869 (1912).

\textsuperscript{125} Hirschberg v. Russell, 317 Ill. App. 329, 45 N.E.2d 886 (1943);
tenant and the benefit would run to the successor of the landlord's reversion. Likewise, the burden of the landlord's undertaking to heat the leased building\textsuperscript{126} to supply water\textsuperscript{127} or to repair\textsuperscript{128} would run to the grantee of the landlord and the benefit to the tenant's assignee.

A similar approach is used with respect to promises to perform physical acts contained in conveyances in fee. For example, if the promise requires construction or maintenance of a structure on the premises, the burden of the covenant would run with the land in the hands of a subsequent grantee and the benefit would run with the land of the covenantee intended to be benefited.\textsuperscript{129} And where the agreement is to furnish water, gas or electricity, the cases turn on whether the services are supplied from the land of the burdened party and are to be used on the property of the benefited party. If they are, then both the benefit and burden run with the appropriate property.\textsuperscript{130} If, on the other hand, the service is not supplied from the adjoining land, the burden would not run, and likewise if the service is not to be used on the property of the benefited party, the benefit would not run. Thus, if a grantee as part of the consideration for the purchase of land agrees to supply his grantor with electric power if a certain mill on the conveyed property is moved, the burden would not run with the conveyed property, as it was not contemplated that the power would be manufactured on the property.\textsuperscript{131} This would seem to accord with normal expectations in that situation.

Promises not to perform a physical act involve most intimately the equity jurisdiction of the court. The courts of equity have

\textit{In re Loew's Buffalo Theatres, Inc.}, 233 N.Y. 495, 135 N.E. 862 (1922). Both cases held the benefit of the covenant runs with the land to the grantee of the reversion. However, the latter case involved an agreement reserving the right to terminate for only a period of three months after the original lessor sold the premises.


\textsuperscript{128} Morehouse v. Woodruff, 218 N.Y. 494, 113 N.E. 512 (1916); Hight v. McCulloch, 150 Tenn. 117, 263 S.W. 794 (1924).


\textsuperscript{130} See cases collected in 2 \textsc{American Law of Property} § 9.13 nn. 32-33 (Casner ed. 1952) [hereinafter cited as A.L.P.].

generally not discussed or even mentioned the touch and concern requirement with respect to the equitable servitude. The reason for this is clear. The usual promise enforced there involves an engagement not to build industrial or commercial structures or some similar promise with respect to how the land is not to be used. Such a promise obviously touches and concerns or, in the policy terms here articulated, normally would be intended to bind successors. Therefore, as noted above, courts of equity, which deal almost exclusively with these negative agreements, have not often found it necessary to mention the touch and concern problem.

2. Promises to Pay Money
   a. The Basic Problems

   There is more difficulty in determining whether promises to pay money touch and concern the land for the obvious reason that such promises are equivocal, in that they may relate to a transaction not necessarily having to do with a land relationship. The test again should be whether the promise was so land-related that subsequent parties would assume that in the usual or normal case the benefit or burden was intended to run with the property interest. The cases do not use this approach as such; rather they purport to approach the problem from the objective standpoints discussed above. Nevertheless, it seems clear that many of the easier cases reach substantially the same result as would be reached by use of the standard suggested here. Thus, under the authorities the burden of a covenant to pay rent runs with the land to the assignee of the tenant and the benefit runs to the successor in ownership of the landlord's reversion. This result accords with what the usual intent of the parties would be, where it would be expected that the successor of the tenant would have the obligation to pay rent and the new property owner the right to enforce that obligation. The same rule would obtain with respect to the tenant's covenant to pay the taxes on the leased premises.

