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NOTES

COVENANTS RUNNING WITH THE LAND: Viable Doctrine or Common-Law Relic?*

Prominent legal scholars have questioned their fascination with the common-law doctrine of “covenants running with the land.”¹ Oliver Wendell Holmes once remarked that recalling his former interest in the subject gave him “a spell of the dry grins.”² Judge Charles Clark doubted that this “narrow corner of the law” deserved to have any “more good white paper” devoted to it.³ Notwithstanding the ambivalence of Justice Holmes and Judge Clark, this complex doctrine persists. Confusion and uncertainty pervade reported decisions, as courts continue to apply this relic of the days of inflexible common-law rules.

Judge Clark made a comprehensive study of covenants running with the land, based on case law through the 1940’s.⁴ He clarified much of the confusion surrounding the doctrine, and made suggestions for its proper judicial use. Although he believed that it was then premature to discard the common-law theory, he intimated that much of the doctrine might be replaced by modern alternatives.⁵

This Note is a follow-up to Judge Clark’s work. It has three purposes: to further explain proper use of the theory of covenants running with the land, to consider the cases since Judge Clark’s

* I wish to thank Professor David K. Kadane of the Hofstra University School of Law for his inspiration, guidance, and endless patience.

1. Although modern terminology refers to covenants “running with the land,” it is more accurate to refer to them as running with the estate in land. An easement “runs with land,” and is enforceable by or against any possessor of the land, including disseisors and adverse possessors. A covenant, however, runs with the estate and people become parties to a covenant only by succeeding to that estate. This distinction is discussed more fully in connection with the requirement of privity of estate. See text accompanying note 52 infra. See generally C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH “RUN WITH LAND” 93-94 (2d ed. 1947); 2 AMERICAN LAW OF PROPERTY § 9.8 (A.J. Casner ed. 1952) [hereinafter cited as Casner]; O.W. HOLMES, THE COMMON LAW 314-15 (M. Howe ed. 1963).

2. 2 HOLMES-POLLOCK LETTERS 234 (M. Howe ed. 1941).
3. C. CLARK, supra note 1, at 208.
4. C. CLARK, supra note 1
5. Id. at 9-12, 179-81.
study, and, finally, to make suggestions for change in the law. The first section explains and analyzes the historical development and socioeconomic functions of the doctrine and each of its separate rules. The second section reviews the cases decided under this theory since Judge Clark's work, focusing on judicial misuse of the doctrine as a whole and of each of its rules. This survey demonstrates that confusion persists, despite Judge Clark's efforts to clarify the law. The third section suggests that understanding and reform are urgently needed, and argues that the purpose of the doctrine would be met more effectively by application of the doctrine of equitable servitudes and various statutes.

HISTORY AND FUNCTIONS OF THE DOCTRINE

The theory of covenants running with the land distinguishes between personal and real promises made by landholders to allow real promises to run with the land. Personal promises are incidental to any interest in land. Real promises are intimately associated with landholder status. Therefore, it may be economically or socially important for these promises to bind or benefit future holders of the land. If a covenant affecting land use cannot survive changes in ownership, it loses meaning when the covenanting parties no longer retain title to the land which the covenant affects.

Originally, real covenants were contracts, rather than property interests. Early common law did not allow assignment of contract rights or delegation of contract duties. A mechanism was therefore needed to enable rights and duties of the original covenanting parties to pass to their successors in title.

Over the centuries, common-law rules developed to distin-

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6. Only those cases involving covenants between owners in fee are considered because covenants between landlords and tenants raise different issues. See id. at 94. See also notes 12, 23 & 24 infra; text accompanying notes 43-47 infra. The cases reviewed here were decided from 1938 to the present. The year 1938 is appropriate because that starting point assures covering the cases since Judge Clark's work, and 1938 is the year the highly influential Neponsit Property Owners' Ass'n, Inc. v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938), was decided. A survey of the cases following that decision enables assessment of Neponsit's effect on them. See text accompanying notes 72-83, 140 & 141 infra.

7. The terms "promise" and "covenant" will be used interchangeably in this Note. Abolition of the sealed instrument has eliminated the importance of the technical term "covenant." See note 12 infra; note 106 infra and accompanying text. A real promise, as distinguished from a personal promise, is so named because of its close association with real property.


9. Id.
guish covenants that ran with the land from those that were extin-
guished with changes in ownership.\textsuperscript{10} To run with the land, a cov-
enant must meet the following requirements: (1) \textit{Form}—the proper
form must be followed in making the covenant; (2) \textit{intention}—the
parties making the covenant must intend that it run with the land,
and not be personal to them; (3) \textit{touching}—the promise must con-
cern the land; and (4) \textit{privity}—there must be privity of estate be-
tween the various parties.\textsuperscript{11}

The following discussion focuses on the historical functions and
authoritative construction of these rules. The form and intention
rules are relatively simple, while the touching and privity rules are
complex and have been subject to much interpretation.

\textbf{The Form Rule}

Formerly, it was required that the covenant be written, signed
and sealed by the covenantor.\textsuperscript{12} This rule was probably designed to
ensure deliberation by the parties to the covenant\textsuperscript{13} and to provide
evidence of the agreement.\textsuperscript{14} Such a rule was necessary before re-
cording acts were enacted;\textsuperscript{15} today, however, such laws are uni-
versally established in this country\textsuperscript{16} and provide a sensible alternative
to the form rule.

\textbf{The Intention Rule}

The second requirement for a covenant to run with the land is
that, at the time the covenant was made, the parties intended to

\begin{itemize}
  \item \textsuperscript{10} Probably the earliest reported case involving a real covenant is Pakenham's
          Case, Y.B. 42 Edw. 3, f. 3, pl. 14 (1368). Casner, supra note 1, § 9.1. The case, involv-
          ing a promise by a prior to hold services in a particular chapel, is translated from the
  \item \textsuperscript{11} C. CLARK, supra note 1, at 94.
  \item \textsuperscript{12} Casner, supra note 1, § 9.9; C. CLARK, supra note 1, at 94. The seal, which
          distinguished covenants from other written contracts, substituted for a signature or
          mark in days when few could write. It was difficult to forge and was possessed by
          important men only. O.W. HOLMES, supra note 1, at 213-14. For covenants in leases,
          proper form required that when the object of the covenant did not exist, for exam-
          ple when the promise was to build a wall, the document had to specify that assigns
          of the covenantor were to be bound. When, however, the covenant concerned some-
          thing \textit{in esse}, no such words were necessary. Spencer's Case, 77 Eng. Rep. 72, 74
          (K.B. 1583). This requirement was not consistently applied to covenants with fees,
          Casner, supra note 1, § 9.10, and today is rarely imposed. Rather, explicit reference
          to assignees of the covenantor is considered merely one indication of the parties'
          intention that the covenant run. \textit{Id.} See C. CLARK, supra note 1, at 94-95.
  \item \textsuperscript{13} See Casner, supra note 1, § 9.9.
  \item \textsuperscript{14} See O.W. HOLMES, supra note 1, at 214.
  \item \textsuperscript{15} See 4 AMERICAN LAW OF PROPERTY § 17.5 (A.J. Casner ed. 1952).
  \item \textsuperscript{16} See \textit{id.} § 17.5 n.63.
\end{itemize}
bind and benefit their successors, rather than merely themselves.\(^{17}\)

Thus, the intention rule has a subjective focus: the standpoint of its original makers.\(^{18}\)

**The Touch and Concern Rule**

The rule that a promise must "touch and concern" the land to run is the only rule that requires analysis of the covenant itself, rather than the actions of and relationships between the people involved. This rule limits covenants that may run to those affecting real property.\(^{19}\) Thus, in contrast to the intention rule, the touching rule has an objective focus.\(^{20}\)

The touching requirement has become more than a device to discriminate between real and personal promises. It has developed into a conduit for reaching judicially desired results and effecting policies not envisioned when the four rules were developed.

To explore how policies are furthered, two parts of a covenant, the burden and the benefit, must be distinguished. The burden of an affirmative covenant\(^{21}\) is the promise to perform an act by the covenantor; the benefit is the result of that act as it affects the covenantee. For example, a promise to supply heat to a neighbor's building is a burden; the right to receive the heat is a benefit.\(^{22}\)

Important consequences flow from this distinction. If the burden runs with the land, the obligation may make the land less attractive to potential buyers. Such burdens encumber title, thereby reducing marketability. If it is the benefit which runs, marketability is relatively unaffected, perhaps enhanced: Few object to buying land entitled to the benefit of a promise.\(^{23}\)

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17. C. CLARK, supra note 1, at 96.
19. See C. CLARK, supra note 1, at 96-100.
21. Most cases decided using this doctrine concern affirmative covenants, promises by the covenantor to perform an act. In contrast, restrictive covenants, or promises by the covenantor to refrain from an act, are generally decided under the doctrine of equitable servitudes. For a discussion of the doctrine of equitable servitudes, see C. CLARK, supra note 1, at 179; text accompanying notes 213-224 infra.
23. See generally Casner, supra note 1, § 9.14. Which parcel of land the covenant must touch was not at issue when the court in Spencer's Case, 77 Eng. Rep. 72 (K.B. 1583), established the touching requirement, for that case involved a lease, and therefore only one piece of land. See id. The need to distinguish between touching of the burden and touching of the benefit is only one example of the problems in-
Any avoidance of encumbrances on title to ensure the marketability of land conflicts with the ability of landowners to make lasting arrangements regarding their property. Three major views have developed to reconcile this conflict. All three agree that, if the other rules are satisfied, a covenant may run with land touched by its benefit, since this does not encumber title and, therefore, creates no conflict of policies. However, there is disagreement whether, and under what conditions, a burden may run.