---

133. Salisbury v. Shirley, 66 Cal. 223, 5 P. 104 (1884); Berg v. Ridgway, 258 Iowa 640, 140 N.W.2d 95 (1966); Whitney v. Leighton, 225 Minn. 1, 30 N.W.2d 329 (1948).
b. The Problems of Greater Difficulty

There are a number of covenants to pay money which for one reason or another have presented substantial difficulty to courts and commentators. Sometimes the reason is the inherent ambiguity of the underlying transaction; other times, the reason is one of history or mistaken precedent. The areas discussed here include tenants' covenants to pay for insuring leased property, tenants' covenants to pay taxes on adjoining property, grantees' agreements to pay for future assessments on adjoining property retained by the grantor, grantees' agreements to assume mortgages on the conveyed property, grantees' agreements to pay future assessments for the maintenance of common areas and grantees' agreements to pay grantors' obligations with relation to improvements existing on the conveyed premises.

i. Tenants' Covenants to Insure Leased Property

An interesting problem arises in connection with a tenant's covenant to pay for insuring the leased property. Does the burden run to the assignee of the tenant and can a new landlord enforce it? The cases distinguish between two situations: first, where the landlord has a duty to use the proceeds of the insurance to rebuild the property, in which case it is said that the benefit and burden run and second, where the landlord can pocket the proceeds, in which case it is said that neither benefit nor burden run. The decisions have the virtues of certainty and predictability but they seem unsound. In both cases, the usual commercial understanding would probably be that the agreement to pay for insurance was an additional item of rent, the burden and benefit of which would run with the land.135

ii. Covenants to Pay Taxes on Adjoining Property

Assume the case of T's (tenant's) covenant in the lease to pay

---


135. See St. Regis Restaurants, Inc. v. Powers, 219 App. Div. 321, 219 N.Y.S. 684 (1927). This case involved insurance premiums that were to be paid by the lessee as additional rent. The court held that since the premiums were to be paid as part of the rent, the covenant to insure ran to the assigns of the lessee, even though there was no provision that the insurance proceeds would be used to rebuild the premises. It would seem this result should follow whether the parties said it was part of the rent or not since that is the substantial effect in any case.
taxes on property owned by L, the landlord, adjoining the leased premises. Assume further that L sells the leased premises to X and the adjoining property to Y and that T assigns his lease to A. May L, X or Y recover the amount represented by the taxes? And against whom, T or A? There is very little authority upon the point. The English case of Gower v. The Postmaster General\(^{136}\) involved only the problem of the running of the burden and held, citing Spencer's Case, that the burden was collateral and did not run with the leased land.

The solution to the problem should, if possible, rest upon principles already discussed. Since the courts use the touch and concern requirement to give effect to the normal or usual expectations of the community (at least in the absence of an expressed intent to the contrary), it becomes crucial to determine just what those expectations are. And here lies the most difficult problem in this case, because the underlying obligation to pay taxes on another piece of property is rather unusual and atypical. The touch and concern test as above formulated obviously has its greatest utility when the transaction is sufficiently common that it is possible to draw meaningful and accurate conclusions about probable community sentiment. Where the obligation is highly unusual, it is fair to say that the community understanding about the issue may not exist at all. If that is true in this hypothetical, then the use of the touch and concern test may become a sterile exercise rather than a meaningful approach. Perhaps a deeper analysis of the economic realities will be of some help in determining a rational answer. If the amount that T originally agreed to pay was $1,000 per month for five years plus payment of taxes on the property next door, he must have made that agreement because he thought the possession of the leased property was worth that amount. In that sense then, T's agreement to pay those taxes would normally be considered as rental for the property leased and the burden of his agreement should run to the successor of his tenancy interest. If that is true, then A should be liable to pay the taxes and the Gower case is wrong. But to whom shall the taxes be paid? Again let us look at the economics. When L leased the property to T, he, as a rational man, would normally be expected to demand as rental for the leased property a sum close to its value in that use. He is taking that sum in return for allowing T to use the property. When he takes it, he would not normally differentiate between his interest as owner of the property leased and as owner of the adjoining

\(^{136}\) 57 L.T.R. (n.s.) 527 (Ch. Div. 1887).
property. But when \( L \) sold the leased property to \( X \) and the right to the rents passed to him, \( X \) would normally expect that whatever rents in whatever form extracted from the leased property would also pass to him. To take an extreme example, suppose that the only rent payable for Blackacre were to pay the taxes on Whiteacre. A purchaser of Blackacre in buying that piece would assume that that amount should be payable to him. Else he would be buying property subject to lease with no rent being paid to him at all. Therefore, unless \( X \) had received an adjustment in the purchase price based on this loss of rent, it should be held that the benefit runs with the leased land to \( X \).

But that answer poses its own problems. Could not \( A \) discharge his obligation under the lease by paying the taxes? And would this not benefit \( Y \) rather than \( X \)? The answer to this may be found in the analogous area of assignments of choses in action. Suffice it to say here that there are devices to protect persons who in good faith pay funds to an individual who was once but is no longer entitled to payment.\textsuperscript{137}

If, on the other hand, the agreement of \( T \) were not related to a rental the rule might be entirely different. For example, if \( T \) agreed to pay a rent of $1,000 per month and in addition to pay the taxes on the property next door in order to pay off a pre-existing debt to \( L \), the case would be entirely different. In such a situation, the agreement would be the personal responsibility of \( T \) to \( L \) and neither the benefit nor the burden would run with the land.

The approach suggested here does have support in a case with very closely related facts, \textit{Child v. C. H. Winans Co.}\textsuperscript{138} In that case, the grantor conveyed property to the grantee for a money consideration plus the grantee's agreement (contained in a covenant in the deed) to take a lease upon and pay the taxes on grantor's adjoining property for the life of the grantor and her daughter. The only reason the grantee agreed to do this was that the grantor insisted upon it before she would agree to sell the property the grantee very much wanted. Although under the law of New Jersey the burden could not run with the conveyed land, since New Jersey followed the English view requiring tenurial privity, the court did the next best thing and imposed an equitable lien on the conveyed premises, which it held

\textsuperscript{137} Payment in good faith without notice would under normal principles be a defense to a claim for a second payment. \textit{Restatement, supra} note 109, § 170(2).

\textsuperscript{138} 119 N.J. Eq. 556, 183 A. 300 (Ct. Err. & App. 1936).
was good against a subsequent mortgagee with notice. In doing so the court emphasized that part of the consideration the grantee paid for the property asserted to be burdened was the payment of taxes on the adjoining property:

The proofs clearly establish that the rental value of the leased [adjoining] tract was much less than half of the annual taxes; and they further clearly establish, as has already been pointed out, that the agreement by Lambert to pay these taxes on the Child tract was a part of the consideration insisted upon by Mrs. Child for her execution of the deed to the Lambert tract.\(^3\)

Since the consideration agreed to be paid for the burdened property was to pay taxes on other property, it would be clearly unfair if someone were to come into the former piece completely free of a duty to pay the full consideration originally agreed upon.

### iii. Grantees' Covenants to Pay for Future Assessments on Adjoining Property Retained by Grantor

A problem closely related to the one just discussed involves a grantee’s agreement to pay for future assessments on adjoining property retained by his grantor. The analysis should be the same. The problem is best discussed in connection with a decided case. In *Maher v. Cleveland Union Stockyards Co.*,\(^1\)0\[55 Ohio App. 412, 9 N.E.2d 995 (1936).\]

*Maher* v. *Cleveland Union Stockyards Co.*,\(^1\)0 M, plaintiff's predecessor in title, conveyed to the X Stockyards Co., defendant's predecessor in title, a strip of land so that X could have access to a road to be built later. The consideration for the deed was $2.00. In addition the deed provided that "[a]s a part of the consideration of this deed, said grantee agrees to protect and save harmless said grantor from all assessments for the opening of Storer avenue . . . as to said grantor's adjoining or abutting property." Later M conveyed the adjoining retained piece to his daughter, the plaintiff, without mentioning the above covenant and X conveyed all its property including the strip in question to the defendant. The street was subsequently opened and plaintiff brought this suit after being assessed and making a demand for payment from defendant. The court held that the benefit of the covenant ran with the adjoining retained piece and the burden ran with the conveyed piece. The justification was that the agreement to hold the grantor harmless from assessment liability as to the retained piece was the real consideration to him.