The English rule favors the policy of avoiding encumbrances on title. Thus, English courts have decided that the burden of an affirmative promise may never run with land.24

A middle view, adopted by the American Law Institute in the Restatement of Property,25 is that the burden of a covenant will run with land only if there is also some land benefited; the benefit may not be held in gross. Benefits may touch either the burdened land or a different parcel of land.26 For example, a promise by a property owner to pay for street paving near his or her property benefits that property;27 one piece of land is both burdened and benefited by the covenant. A promise to furnish heat to a neighbor's property benefits only that property, not the property of the one who must supply the heat.28 The Restatement view permits both of these covenants to run, for both benefit some land, balancing the encumbrance on title created by the burden.

The third view, which allows the greatest number of covenants to run, was adopted by Judge Clark.29 He rejected the position of the Restatement, finding no justification for a policy opposing benefits herent in transferring this doctrine from cases involving leases to those involving fees. See also text accompanying notes 43-47 infra. 24. Keppell v. Bailey, 39 Eng. Rep. 1042, 1049-50 (K.B. 1834). This rule applies only to covenants between owners in fee. Id.
26. Id. § 537. The Restatement does allow, however, the benefit to run when the burden is in gross. Id. § 543, comment c at 3256. In addition, the Restatement adopted other rules to avoid encumbrances on title. The requirements for privity of estate differ depending on whether it is the burden or the benefit which is to run. Compare id. § 534 with id. § 548. See id. § 548, comment a at 3271-72. When the burden is to run, there must be physical benefit to land; economic benefits to the covenantee are insufficient. However certain commercial benefits may be sufficient when the benefit is to run. Compare id. § 537, comment f at 3220 with id. § 543(2). Burden must be balanced against benefit to determine whether the covenant will run with the land. Id. § 537, comment h at 3222-23.
29. C. CLARK, supra note 1, at 101-11, 139-43.
in gross. He maintained that a covenant should run with burdened land both when the benefit touches land and when it is in gross.\textsuperscript{30}

The "in gross exclusion" is an illogical and arbitrary limitation on the running of covenants, rather than a sensible method for limiting burdens to encourage marketability of land. Land burdened by a covenant is no less burdened because neighboring land is benefited. The marketability of burdened property is unaffected by landholding status of the beneficiary of the covenant. Moreover, this rule fails to account for the nature of the covenant, striking it down even when the burden is slight.

If the market price of both parcels of land were adjusted to reflect the existence of the covenant, the marketability of burdened land would not be impaired. A successor to the covenantor might pay less for his or her land than if there were no covenant; a successor to the covenantee might pay more. This is preferable to arbitrarily limiting the running of covenants to ensure marketability.

\textit{The Privity of Estate Rule}

\textit{Definition of the Rule.}—"Privity" describes a relationship between people: privity of contract, a contractual relationship;\textsuperscript{31} privity of estate, a shared interest in land.\textsuperscript{32} The requirement of privity of estate is the most complex of the four rules because three types of privity of estate—horizontal, mutual, and vertical—may be required for covenants to run with fees.\textsuperscript{33}

Horizontal privity exists whenever two parties participate in a real estate transaction. Suppose that A owns two buildings, and one depends upon the other for its heat. A may sell the building providing the heat to B on the condition that B promise to continue supplying heat to A's retained building.\textsuperscript{34} The sale of the building establishes horizontal privity of estate between A and B.\textsuperscript{35}

\textsuperscript{30.} Id. For another criticism of the Restatement position, see Sims, \textit{The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute}, 30 \textit{Cornell L.Q.} 1, 27-37 (1944).

\textsuperscript{31.} The people making the covenant are in privity of contract with one another, since a covenant is a contractual obligation, not a property interest. Casner, supra note 1, § 9.8.

\textsuperscript{32.} C. CLARK, supra note 1, at 112-13.

\textsuperscript{33.} E.g., Berger, supra note 18, at 180-82; C. CLARK, supra note 1, at 111.


\textsuperscript{35.} One difficulty with the privity rule is that different authorities have differ-
Mutual privity can coexist with horizontal privity. There is mutual privity if the parties have common rights in property. Assume that W owns a farm and conveys an easement to X, a railroad company, so that X's track may cross W's farm. X covenants to build passageways for W's cattle to cross the track. \( W \) and \( X \) are in horizontal privity because at the time of the covenant \( W \) conveyed the easement, a real estate interest, to \( X \). In addition, this easement gives \( W \) and \( X \) a common interest in property, and thereby establishes mutual privity. Thus, while all real estate transactions give rise to horizontal privity, only those that result in a common interest in property also give rise to mutual privity.

Vertical privity arises only after the original covenanting parties make their agreement. It exists between the grantor and grantee of an estate burdened or benefited by a covenant. Suppose that in the building case, \( A \) sells his or her retained building to \( C \), or \( B \) sells his or her building to \( D \). \( A \) and \( C \), or \( B \) and \( D \), are in vertical privity. Similarly, in the farmland case, if \( Y \) purchases the farm, or \( Z \) purchases the railroad, \( W \) and \( Y \), or \( X \) and \( Z \), would have vertical privity.

The mutual privity shared by \( W \) and \( X \) would exist for \( Y \) and \( Z \), for the easement passes with the land. However, when \( A \) conveys his building to \( C \), or \( B \) to \( D \), there is no longer horizontal privity between the owners of the buildings; thus, since there was no mutual privity between \( A \) and \( B \), \( C \) and \( D \) have no privity of estate.

ent designations for the various types of privity. Some of these designations are ambiguous in that they can apply to more than one kind of privity. For example, Professor Casner refers to both horizontal and vertical privity as the "successive or instantaneous type." Casner, supra note 1, § 9.11. This is accurate, because both types of privity are based on a conveyance, so that one person succeeds to the estate of the other. Further, their realty relationship does exist for an instant in time. However, the use of the same term for different kinds of privity is confusing. See text accompanying notes 176-181 infra. The terms "vertical" and "horizontal" refer to dimensions in time. See Figure 1, p. 146 infra.

36. Mutual privity is also known as "simultaneous" privity, C. CLARK, supra note 1, at 111; "privity by way of tenure," id. at 128; "substituted privity," id.; and "continuing privity," Casner, supra note 1, § 9.11.


38. Mutual privity may exist without horizontal privity. See text accompanying notes 41 & 42 infra.

39. See Berger, supra note 18, at 181-82. Vertical privity is also designated as "successive or instantaneous" privity. Casner, supra note 1, § 9.11. See note 35 supra.

40. An easement passes with the land because, once established, it is an intrinsic part of the property. C. CLARK, supra note 1, at 93-94. See note 1 supra.
The previous situations are diagramed in Figure 1.

Figure 1:

In a rare case, there may be mutual privity in the absence of horizontal privity.\textsuperscript{41} Suppose that in the farmland case, \(W\) grants \(X\) the easement, and then \(W\) and \(X\) convey to \(Y\) and \(Z\), respectively, and \(Y\) and \(Z\) make the covenant regarding the passageways. The covenanting parties, \(Y\) and \(Z\), have no horizontal privity; they did not participate in a real estate transaction.\textsuperscript{42} They are, however, in mutual privity because they share a common interest in the easement. In this case, vertical privity, which arises only after the covenant is made, will exist when \(Y\) and \(Z\) convey their estates to others.

It is also possible for covenanting parties to have no privity of estate. For example, in the building case, if \(A\) and \(B\) had originally each owned one of the buildings and had covenanted that \(B\) would supply heat to \(A\)'s building from \(B\)'s, then there would be neither horizontal nor mutual privity between \(A\) and \(B\). There may later be vertical privity, when \(A\) and \(B\) convey to \(C\) and \(D\), but this is independent of the privity between \(A\) and \(B\).

Historical Development of Privity of Estate.—The three types of privity of estate have evolved from centuries of case law. Much of the confusion and ambiguity surrounding the privity rule may be attributed to grafting this concept onto a situation unlike the ones in which it was developed. Privity regarding real covenants between owners in fee has two historical roots: landlord-tenant law and covenants for title. Each of these contain similarities to real covenants between fee owners, but they also have important differ-


\textsuperscript{42} The covenant is a contract and does not qualify as a realty transaction. See text accompanying note 9 supra.
ences which were overlooked when the privity rule was applied to owners in fee.