---

139. Id. at 561-62, 183 A. at 303.
140. 55 Ohio App. 412, 9 N.E.2d 995 (1936).
for conveying the other piece to the grantee and defendant knew it:

If an analyzation of the host of reported cases were to be attempted we should quickly find ourselves enmeshed in a prolixity of legal reasoning and conflicting theories as applied in the various jurisdictions. We perceive a point of difference in the cause before us which we are unable to find considered in any reported case. That distinction lies in the fact that the covenant or condition contained in the Maher deed to the Farmers' & Drovers' Company is, in fact, a postponement of the payment of the actual consideration for the premises conveyed. It is evident that the sum of $2 was but the nominal and not the actual consideration agreed upon. The covenantee and the covenantor well knew that when and if Storer avenue was produced the cost thereof would be considerable and that the residue of the two acre tract would then be an abutting property to the street improvement and subject to assessment for the cost thereof. It was the present lack of benefit of Maher's land, and the future probability of a heavy charge, and the immediate and future benefit to the Farmers' & Drovers' Company's business activity that actuated the parties in postponing payment of the actual consideration for the transfer which could not then be estimated. It therefore appears to this court that the Farmers' & Drovers' Company secured but the bare legal title to the 30-foot strip, and that the equities therein retained by Maher would only be divested upon the payment of the actual consideration yet to be paid. The Farmers' & Drovers' Company accepted this deed as written. It obligated itself to pay that consideration when, if and in the amount subsequently ascertainable. . . .

The question now comes: Did the appellant assume this obligation? It most certainly did, even if the word "assigns" was omitted and it did not expressly assume its payment in the deed to it. When it accepted Drovers' deed, containing the clause, "and being the same land and subject to the same conditions contained in the deed from Michael Maher to The Farmers' & Drovers' Stockyards Company," it not only had constructive notice, but had actual notice of the fact that the actual consideration for the 30-foot strip had not been paid. The earlier deed was of record. It must have been known that only the nominal consideration had been paid and that it acquired but a bare legal title. It certainly and clearly appears to this court that it would be most inequitable to permit these two companies to enjoy for forty years the benefit of their purchase, and to sell the strip to the city for a valuable consideration, and then be heard to say that they were not bound to pay the actual purchase price of that which they enjoyed and sold, to wit, pay the consideration, which was the assessment levied against the two acre tract.\footnote{141}

The court's analysis seems to this writer to be sensible and rational.

\footnote{141. Id. at 416-19, 9 N.E.2d at 997-98 (emphasis added).}
iv. Covenants to Pay or Assume Mortgages

The problem probably most burdened with an unfortunate history is that of a covenant to pay or assume a mortgage. The rule of the law has been well established that a covenant to pay or assume a mortgage by the mortgagor or his assignee does not run with the land to a subsequent grantee who does not expressly assume the mortgage.\textsuperscript{142} For example, if R gives a mortgage to E, then sells the mortgaged property to A who expressly assumes payment thereof and then A sells the property to B, who does not expressly agree to assume, B is not personally liable on the mortgage because it is said the covenant of assumption does not touch and concern the land and therefore the burden does not run. In the words of the Supreme Court of Minnesota:

The agreement to assume and pay a mortgage manifestly is not such a covenant [as to run with the land]. It is the personal agreement of the grantee to pay money due to a third person for which the grantor is bound, and the legal effect of which is to create the relation of principal and surety . . . . The contract does not relate to or in any manner concern the land conveyed, or its use and enjoyment . . . .\textsuperscript{143}

One might reasonably ask if it is so clear that the burden of a covenant to pay rent runs to the assignee of a leasehold interest, why is it likewise so clear that the burden of a covenant of mortgage assumption does not run to assumer's grantee. Is the court's justification that such a covenant "does not relate to or in any manner concern the land conveyed or its use or enjoyment" really true of an agreement to pay the mortgage? And is it any more true of such an agreement than of one to pay rent? Do not both in fact relate to the right of those in possession to remain in possession and thereby continue "use or enjoyment?" In fact the covenant to pay rent is even less involved with use and enjoyment because at common law the tenant's failure to pay rent did not authorize the re-entry by the landlord. The tenant could continue to default in his rent and stay in possession in the absence of a lease provision to the contrary, his liability being, of course, to pay the rent upon suit by the landlord.

The explanation of the difference in treatment undoubtedly lies in history. Since a covenant of assumption of a mortgage invariably involved owners in fee rather than landlord-tenant relationships, the question of whether such a covenant touched

\textsuperscript{142} Seventeenth & Locust Streets Corp. v. Montcalm Corp., 54 F.2d 42 (3d Cir. 1931); Clement v. Willett, 105 Minn. 267, 117 N.W. 491 (1908); G. Osborne, Mortgages 703 (1951).

\textsuperscript{143} Clement v. Willett, 105 Minn. 267, 270, 117 N.W. 491, 492 (1908).
and concerned and therefore ran with the land never came up. This was because of the English view that affirmative covenants could not run with the land between owners in fee for lack of the requisite tenurial privity. The English rule was softened by the doctrine that the grantee of mortgaged property had an obligation to indemnify his grantor against the latter's liability to the mortgagee for the amount of the mortgage even though there was no express assumption of liability to do so.\textsuperscript{144} In this country that approach has not been generally adopted. The rule in most states seems to combine the strictest of possible approaches. Thus, neither the burden of mortgagor's original promise to pay nor that of any subsequent purchaser's covenant of assumption runs with the land. And most courts do not imply an agreement of assumption when the grantee takes "subject to" the mortgage.\textsuperscript{145} Thus, the grantee is not liable to the mortgagee. Further, the courts generally refuse to imply, as the English do, an agreement of indemnity by the grantee to his grantor.\textsuperscript{146} The result in the majority of jurisdictions is that the nonassuming grantee is not personally liable at all. Of course, he is under the obvious compulsion that, unless he pays the mortgage as due, the land will be foreclosed out from under him, but still the mortgagor and not he will be liable for any deficiency. The rule seems unjust. The grantee has paid to the grantor the amount of the contract price less the amount of the unpaid mortgage. It would seem that there is an implicit understanding that he will pay the rest of the purchase price as requested by the mortgagee. If considered anew, the problem would probably be treated just like the burden to pay rent, which runs with the land. But the problem is not new. Perhaps now, community expectations are based upon the rule as it is, and a prospective change by statute is the appropriate way to handle the problem.

v. Grantees' Agreements to Pay for Future Maintenance of Common Areas

Covenants to pay for improvements or maintenance present some difficult and interesting problems. Often such covenants arise in connection with a subdivision development where the

\textsuperscript{144} J. Falconbridge, Mortgages § 134 (3d ed. 1942).

\textsuperscript{145} G. Osborne, Mortgages § 257 (1951). There are a minority of jurisdictions which imply a personal obligation to indemnify the original mortgagor or to pay the mortgagee where the amount of the mortgage has been deducted from the purchase price paid by the last purchaser. This of course occurs in the vast majority of cases.

\textsuperscript{146} Id.
developer or the property owners' association is given the responsibility of maintaining common walkways, parks, swimming pools and other recreational facilities. In the deed to the original homeowner, there is usually a covenant in which the grantee agrees for himself, his heirs and assigns to pay an annual assessment either to be fixed later or in a set amount to support the maintenance. There are also many cases involving a covenant by the grantee to pay a pro rata amount of the future construction costs of such improvements as streets, sewers and water lines. As a matter of policy it seems to be perfectly clear that in both types of situations the burden of the covenant ought to run to the subsequent grantees of the original covenantor. Such an expense would clearly relate to the individual as owner and any reasonable purchaser would realize that. The cases are generally in accord, 147 but there is at least limited authority that such a covenant will not run where it leaves to the original grantor discretion as to what maintenance services should be rendered and, within limits, what charge should be made. 148 Where it is clear that the developer has no responsibility to do anything and can still make an assessment, such a result would seem to accord with justice, but perhaps a sounder way to approach such a problem would be to imply an obligation to perform the maintenance on the common areas and allow the covenant to run, especially in the case where the services are in fact being rendered. In one case, 149 the services were actually being rendered and still the court said that since there was no express obligation to do so the burden to pay for them did not run. That case seems unfortunate.