The rule that privity of estate is required for a covenant to run with land was first established in a case involving a lease,\textsuperscript{43} and was later applied to owners in fee.\textsuperscript{44} The requirement of privity of estate presupposes the importance of identifying the estates in land held by possessors of land. In leases, this distinction is understandable. A landlord’s and tenant’s interests in the same land are differentiated only by their estates: the landlord has a reversion, the tenant a leasehold. However, holders of fees almost always have an estate in the same land that they possess. Only an adverse possessor or a disseisor occupies land without holding the estate.\textsuperscript{45}

In addition, landlords and tenants are always in mutual and horizontal privity: mutual privity because they share an interest in the leased estate; horizontal privity because the lease is the result of a real estate transaction.\textsuperscript{46} However, a covenant between holders of fees can be made in the absence of either type of privity.\textsuperscript{47} Thus, mutual and horizontal privity should not be required in fee cases merely because they are present in lease cases. Rather, such a requirement in fee cases should have an independent policy basis.

Real covenants also have been historically associated with covenants of title.\textsuperscript{48} By definition a covenant of title is part of the conveyance, so horizontal privity always links the grantor-covenantor and grantee-covenantee.\textsuperscript{49} Moreover, if an easement is retained by the grantor or given to the grantee in the retained estate, there is mutual privity. The requirement that there be privity between the covenancing parties for a real covenant to run has been influenced

\textsuperscript{43} Spencer’s Case, 77 Eng. Rep. 72 (K.B. 1583).
\textsuperscript{44} Casner, supra note 1, § 9.11.
\textsuperscript{45} See C. CLARK, supra note 1, at 136.
\textsuperscript{46} In Spencer’s Case, 77 Eng. Rep. 72 (K.B. 1583), there were all three types of privity. Plaintiff was lessor and covenantee; defendant was assignee of the lessee-covenantor. Mutual and horizontal privity necessarily existed in the lessor-lessee relationship, and vertical privity existed for defendant. Vertical privity was not relevant for plaintiff because he was a party to the covenant.
\textsuperscript{47} See C. CLARK, supra note 1, at 94; Casner, supra note 1, § 9.11; 3 H. TIFFANY, THE LAW OF REAL PROPERTY § 851 (3d ed. 1939).
\textsuperscript{48} For discussions of whether the law of covenants originated in the law of warranties of title, compare C. CLARK, supra note 1, at 124-27, with Sims, supra note 30, at 2-5. See generally O.W. HOLMES, supra note 1, at 306-17. The nexus between covenants for title and other real covenants still exists. See text accompanying notes 99-103 infra.
by the presence of such privity in covenants for title. However, covenants for title and real covenants are quite different; a characteristic of the former should not be mechanically transposed to the latter.

**Policies Justifying Privity of Estate.**—Once the requirement of privity of estate was established, policy justifications for each type of privity were developed. These rationales no longer support retention of the privity rule.

Vertical privity was the only type that Judge Clark believed to have a sound policy basis. If the mere presence of vertical privity permits a covenant to run, a mechanism for the devolution of rights and obligations created by predecessors in title is provided. Successors to the estates of the covenantee parties become involved in the covenant only because they hold the estates of the original covenantee parties. Because these covenants are contractual obligations rather than property interests, vertical privity is needed to permit devolution of rights and duties from the covenantee parties to their successors.

Vertical privity also limits those to whom covenants may run. It prevents persons who obtain no land from covenantee parties and those who obtain land, but not estates, from succeeding to covenants. This bars adverse possessors and disseissors from becoming parties to a covenant. However, there is no longer a valid reason for prohibiting covenants from passing to successors in the same manner as easements: as property interests attached to the land.

Cases involving adverse possessors and disseissors of land burdened or benefited by a covenant rarely arise. Even a few cases would not justify the difficulties caused by the privity rule. Furthermore, it is questionable whether adverse possessors and disseissors should be treated differently from holders of an estate. On the contrary, it is logical for an adverse possessor to bear the burden of a covenant. Certainly one should not be deprived of the benefit of a

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50. C. Clark, supra note 1, at 119-21; Sims, supra note 30, at 30-31.
51. C. Clark, supra note 1, at 111-15.
52. Id. at 113-14. Accord, O.W. Holmes, supra note 1, at 313-14.
53. See text accompanying note 45 supra.
54. See note 40 supra. This proposal has been made before. E.g., Berger, supra note 18, at 190-93; C. Clark, supra note 1, at 136; O.W. Holmes, supra note 1, at 313.
55. There was no case found in the past forty years in which a successor had taken the land, but not the estate, of a covenantee party.
COVENANTS RUNNING WITH THE LAND

The requirement of mutual privity has been justified by the nature of the limitations it places on the running of covenants. Such limitations are supported by those believing covenants to be socially undesirable impediments to the free marketability of land.\(^5\) The requirement of mutual privity ensures that only land already encumbered by an easement or other interest giving rise to mutual privity is burdened by a covenant. Judge Clark argued that this burden does not contribute to the already impaired marketability of the land.\(^7\)

There are several flaws in this argument. No reason exists to require mutual privity for the running of benefits, since the benefit of a covenant makes land more, rather than less, marketable.\(^5\) Furthermore, it is not always true that the same land is encumbered by both the easement and the covenant. Very often the holder of the dominant tenement of the easement has the burden of the covenant, while the benefit of the covenant is with the servient landowner. For example, the grantee of an easement may promise to build fences on the granted easement.\(^9\) Instead of one estate being burdened by both the easement and the covenant, both estates are burdened and benefited by the combined easement and covenant. Moreover, even were the same estate burdened by the covenant and the easement, the addition of the burden of the covenant to the burden of the easement is not inconsequential. Burdens differ in oppressiveness, and land encumbered by two burdens may well be less marketable than land burdened by one.

The other explanation for requiring mutual privity is that it prevents the benefit from being held in gross. This is purportedly because mutual privity can exist only when there is both a dominant and servient tenement.\(^6\) However it is possible for mutual

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56. See C. CLARK, supra note 1, at 128-30.
57. Id. at 128.
58. See id. at 131-32. Judge Clark found mutual privity unjustified even for the running of burdens. Id. at 215-16.
60. Id. at 128.
privity to exist even when a benefit is held in gross. For example, if a utility company holding an easement to lay lines into a development had been promised the right to furnish services to the development, the company would hold both the easement and the benefit of the covenant in gross and would, nevertheless, be in mutual privity with the developer.

The policies allegedly served by the mutual privity rule would be better and less arbitrarily promoted by permitting property values to vary in accordance with the nature and extent of encumbrances. Thus, adjusting the market price to reflect the existence of covenants can replace the mutual privity requirement as well as the in gross exclusion.

Horizontal privity of estate has been justified both as ensuring a connection between the parties to the covenant and as discouraging all but cautiously considered promises. Judge Clark properly criticized both rationales. The former he found unnecessary, since the covenant itself created a link. Further, he believed it to be a "barren formality," easily satisfied by a sham conveyance between the convenanting parties. As for the cautionary rationale, he found no reason to assume that a conveyance would evoke greater deliberation than a covenant.

Modern Influences on the Privity Rule.—Two modern authorities differ with Judge Clark's conclusion that only vertical privity is justified by history and policy. The Restatement of Property requires either horizontal or mutual privity, in addition to vertical privity, for the burden of a covenant to run. Although this position has been widely criticized, it has undoubtedly encouraged

62. See text following note 30 supra.
63. C. CLARK, supra note 1, at 117; RESTATEMENT OF PROPERTY § 534, comment n at 3206-07 (1944). According to the Restatement, this connection might also be provided by a preexisting easement, so that there would be only mutual privity between the convenanting parties. Id. § 534(b).
64. C. CLARK, supra note 1, at 216-17; Sims, supra note 30, at 33.
65. C. CLARK, supra note 1, at 117.
66. Id. For a case where this appears to have been done, see Sanitary Facilities II, Inc. v. Blum, 22 Md. App. 90, 322 A.2d 228 (1974).
67. C. CLARK, supra note 1, at 217.
68. Id. at 131.
69. RESTATEMENT OF PROPERTY §§ 534-35 (1944).
70. E.g., C. CLARK, supra note 1, at 137-43, 206-49; Casner, supra note 1, § 9.11; POWELL ON REAL PROPERTY § 674 (abr. ed. R. Powell & P. Rohan 1968); Sims,
The second major modern influence on the privity rule is *Neponsit Property Owners' Association, Inc. v. Emigrant Industrial Savings Bank.* The New York Court of Appeals' handling of the privity rule in *Neponsit* is a good example of a practical approach to the privity problem; yet this approach has led to considerable additional confusion.

The covenant in *Neponsit* was made by the original buyer of a development lot to the developer or his assigns. The covenantor promised to pay assessments to maintain common grounds in the development. The developer assigned the benefit of this covenant to plaintiff property owners' association, which owned no land in the development. Defendant, a remote purchaser from the first owner of the lot, took subject to deed restrictions, including the covenant to pay assessments to the developer or his assigns. Because the covenant had been made by defendant's predecessor in title to plaintiff's assignor at the time of sale, there was horizontal privity between the original parties. However, since the association owned no land, there was neither vertical privity for the benefit of the covenant nor mutual privity.

The court found the privity requirement satisfied, although it is unclear which type of privity was required. The court recognized the presence of horizontal privity when it asserted that there was privity "between the grantor and the grantee." This was insufficient, however, because the court also required some relationship between "the plaintiff and the defendant in this case." Such a statement describes mutual privity, but the court seemed to

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**Notes:**


72. 278 N.Y. 248, 15 N.E.2d 793 (1938).

73. Id. at 253-54, 15 N.E.2d at 794-95.

74. Id. at 252-53, 15 N.E.2d at 793-94.

75. Id. at 260, 15 N.E.2d at 797.

76. Id.

77. Id.

78. The existence of mutual privity can be inferred from another part of the opinion. In discussing the touching rule, the court implied that defendant held an easement in the common grounds. *Id.* at 259-60, 15 N.E.2d at 797. Such an easement might have provided mutual privity had the association held title to the common grounds.
mean vertical privity between plaintiff and the developer.\textsuperscript{79} This could not exist since plaintiff owned no land; however the court elided this problem by looking through the corporate form of the plaintiff as representative of the property owners, and stating that "[o]nly blind adherence to an ancient formula devised to meet entirely different conditions" would prevent this covenant from running simply because the plaintiff owned no property.\textsuperscript{80} "[I]n substance, if not in form," declared the court, "there is privity of estate between the plaintiff and the defendant."\textsuperscript{81}

Thus, the court in \textit{Neponsit} reached its result by retaining the form of the privity rule, but confusing its substance. It declined the opportunity to modernize the law by eliminating the privity requirement;\textsuperscript{82} instead it retained the rule and left a legacy of confusion and uncertainty about the various types of privity.\textsuperscript{83}

**RECENT CASES DECIDED UNDER THE DOCTRINE:**

**CONFUSION IN THE COURTS**

Decisions over the past forty years using the theory of covenants running with the land give an impression of superficiality and confusion. Few courts appear to understand the rules underlying the doctrine and the reasons for their existence.\textsuperscript{84} The following survey of cases illustrates the difficulties presented by the doctrine and each of its rules.

**The Rules as One Doctrine**

The failure of some courts to understand the doctrine of covenants running with the land has occasionally led to its use where other theories would be more appropriate. For example, in \textit{Berardi}

\begin{footnotes}
\item[79] \textit{Id.} at 260, 15 N.E.2d at 797.
\item[80] \textit{Id.} at 262, 15 N.E.2d at 798.
\item[81] \textit{Id.}
\item[82] \textit{Id.} at 261, 15 N.E.2d at 798.
\item[83] See, e.g., \textit{Nassau County v. Kensington Ass'n}, 21 N.Y.S.2d 208, 212 (Sup. Ct. 1940). The court in \textit{Kensington} required privity between the person claiming the benefit and the one liable for the burden (horizontal or mutual privity). \textit{Id.} at 213. Relying on \textit{Neponsit}, the court declared that this requirement was met because plaintiff had the representative capacity necessary to enforce the covenant (vertical privity). \textit{Id.} The cases cited in notes 183-185 \textit{infra} contain varying definitions of privity, and all rely on \textit{Neponsit} to some extent.
\item[84] A notable exception to this statement is an opinion, written by Judge Clark, which both uses the rules correctly and discusses some of the reasons behind them. \textit{See} 165 \textit{Broadway Bldg., Inc. v. City Investing Co.}, 120 F.2d 813 (2d Cir.), \textit{cert. denied}, 314 U.S. 682 (1941).
\end{footnotes}
v. Ohio Turnpike Commission, the doctrine was applied when it was simply irrelevant. Plaintiff's predecessor in title sold part of his land to defendant to build a turnpike. The parties neglected to include in the deed a prior agreement that seller have access to his retained land through the deeded property. The court permitted plaintiff to reform the deed to include this provision, in part because the covenant was held to run with plaintiff's land. Berardi is a good example of a court using strained reasoning to reach a desired result. The outcome may have been correct, since it would have been absurd to deny plaintiff access to his own land. Nevertheless, whether the omitted covenant ran with the land was irrelevant to the right to reform the deed.

The doctrine also has been misapplied to cases involving easements, which are more appropriately decided under a less complex theory. In addition, the doctrine of covenants running with the land has occasionally been confused with other property theories, such as conditions subsequent and warranties for title. The law has become so confused that one court applied the law of real covenants when there was no land with which the covenant might run.

85. 1 Ohio App. 2d 365, 205 N.E.2d 23 (1965).
86. The missing covenant might have been construed as an easement. This is an additional reason why use of the doctrine of real covenants is inappropriate. See text accompanying note 87 infra. See also Rawson v. Brosnan, 187 Ga. 624, 626-27, 1 S.E.2d 423, 424-25 (1939) (dictum) (one in privity of estate with maker of deed may reform it). But see Halbert v. Green, 156 Tex. 223, 228, 293 S.W.2d 848, 851 (1956) (right to reform deed is personal and does not run with land); Barker v. Levy, 507 S.W.2d 613, 620 (Tex. Civ. App. 1974) (right to reform deed is personal and does not run with land).
88. Easements are property rights, not contracts; their running invokes a different theory. See note 1 supra. See generally C. CLARK, supra note 1, at 65-91. For discussion concerning use of the legal rules for real covenants when the doctrine of equitable servitudes would better serve, see text accompanying note 229 infra.
91. See Wood Fabricators, Inc. v. Hayes, 250 Ala. 475, 35 So. 2d 106 (1948). Not surprisingly, the court held that the covenant did not run with the land because there was no privity of estate. See also Mathis v. Mathis, 402 Ill. 60, 83 N.E.2d 270 (1948), in which plaintiff's father had conveyed him land with the provision that plaintiff pay a set amount of money to his brother each year. The court held plaintiff
When the doctrine has been properly invoked, it often has been improperly applied. Some courts have incorrectly stated the legal requirements. Others have determined whether a covenant runs without discussing any of the four rules, in a manner so superficial that it is impossible to determine the basis for the decision. In still other cases, courts have declared that a covenant may run upon finding that only one or two of the four requirements was obligated to pay this money to his brother's heirs because the covenant ran with plaintiff's land. This conclusion does not follow. Plaintiff had not conveyed his land. Unless the covenant was running in place, it was not doing any running: Certainly it was not running with the land, because the land, to continue the analogy, had not moved. Moreover, the brother had never owned any land related to the covenant, so the benefit was in gross. See generally Comment, A Promise to Pay Money as a Covenant Running with Land, 1949 U. ILL. L.F. 528.

92. See CBN Corp. v. United States, 328 F.2d 316, 321 n.4 (Ct. Cl. 1964) ("Any contract runs with the land if it affects the land, is in writing duly acknowledged and filed with the deed records.") (dictum); Kirkley v. Seipelt, 212 Md. 127, 131, 128 A.2d 430, 432-33 (1957) (citing Glenn v. Canby, 24 Md. 127 (1866)) (covenant must affect estate conveyed, there must be privity of estate, covenant must be consistent with estate to which it adheres, and estate must be undefeated and unchanged by performance of covenant); Moravecz v. Hillman Coal & Coke Co., 18 Somerset Legal J. 46, 50 (Pa. C.P. 1956) (covenant must touch land, be certain and definite, benefit dominant estate, have been intended to run with land, and there must be privity of estate). See also cases cited note 100 infra, in which courts confuse the touching and privity requirements by demanding that the covenant be part of a grant.


94. For cases requiring only that the intention rule be met, see Water Works & Sanitary Sewer Bd. v. Campbell, 267 Ala. 561, 103 So. 2d 165 (1958); Lincoln Land Co. v. Palfery, 130 Ga. App. 407, 203 S.E.2d 597 (1973); Mayor v. Ratliff, 297 Ky. 127, 179 S.W.2d 200 (1944); Folger v. Commonwealth, 330 S.W.2d 106 (1959), overruled on other grounds, 350 S.W.2d 703 (Ky. 1961); Hughes v. City of Cincinnati, 175 Ohio St. 381, 195 N.E.2d 552 (1964). For cases requiring only that the touching rule be met, see Kell v. Bella Vista Village Property Owners Ass'n, 258 Ark. 757, 528 S.W.2d 651 (1975); Pizzolato v. Cataldo, 202 La. 675, 13 So. 2d 677 (1943); Town of Skiatook v. Brummett, 387 P.2d 115 (Okla. 1963); Rodruck v. Sand Point Maintenance Comm'n, 45 Wash. 2d 595, 295 P.2d 714 (1956). For a case requiring compliance only with the privity rule, see Morava v. Lattingtown Harbor Dev. Co., 20 Misc. 2d 338, 187 N.Y.S.2d 348 (Sup. Ct. 1959).

95. For cases requiring only that the intention and touching rules be met, see
have been met.

Other courts have misused the four rules by combining two rules into one requirement. This has most often occurred with the touching rule and either the intention rule or the privity of estate rule.