Where, because of the strict rules of local law regarding privity, the court is impelled by precedent to hold that the burden of an affirmative covenant to pay for future maintenance does not run to a subsequent grantee, there is a line of cases implying a lien upon the burdened land in equity. 150 The result is

150. Fresno Canal & Irrigation Co. v. Rowell, 80 Cal. 114, 22 P. 53 (1889); Everett Factories & Terminal Corp. v. Oldetyme Distillers
ordinarily the same because if the new owner wants to sell the property, he will have to discharge the lien in order to convey a marketable title, and even if he does not want to sell, the lien may be foreclosed in equity. It would seem that the use of such a device is salutary in that it makes viable the very important and socially useful institution of group maintenance of common areas in those states where, because of local peculiarities of the law regarding privity of estate, this would otherwise not be so. In opposition it could be argued, however, that the imposition of a lien by a court clouds titles in an unforeseen and unforeseeable manner and is therefore a burden on the recording system. The best answer to this is that the promise to pay is itself discoverable from the record and the lien should cause no undue surprise to one having read the title.

vi. Grantees’ Agreements to Pay Grantor’s Obligations for Existing Improvements

A difficult problem is posed by the following set of facts: A, owner of Blackacre, contracts to have new roofing and siding put on the residence located thereon and agrees to pay for it in annual amounts of $500 for five years. Soon thereafter, A sells Blackacre to B for $20,000 plus B’s agreement to assume payment of the obligation to the roofer. In the deed to B, there is a covenant by B, his heirs and assigns to make such payment. Now B sells Blackacre to C and there is no agreement or mention of the duty to pay for the roofing and siding, but, of course, a search of the record discloses to C and his attorney the existence of the aforementioned covenant. Is C personally liable to pay for the improvement upon land that he now owns? There is surprisingly little authority upon the point. The American Law of Property takes the position that if the promise is for an existing improvement and not for future maintenance, the burden does not run with the land and is a personal debt of the covenantor. This result seems subject to doubt. One seeing a covenant to pay for such existing improvements on the back title probably ought reasonably to assume that the covenant bound the covenantor as owner of the land, and the burden probably


151. 2 A.L.R., supra note 130, § 9.13 n.50.
ought to run. Where it is clear that there has been a deduction from the amount of the purchase price in the transaction to the last grantee to cover the cost of this liability, such a result would, of course, be much easier to justify. But where there is ambiguity on this point the case is a more doubtful one. The one case I have found on the subject indicates that the covenant would not run.\textsuperscript{152} It would seem that in such a case the most appropriate solution would be a compromise. There is a logical middle ground between a holding that the covenant is personal and does not run and a holding that the burden runs with the land. In such a situation as this, where it appears that the purchaser, argued to be personally burdened, did not receive an adjustment in the purchase price to cover his personal liability and the covenant is such that reasonable men might differ on the question of whether it touches and concerns the land but it is held that it does so touch, the imposition of an equitable lien binding the land but not the purchaser personally might be an appropriate solution to the problem. There is, as noted above,\textsuperscript{153} some authority implying an equitable and foreclosable lien where the covenant touches and concerns the land, the purchaser has actual or constructive notice of that covenant and for some reason or other (usually lack of privity) the covenant will not run. The extension of the lien idea to situations where there has been no adjustment of the later purchase price would be an improvement over existing law.