As discussed earlier, both the intention and touching rules are different ways of viewing the covenant: the former has a subjective focus;96 the latter an objective one.97 Yet, courts have combined these two distinct requirements, usually when they have had difficulty ascertaining the intention of the parties. They determine intention by use of the touching rule: It has been held that because a covenant concerned the land, its makers must have intended it to run to their successors.98

The touching requirement has also been confounded with privity of estate.99 A number of decisions have held that, for a cove-


96. See text accompanying note 18 supra.

97. See text accompanying note 20 supra.


99. See C. CLARK, supra note 1, at 96.
nant to run with the land, it must concern the estate or interest granted.\textsuperscript{100} Again, the courts combined two rules into one: The touching rule was explicitly applied, while horizontal privity was implied by an assumed grant between the covenanting parties.\textsuperscript{101} It is possible that the tendency to combine the touching and privity rules stems from a failure to distinguish the law of real covenants from that of express covenants for title, where the covenant is always contained in a grant of realty.\textsuperscript{102} The historical association of these two areas of law is discussed earlier;\textsuperscript{103} the cases indicate a nexus has survived, producing complication in the doctrine of covenants running with the land.

The Form Rule

The cases rarely discuss the requirement of form.\textsuperscript{104} Issues evoking this rule infrequently arise. The rule originally required the covenantor’s seal, signature, and writing.\textsuperscript{105} The seal is no


\textsuperscript{101} See text accompanying notes 34 & 35 supra.

\textsuperscript{102} 3 AMERICAN LAW OF PROPERTY § 12.124 (A.J. Casner ed. 1952).

\textsuperscript{103} See text accompanying notes 48-50 supra.

\textsuperscript{104} Except for some older decisions, which mention it only in passing, e.g., Neponsit Property Owners’ Ass’n, Inc. v. Emarit-Indus. Sav. Bank, 278 N.Y. 248, 254-55, 15 N.E.2d 793, 798 (1938), few decisions acknowledge this requirement.

\textsuperscript{105} See note 12 supra and accompanying text. In addition, for covenants running with fees, the rule was occasionally construed to require that assigns of the covenantor be expressly bound by the covenant if it concerned an object not in esse. See note 12 supra. There are five decisions in two common-law states where this principle is accepted. See City of Douglas v. Cartrett, 109 Ga. App. 683, 686, 137 S.E.2d 358, 361 (1964); Paul v. Bailey, 109 Ga. App. 712, 716, 137 S.E.2d 337, 341 (1964); Atlantic Coast Line R.R. v. Georgia, A., S. & C. Ry., 91 Ga. App. 698, 704-05, 87 S.E.2d 92, 97, cert. denied, 350 U.S. 887 (1955) (object in esse found so that covenant might run); Billington v. Rife, 492 S.W.2d 343, 346 (Tex. Civ. App. 1973) (omission of “assigns” from covenant showed lack of intent that it run); Panhandle & S. Fe Ry. v. Wiggins, 161 S.W.2d 501, 505 (Tex. Civ. App. 1942). The four states adopting the common-law doctrine by statute require that the assigns be named. CAL. CIV. CODE § 1464 (West 1954); MONT. REV. CODES ANN. § 58-308 (1970); N.D. CENT. CODE § 47-04-27 (1978); S.D. COMP. LAWS ANN. § 43-12-4 (1969).
longer necessary. Most modern covenants are contained in deeds poll or recorded subdivision plans, which are enforceable without the covenantor's signature. The only two cases involving an oral promise reach opposite results on the necessity of a writing.

The Intention Rule

The intention rule provides an opportunity for courts to tailor their findings to justify the results they desire. The courts have great flexibility because they must endeavor to determine that which cannot be known with certainty: the subjective state of mind of the makers of the covenant. Real covenant cases often contain the difficulties of both contract and property cases. In some contract cases, there is an issue of mutual consent; the intention to be ascertained is that of two people, rather than one. This is also true in real covenants cases; the mutual intention of the makers must be ascertained. It may be more difficult to assess a joint, rather than a


109. The law of real covenants is a mixture of contract and property law; it is contract theory applied to real property. See text accompanying note 9 supra.

110. See 1 WILLISTON ON CONTRACTS § 22 (3d ed. 1957).
single, intention. Real covenant cases are also similar to cases in other areas of property law, such as in the law of wills, in that the intention of a person who is unavailable to testify often must be ascertained.\textsuperscript{111} The court’s finding, based on the information available,\textsuperscript{112} thus may not coincide with the actual intention of the covenanting parties.

It is apparent that in some cases desired results influenced the findings regarding intention.\textsuperscript{113} For example, in one case,\textsuperscript{114} a seller of land promised the buyer to supply fill dirt from land retained by seller. This covenant was in the contract of sale. Before trial, seller conveyed his retained land to a straw party. The court held that the promise to supply dirt ran with the retained land; the dirt had to be supplied from the land possessed by the straw party. To reach this result, it was necessary for the court to find that the covenanting parties intended the promise to run with the land, although no express words in the contract indicated this intention, and seller was capable of supplying dirt from elsewhere.\textsuperscript{115} It is likely that the court found the intention rule satisfied to allow the covenant to run, thereby avoiding defeat of the covenantee’s expectations by a sham conveyance.

\textit{The Touch and Concern Rule}

This section has a dual function. First, because the rule of touch and concern focuses on the nature of the promise, this is the logical place to categorize cases involving affirmative covenants ac-

\begin{footnotes}
\footnoteref{fn111}
See 4 PAGE ON WILLS § 30.6 (Bowe-Parker ed. 1961).

\footnoteref{fn112}

\footnoteref{fn113}

\footnoteref{fn114}
Kerrick v. Schoenberg, 328 S.W.2d 595 (Mo. 1959).

\footnoteref{fn115}
Id. at 600-01.
\end{footnotes}
Covenants Running with the Land

Rau: Covenants Running with the Land: Viable Doctrine or Common-Law Re
cording to their specific promises. Second, this section will examine each category to demonstrate where problems exist in the application of the rule.

The cases decided in the past forty years may be grouped into nine major categories:

1. Promises to pay money,
2. Promises to build or maintain a structure, or to maintain the property in a specified way,
3. Promises to furnish utilities or other services

The categories are listed in descending order of the number of cases in each group. Only three cases were unique: Kerrick v. Schoenberg, 328 S.W.2d 595 (Mo. 1959) (promise to sell dirt held to touch land); Place v. Cummiskey, 6 A.D.2d 344, 176 N.Y.S.2d 806 (1958) (promise to retain street name held not to touch land); International Ass'n of Machinists v. Falstaff Brewing Corp., 328 S.W.2d 778 (Tex. Civ. App. 1959) (labor contract held not to touch land). Cases falling into several categories are listed in each.

See notes 126-136 infra and accompanying text.


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to property, \(^{119}\) (4) agreements concerning exclusive use of products or services, \(^{120}\) (5) promises to make future conveyances or changes


COVENANTS RUNNING WITH THE LAND

in title,\(^{121}\) (6) promises not to sue for damage to land or not to assess property,\(^{122}\) (7) promises to use land in a specified way,\(^{123}\) (8) promises related to development plans,\(^{124}\) and (9) promises that land may be used for a fixed rate.\(^{125}\)

Promises in the first category, those to pay money, may be subdivided according to the nature and purpose of the payment:\(^{126}\) (a) Recurring charges for maintenance or services within a develop-


126. These categories are also listed in descending order of the number of cases in each.
ment,\textsuperscript{127} (b) special assessments for repairs or improvements to property or payments for damage,\textsuperscript{128} (c) shared maintenance costs
for a structure, payments for use of easement or profit, (e) real estate commissions, (f) support of another person, (g) refund of payments previously made, (i) payments for receipt of water, and (j) mineral royalties.

An examination of these categories illuminates the situations in which the rule of touch and concern is manipulated to achieve desired results. In addition, it identifies which types of promises

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135. Adaman Mut. Water Co. v. United States, 278 F.2d 842 (9th Cir. 1960); Orchard Homes Ditch Co. v. Snively, 117 Mont. 484, 159 P.2d 521 (1945); Cabell v. Federal Land Bank, 173 Or. 11, 144 P.2d 297 (1943).


137. A number of cases exemplify applications of the touching rule which can only be explained by assuming that covert policy reasons motivated the court. See City of Douglas v. Cartrett, 109 Ga. App. 683, 137 S.E.2d 358 (1964) (no policy
touch the land and which do not. Finally, it considers judicial approaches to policies opposing benefits in gross.

On occasion, courts have been overly technical when applying the touching rule to promises to pay money. If a promise to pay money is isolated from the purpose of the payment, the promise easily can be viewed as not touching the land. For example, in City of Douglas v. Cartrett,138 the grantee of an easement for a sewage line promised to pay for damage to the grantor’s land caused by use of the easement. The court looked only at the promise to pay, not at the purpose for the payment, and held the covenant not to touch the land.139

That this has not happened frequently may be attributed in part to the sound reasoning articulated in Neponsit Property Owners’ Association, Inc. v. Emigrant Industrial Savings Bank.140 Neponsit considered whether a promise to pay an annual charge for the maintenance of public areas in a development touched the private land of the homeowners who were required to make the payments. By analyzing the purpose of the promise, rather than the isolated promise to pay, Justice Lehman found that the covenant did touch the land. The promise to pay, he reasoned, was in return for easements to common grounds maintained by the payments; the covenant as a whole concerned the private land by making it the dominant tenement for purposes of the easements.141

The Neponsit approach is commendable because the promise to pay is meaningless if separated from the context of the payment. If the covenant involves payment for damage to land, the obligation to pay does not arise until there is damage; if the covenant involves payment for services to land, failure to provide services should relieve the obligation to pay. The promise to pay money is necessarily dependent on the purpose of the payment and thus should not stand alone. Accordingly, most courts have considered promises to pay money in the context of benefit to the covenantor;142

139. Id. at 686, 137 S.E.2d at 361.
140. 278 N.Y. 248, 15 N.E.2d 793 (1938).
141. Id. at 259-60, 15 N.E.2d at 797.
142. The only cases in which the promise to pay money was isolated from the
thus payments for something associated with the covenantor's property have generally been held to touch the land.\footnote{143}

Conversely, promises to make refunds have often been isolated from their contexts.\footnote{144} For example, in \textit{Meado-Lawn Homes, Inc. v. Westchester Lighting Co.},\footnote{145} a developer paid a lighting company to lay gas mains in the development. The parties agreed that the payment would be refunded when houses were connected to the gas lines. Before the refunds became due, the developer sold the property, and both he and the new owner claimed the refunds. The court considered the promise to pay in isolation, holding that the covenant did not concern the land; the refund went to the original developer.\footnote{146}

In such a case the touching rule is applied in an overly technical manner to reach a desired result. This may be attributed to the failure of the touching requirement and the other three rules to address the most important issue: To whom should the refunds be made? The rules do not question whether the refund was intended


143. See cases cited note 127 supra (payments for maintenance or services within development). In only one case was the promise held not to touch the land. Nassau County v. Kensington Ass'n, 21 N.Y.S.2d 208, 215 (Sup. Ct. 1940). See cases cited note 128 supra (special assessments for repairs or improvements or payments for damage). Only two promises were found not to touch the land. City of Douglas v. Cartrett, 109 Ga. App. 683, 686-87, 137 S.E.2d 358, 361 (1964), \see text accompanying notes 138 \& 139 supra; Sanitary Facilities II, Inc. v. Blum, 22 Md. App. 90, 103-04, 322 A.2d 228, 235-36 (1974), \see note 169 infra and accompanying text. \See also cases cited notes 129 (shared maintenance costs), 130 (payments for use of easement or profit) \& 135 (payments for receipt of water) supra. None of these promises failed to meet the touch and concern test.

144. See cases cited note 134 supra. In only one of these cases did the court look at the promise to pay in context. \See 165 Broadway Bldg., Inc. v. City Investing Co., 120 F.2d 813 (2d Cir.), \cert. denied, 314 U.S. 682 (1941). \See generally Comment, \textit{Real Property: Covenants Running with the Land}, 25 \textit{CORNELL L.Q.} 621 (1940).


146. Id. at 671, 13 N.Y.S.2d at 712.
to reimburse the developer\textsuperscript{147} or the new owner\textsuperscript{148} for work one of them might have to do. Further, the rules do not examine whether the developer expressly assigned the right to receive refunds to the new owner.\textsuperscript{149} The only rule asking a correct question is the intention rule, and it asks the question only indirectly. It considers whether the original parties intended the promise to pass to their successors in title. The better question is whether they specified to whom the refunds should be made.\textsuperscript{150}

Courts have had little difficulty applying the rule of touch and concern in the remaining categories of promises to pay money. In two of them, payments of real estate commissions\textsuperscript{151} and payments of the covenantee’s debt,\textsuperscript{152} the promises have never been enforced, generally because it has been held that such promises do not touch the land. Promises to pay mineral royalties have consistently been held to meet the touching requirement.\textsuperscript{153}


\textsuperscript{148} See 165 Broadway Bldg., Inc. v. City Investing Co., 120 F.2d 813 (2d Cir.), cert. denied, 314 U.S. 682 (1941). But see id. at 820 (Chase, J., dissenting).

\textsuperscript{149} See Safe Deposit & Trust Co. v. Baltimore-Gillet Co., 176 Md. 594, 6 A.2d 226 (1939); see generally Note, Covenants Running with the Land: Their Desirability and Utility, 32 Notre Dame Law. 502, 515 (1957).


\textsuperscript{152} See cases cited note 132 supra. Three of these five promises were not enforced because they did not concern covenanantor’s land. Pelser v. Gingold, 214 Minn. 281, 285-87, 8 N.W.2d 36, 39-40 (1943); Beaver v. Ledbetter, 269 N.C. 142, 147, 152 S.E.2d 165, 170 (1967); Lundeberg v. Dastrup, 28 Utah 2d 28, 31-32, 497 P.2d 648, 650 (1972). One covenant was not upheld because it failed to touch the land granted. Talley v. Howsley, 170 S.W.2d 240, 243 (Civ. App.), aff’d, 142 Tex. 81, 176 S.W.2d 158 (1943). See text accompanying note 100 supra. The other promise to pay a debt was not enforced for lack of a seal. Schram v. Coyne, 127 F.2d 205, 206, 209 (6th Cir.), cert. denied, 317 U.S. 652 (1942) (dictum that agreement to pay mortgage is not covenant running with the land).

\textsuperscript{153} See cases cited note 136 supra. In Thew v. Thew, 35 Cal. App. 2d 691, 96 P.2d 826 (1939), only the burden touched the land; the benefit was in gross. See notes 173 & 174 infra and accompanying text. The covenant in Maynard v. Ratliff, 297 Ky. 127, 179 S.W.2d 200 (1944), was enforced. The promise was not enforced in McIntosh v. Vail, 126 W. Va. 395, 28 S.E.2d 607 (1943), because it touched the wrong
Courts occasionally have been overly technical in applying the touching requirement to promises to furnish utilities or other services to property, a group of covenants not involving payments. In *Town of Vinton v. City of Roanoke*, the court held that a promise by a water company to furnish water could not run with its land because the document containing the covenant failed to describe the burdened land. Because the court inferred that water might be supplied by another source, the promise was held not to touch the water company's land. This reasoning may have been used to reach a desired result; such a requirement has been imposed infrequently.

Most courts have found that covenants to build or maintain a structure, to make future conveyances, to use land in a specified estate. *Id.* at 403-04, 28 S.E.2d at 612. See note 100 supra and accompanying text. In the final category of promises to pay money, covenants for support, one court specifically held that the promise did not relate to the land. See *Schaefer v. Apel*, 295 Ala. 277, 281, 282 So. 2d 274, 277 (1976). In the other cases in this category, courts stated that the promises would run with the land. However, in one of the cases the doctrine was used inappropriately. See *Mathis v. Mathis*, 402 Ill. 60, 67, 83 N.E.2d 270, 274 (1948) (court stated covenant ran with land, but dispute was between original covenantor and heirs of covenantee, who owned no land with which covenant might run). See also note 91 supra. In the other cases the statement that the covenant ran was dictum. See *Moore v. Tilley*, 15 N.C. App. 378, 381, 190 S.E.2d 243, 246 (1972); *Blanchard v. Knights*, 121 Vt. 29, 36-37, 146 A.2d 173, 178-79 (1958).

154. See cases cited note 119 supra.


156. *Id.* at 891-94, 80 S.E.2d at 614-16.

157. In *Town of Vinton*, the decision appeared to be based on the unfairness of charging one class of water customers a disproportionately low rate. *Id.* at 894, 80 S.E.2d at 616.

158. The only other case involving a promise to furnish utilities or services where this requirement was made is *Nordin v. May*, 188 F.2d 411, 413 (8th Cir. 1951) (lower court had denied enforcement because, *inter alia*, covenant failed to describe source of steam to be furnished). *Accord*, *Schaefer v. Apel*, 295 Ala. 277, 280-81, 282 So. 2d 274, 277 (1976) (promise to support siblings of covenantor failed to specify that home had to be on land granted to covenantor); *Caulett v. Stanley Stilwell & Sons*, 67 N.J. Super. 111, 114-17, 170 A.2d 52, 54-55 (App. Div. 1961) (covenant to allow grantor to build house on granted land failed to adequately describe premises). Only one other promise to furnish utilities or services was found not to concern the land. This result was probably influenced by termination of the recipient's need for the water, as well as by the unlimited duration of the covenant. See *Eagle Enterprises, Inc. v. Gross*, 39 N.Y.2d 505, 349 N.E.2d 816, 384 N.Y.S.2d 717 (1976).

159. See cases cited note 118 supra. In only two of these cases was enforcement denied because of the touching rule. *Salvi v. John A. Manning Paper Co.*, 168 Misc. 661, 7 N.Y.S.2d 36 (Sup. Ct. 1938) (enforcement denied on other grounds as well); *City of Seattle v. Fender*, 42 Wash. 2d 213, 254 P.2d 470 (1953) (enforcement denied on other grounds as well).