c. Summary and Synthesis

The test of whether the burden of a covenant to pay money ought to run with the land should relate to the economic realities of the situation. Where, in a landlord-tenant situation, it is clear that the tenant's promise to pay is in essence a part of the rent, the burden ought to run to his assignee. In the analogous situation involving a conveyance in fee simple the problems are much more complicated for the reason that the grantee is not taking his grantor's identical interest in the same sense as does the assignee of a tenant. Thus, where it is clear that the original grantee-covenantor's promise to pay was a part of the consideration he agreed to pay to get the property he desired, that would not necessarily end the inquiry, for the next logical question would be whether the covenantor's successor also adjusted his purchase price to reflect the additional burden he was assuming.

\textsuperscript{152} Pelser v. Gingold, 214 Minn. 281, 8 N.W.2d 36 (1943).
\textsuperscript{153} See cases cited in note 150 supra.
If he did, then there is a good argument that he ought to be deemed in law to have assumed the burden to pay the obligation personally. If he did not, then there is a plausible argument that there ought to be no personal liability unless the covenant to pay so clearly relates to the land that a purchaser could have no reasonable doubt that he would have to pay it. In the case where the subsequent purchaser did not adjust his purchase price in the reasonable but mistaken belief that the obligation to pay was personal to his grantor, the imposition of a lien upon the land should be enough to protect the covenantee or his successor in the great bulk of the cases. In addition, if it can be shown that the covenantor's successor knew or should have known that the covenantor's agreement to pay was a part of the consideration for the original purchase of the land, the burden should run with the land to the successor.

3. Covenants Relating to the Duration of a Leasehold Interest

As a general proposition, covenants which in some way affect the duration of a leasehold interest should be deemed to run both as to benefit and burden. This would be the normal assumption of any person taking a reversion or a leasehold as successor in interest. Thus, it has been held that the benefit of a covenant allowing the landlord to terminate the lease under certain described conditions runs to the landlord's successor in interest.\(^{154}\) Likewise, the benefit of a covenant requiring the tenant to surrender a portion of the leased premises if he does not find any minerals upon it runs to the landlord's successor and the burden runs to the tenant's assignee.\(^{155}\) And the benefit as well as the burden of a covenant providing for acceleration of rental upon tenant's default runs.\(^{156}\)

The problem of the tenant's option to purchase the fee simple contained in a lease at first blush would seem to present the same issues but there has been more dispute about some aspects of the rule. First, there seems to be no question that the burden runs with the land into the hands of the new landlord.\(^{157}\) The split is on the question of whether the benefit of the option to

---

purchase is personal to the tenant or runs with the land to his assignee. The English cases take the position that the covenant is personal and does not run with the land in the absence of an express assignment. The American authorities, on the other hand, adhere to the view that the option passes automatically with the tenancy interest. This view seems preferable. Supporting the English approach is the argument that the right to buy the property is just as beneficial to a nontenant as to a tenant and therefore the right should be assumed to remain with its original owner. However, this seems incorrect. In the usual case where there is an option to purchase, a commercial tenant is reserving this right to be in a position to continue the advantages of his occupancy of that particular property indefinitely into the future. If he no longer occupies the premises anyway, this reason no longer applies.

Suppose the option to buy contains a commitment by the landlord to take back a purchase money mortgage from the tenant for most of the purchase price. Should the benefit of the option run into the hands of the assignee of the tenant for whose credit the landlord has not bargained? One can find language in the cases indicating that the benefit of such a covenant does not run at all. However, that is not strictly true, nor should it be. The benefit of the option should run, but only if the new optionee tenders cash in full instead of the mortgage.

V. CONCLUSION

The rules of law about covenants running with the land are so complex that only a very few specialists understand them. Sometimes complexity in the law is necessary. In this particular case, it is not. If the cases in this area were solved by reference to the underlying policies instead of by reference to outworn precedent, the rules would be reasonably simple to state and the results more consonant with a sound system of private land use control.

158. Woodall v. Clifton, 2 Ch. 257 (1905).