160. See cases cited note 121 supra. There was only one case in this category in
fied way,161 and to allow the use of land for a fixed rate162 touch the land.

In the remaining three categories, the benefit of the covenant has sometimes been held in gross.163 A promise not to sue for damages164 and a promise related to development plans165 were not enforced for this reason. Courts have had no problem applying the touching requirement to other cases in these two categories.166 In cases concerning exclusive use of products or services,167 when the covenant has failed to fulfill the touching requirement, it has been because the promise did not concern the direct use of the burdened land, rather than because the benefit was in gross.168

It is difficult to determine whether the policy opposing benefits in gross is applied consistently. Some courts have denied enforcement when the benefit of a covenant was held in gross,169

which the touching rule precluded enforcement. This was due to the court's reluctance to depart from a requirement of the Restatement that the covenant be beneficial to the physical use of land. See Hudspeth v. Eastern Or. Land Co., 247 Or. 372, 430 P.2d 353 (1967).

161. See cases cited note 123 supra. No promises in this category were found to fail the test of touch and concern.

162. See cases cited note 125 supra. No promises in this category were found to fail the test of touch and concern.

163. See cases cited notes 120 (agreements concerning exclusive use of products or services), 122 (promises not to sue for damage to land or not to assess property) & 124 (promises related to development plans) supra.


166. See also cases cited notes 122 & 124 supra.

167. See cases cited note 120 supra.


while others have not. Because it is rare for one covenaning party to have no land related to the covenant, patterns within one state appear infrequently. However, decisions in two states support the conclusion that the in gross rule is applied selectively. In New York, five cases involved a benefit in gross. The courts in three of these cases concluded that the covenants were unenforceable; the other two allowed the covenants to run. In California, the running of covenants when no land is benefited is statutorily forbidden. Nevertheless, one decision in that state upheld such a covenant by using the theory of equitable servitudes, to which the statute did not apply. It seems that the policy opposing benefits in gross is manipulated to produce the outcome desired.


The Privity of Estate Rule

The most notable characteristic in judicial treatment of the privity rule is superficiality. The rule seems to have taken on a life of its own: Courts have mechanically applied it without considering the reasons behind it. This results in such ambiguity that the type of privity required in any one decision is uncertain, and such inconsistency among decisions that the type required in any one jurisdiction is unclear.

Many cases have required privity between the parties to the covenant. However, it is often impossible to determine whether

the courts are referring to horizontal or mutual privity. Some courts have described the rule as privity between the party claiming the benefit and the party burdened.\textsuperscript{176} This could mean horizontal privity, if referring to the original covenantee parties, but could also mean mutual privity, if referring to their successors. Equally ambiguous are statements that a "mutual or successive relationship"\textsuperscript{177} is required to satisfy the rule. These could refer to mutual, horizontal, or vertical privity.\textsuperscript{178}

At times the type of privity required can be inferred from the facts and result of a case.\textsuperscript{179} Often, however, more than one type of privity is present when the requirement is met,\textsuperscript{180} or absent when it is not met;\textsuperscript{181} the ambiguities cannot be resolved in such cases.


\textsuperscript{178} Horizontal and vertical privity are both successive relationships. See note \textsuperscript{35 supra}. In Cook v. Tide Water Associated Oil Co., 281 S.W.2d 415 (Mo. Ct. App. 1955), the court, defining privity as a "mutual or successive relationship," id. at 419, found privity both between the covenanting parties, and between defendant and his predecessor, the covenantee. Id.

\textsuperscript{179} See Eagle Enterprises, Inc. v. Gross, 39 N.Y.2d 505, 349 N.E.2d 816, 818, 384 N.Y.S.2d 717, 719 (1976); Lincolnshire Civic Ass'n v. Beach, 46 A.D.2d 596, 364 N.Y.S.2d 248 (1975); Silverstein v. Shell Oil Co., 40 A.D.2d 34, 337 N.Y.S.2d 442 (1972), aff'd, 33 N.Y.2d 950, 309 N.E.2d 131, 353 N.Y.S.2d 730 (1974). In these cases, there was horizontal, but not mutual privity; thus the party claiming the benefit and the party carrying the burden must have been the original covenantee and covenantee.

\textsuperscript{180} See, e.g., Peto v. Korach, 17 Ohio App. 2d 20, 244 N.E.2d 502 (1969) (horizontal and mutual privity present to meet requirement of privity between parties with benefit and burden).

\textsuperscript{181} See, e.g., Wood Fabricators, Inc. v. Hayes, 250 Ala. 475, 35 So. 2d 106 (1948); Meado-Lawn Homes, Inc. v. Westchester Lighting Co., 171 Misc. 669, 13
Even an explicit definition of privity may not establish strong precedent; a later decision in the same state is likely to use a different meaning.\textsuperscript{182} In New York, for example, recent cases have described and applied the privity rule inconsistently. Some courts have defined privity as vertical,\textsuperscript{183} others as mutual or horizontal,\textsuperscript{184} and a few as both vertical and horizontal or mutual.\textsuperscript{185} Application of the rule exhibits similar inconsistency: One covenant did not run because there was no privity of any type;\textsuperscript{186} however, it is unclear which type was required because other covenants have run with only vertical,\textsuperscript{187} mutual, or horizontal privity.\textsuperscript{188}

N.Y.S.2d 709 (Sup. Ct. 1939), \textit{aff'd}, 259 A.D. 810, 20 N.Y.S.2d 396, \textit{aff'd} 284 N.Y. 667, 30 N.E.2d 608 (1940); Noyes v. McDonnell, 398 P.2d 838 (Okla. 1965); Hall v. Risley, 188 Or. 69, 213 P.2d 818 (1950). In these cases, neither horizontal nor mutual privity was present. Thus, the requirement of privity between the party claiming the benefit and the party burdened was not satisfied. Accord, Conti v. Duve, 142 Pa. Super. Ct. 189, 15 A.2d 494 (1940) (no mutual or horizontal privity between covenanting parties; defendant held not required to perform burden because, \textit{inter alia}, there was no privity between defendant and those claiming benefit).

182. There is an implicit assumption among commentators that privity of estate, once defined, is the law of that jurisdiction. See, e.g., C. CLARK, supra note 1, at 93; Sims, supra note 30, at 31-32 n.190; Note, \textit{Affirmative Duties Running With the Land}, 35 N.Y.U.L. REV. 1344, 1365-69 (1960). Although this may formerly have been justified, the present status of the privity rule precludes this assumption.


between the covenanting parties was not required in one case, but its absence prevented running in another. Other examples of intrastate inconsistency are found in Georgia and Texas. In Georgia, for a number of years, the courts indicated that horizontal privity was necessary. Then, without explanation for the change, a Georgia court maintained that only vertical privity was required. In Texas the decisions had consistently required some privity relationship between covenanting parties. However, a federal court, applying Texas law, only required vertical privity.

A cynical observer might conclude that courts simply select the type of privity needed to reach a desired result from the smorgasbord created by various interpretations of the privity rule.
is more likely, however, that the inconsistent treatment results because the law surrounding privity of estate is so confused, and the rule itself so confusing, that litigants and judges no longer know what the privity rule requires and, more importantly, why it exists.

A MODERN DOCTRINE FOR MODERN NEEDS

Modern courts have considerable difficulty applying the doctrine of covenants running with the land. Yet they continue to struggle with it, both because the law generally is slow to change, and because the needs which gave rise to the doctrine continue to exist. This section discusses these needs and how they can be met more effectively.

Modern Need for Real Promises

There remains good reason to distinguish promises made by landowners which should run to their successors from those which should not. In fact, the need for a mechanism to allow real promises to run is greater today than it was in the past. When land was plentiful and people lived far apart in rural settings, it was important to allow landowners the freedom to make mutually convenient agreements. This freedom had to be balanced against the need to protect successors from being bound by promises made before they owned the land. Society’s needs were involved on both sides of this balance. It was desirable to encourage promises promoting maximum use of land; however, land too heavily burdened by a covenant would become unmarketable. Thus, common-law rules developed to accommodate these conflicting needs.

Today, in a much more complicated world, the weight is heavier on both sides of the scale. Since people live much closer together than they formerly did, promises involve more than mutual convenience. They frequently mean the difference between living in a pleasant, well-functioning neighborhood and living with disorder and confusion. Close living demands that neighbors share the cost of improvements to common property,196 and that they receive the services they had relied on in purchasing the property.197

In addition, housing developments are becoming increasingly common in the suburbs, and cooperative and condominium apartment complexes are becoming more popular in urban and suburban neighborhoods. Such housing arrangements depend for their

196. See cases cited note 128 supra.
197. See cases cited note 119 supra.
existence upon promises made by individual homeowners for the
benefit of the whole complex.

*Neponsit Property Owners’ Association, Inc. v. Emigrant In-
dustrial Savings Bank*\(^\text{198}\) provides a good example of the interde-
pendence of residents in a housing complex. In *Neponsit*, each
homeowner in the development promised to pay an annual fee for
maintenance of common grounds.\(^\text{199}\) This is a typical covenant.\(^\text{200}\)
Without enforcement of such promises, housing complexes could
hardly function: streets would not be maintained or garbage col-
clected. Such developments are like small towns, the assessments
like taxes.

Just as there are more reasons that these promises should be
enforced, there are also more situations in which they should not
be. Enforcement is unrealistic when the environment has changed,
rendering meaningless the purpose for which the promise was
made. Similarly, when the community as a whole would suffer
from continuation of a promise made long ago, the private arrang-
ment should be subordinated to the public good.

For example, in *Compson v. Walters*,\(^\text{201}\) a village had prom-
ised to furnish water to a farmer whose water source was disrupted
when the village diverted a stream. Sixty-five years later a court al-
lowed a successor to the farmer’s estate to receive free water be-
because of this promise, although the free water would be a windfall
to the landowner, who would not have used water from the di-
verted stream. Moreover, continuation of this promise may have
been a burden to other water customers, who were then effectively
subsidizing the farmer’s successor.\(^\text{202}\)

*Covenants Running with the Land:*
*A Common-Law Relic*

Major difficulties plague the theory of covenants running with
the land. It is a rigid common-law doctrine that does not account
for individual circumstances or most social policies. This results in
unrealistic enforcement\(^\text{203}\) and manipulation of the rules to reach
desired results.\(^\text{204}\)

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\(^{198}\) 278 N.Y. 248, 15 N.E.2d 793 (1938).

\(^{199}\) Id. at 253-54, 15 N.E.2d at 794.

\(^{200}\) See cases cited note 127 *supra*.

\(^{201}\) 54 Misc. 2d 232, 282 N.Y.S.2d 89 (Sup. Ct. 1967).

\(^{202}\) See id. at 234, 282 N.Y.S.2d at 93.

\(^{203}\) See text accompanying notes 201 & 202 *supra*.

\(^{204}\) See notes 113-115 *supra* and accompanying text (intention); note 137, text
In addition, the doctrine has become so complex that some of the rules overlap. The form rule and the horizontal privity requirement share the same function: both encourage caution when making promises. It is unnecessary to have two rules performing this one role, particularly when recording statutes serve the same purpose. Similarly, both the touching and mutual privity requirements prevent covenants from running when the benefit is in gross. The overlapping function served by these rules is not worth serving at all.

The doctrine of covenants running with the land also fails because privity of estate causes considerable confusion while serving no useful purpose. Not only are the various justifications for the rule inadequate, but mutual and horizontal privity are irrelevant in the many modern cases in which the covenant is contained in deed restrictions filed by a subdivider. Although a promise to a developer always gives rise to horizontal privity, and sometimes to mutual privity as well, a promise to a property owners' association will give rise to neither if the association owns no land. Yet there is no functional difference between the two promises. The essential feature in both is that the promise is made by a landowner in a development for the benefit of the community. Requiring a realty relationship between the promisor and promisee is unnecessary and artificial.

Equitable Servitudes: A Viable Doctrine

The doctrine of equitable servitudes was created by English courts for the same reason that it should today replace the doctrine

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following note 146 supra, notes 157 & 158 supra and accompanying text, and text accompanying notes 171-174 supra (touching); note 195 supra and accompanying text (privity).

205. See text accompanying notes 13 (form) & 64 (horizontal privity) supra.
206. See text accompanying note 16 supra.
207. See text accompanying notes 25-28 (touching) & 60 (mutual privity) supra.
208. See text following note 30 supra.
209. See text accompanying notes 51-57 supra. Privity is generally declining in importance throughout the law, as, for example, in the field of products liability. See Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1100 (1960).
of covenants running with the land: The older theory could not respond to a changing world. The doctrine of covenants running with the land was developed and used by English courts of law, which did not permit burdens to run between owners in fee; however benefits were permitted to run when the four requirements were met. This policy against burdens created difficulties as society became increasingly urbanized and demanded exclusively residential neighborhoods. If burdens could not run with land, restrictions on commercial use of property in residential neighborhoods would be ineffective unless each property owner conveyed subject to the restriction. Consequently, the equity court created a new doctrine, equitable servitudes, to protect entire neighborhoods.

The doctrine of equitable servitudes was applied only to restrictive covenants, such as promises not to use land for commercial purposes. This is because the remedy for breach of a restriction was an injunction, obtained in equity, whereas the remedy for breach of an affirmative covenant was damages, obtained in a court of law.

The major difference between the legal and equitable theories is that privity of estate is not needed in the latter to allow promises to pass to successors. Rather, the burden of a restrictive covenant can run if the person subject to it had notice of the restriction when he or she acquired the property. The running of the benefit is determined by contract or property theory. Under contract theory, neighbors enforce the promise as third-party beneficiaries or as assignees of the contract right. Property theory, preferred by Judge Clark and others, treats the benefit like an easement

213. See note 24 supra and accompanying text.
218. Id. § 9.24. Notice is not required in the theory at law; however, courts would be hesitant to impose liability on a successor lacking notice. See 3 H. TIFFANY, THE LAW OF REAL PROPERTY § 850 (3d ed. 1939). There are no cases involving a successor who lacked actual or record notice of the burden. See text accompanying note 107 supra.
219. Neighbors who held benefited land before the covenant was made might sue as third-party beneficiaries; assignees take land after the making of the covenant. See C. CLARK, supra note 1, at 171-74; Casner, supra note 1, §§ 9.29-.30.
220. C. CLARK, supra note 1, at 174-75; Casner, supra note 1, § 9.24.
that passes as part of, or appurtenant to, the land itself.\textsuperscript{221} These theories permit both burdens and benefits to run without requiring privity of estate.

The doctrine of equitable servitudes uses the other three rules of covenants running with the land in slightly different ways. Whether the burden touches the land presents no problem since the doctrine is used only for restrictive covenants; a promise to refrain from an act upon one’s land necessarily concerns that land. If the plaintiff’s lot is within the neighborhood for whose benefit the servitude was established, the benefit is appurtenant to and therefore touches that lot.\textsuperscript{222} Intention is established if the covenanating parties meant to create lasting obligations, rather than personal promises, and if they meant to benefit the plaintiff’s land.\textsuperscript{223} The form required is determined by whether the contract or property Statute of Frauds must be satisfied. Problems have rarely arisen; most agreements are written, either in deeds poll or in a recorded subdivision plot.\textsuperscript{224}

American courts have been more lenient than English courts; they have used the equitable theory for affirmative, as well as restrictive, promises.\textsuperscript{225} An analysis of the cases decided in the past forty years reveals that the distinction between the two theories and between the two types of promises is not always clear. Some of the litigated agreements contain both restrictive and affirmative provisions;\textsuperscript{226} a considerable number of affirmative promises have been identified as restrictive by courts.\textsuperscript{227} Many decisions use

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{221} C. CLARK, \textit{supra} note 1, at 171-77; Casner, \textit{supra} note 1, § 9.24.
\item \textsuperscript{222} See Casner, \textit{supra} note 1, § 9.28.
\item \textsuperscript{223} Id. § 9.29.
\item \textsuperscript{224} Id. § 9.25.
\item \textsuperscript{225} C. CLARK, \textit{supra} note 1, at 179; Casner, \textit{supra} note 1, § 9.36.
\item \textsuperscript{227} Balzer v. Indian Lake Maintenance, Inc., 346 So. 2d 146, 149 (Fla. Dist. Ct. App. 1977); Adams v. Marshall, 554 S.W.2d 359, 359 (Ky. 1977); Folger v. Commonwealth, 330 S.W.2d 106, 107 (1959), \textit{overruled on other grounds}, 350 S.W.2d 703 (Ky. 1961); Troper v. Shoemaker, 312 Ky. 344, 347, 227 S.W.2d 176, 177 (1949); Town South Estates Home Ass’n v. Walker, 332 So. 2d 889, 890 (La. Ct. App. 1976); Kerrick v. Schoenberg, 328 S.W.2d 595, 601 (Mo. 1959); Williams v. Butler, 76 N.M. 782, 785-87, 418 P.2d 856, 857 (1966); Battista v. Pine Island Park Ass’n, 28 A.D.2d
\end{enumerate}
\end{footnotesize}
equitable principles to judge affirmative covenants, rather than, or in addition to, the legal rules for covenants running with the land.\textsuperscript{228}


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Conversely, some cases involving restrictive covenants are decided, at least in part, by the doctrine for affirmative promises, usually resulting in unnecessary requirements of privity of estate. Occasionally courts have asserted that today the distinction between these two types of promises is immaterial, and that an affirmative obligation may run under either theory.

There are a number of advantages to using the equitable, rather than the legal, theory for all affirmative covenants. There is little pragmatic justification for maintaining two distinct theories.
since modern courts are no longer divided between law and equity.\textsuperscript{232} Traditional remedies, damages for breach of an affirmative covenant and injunction for breach of a restrictive covenant,\textsuperscript{233} should be applied interchangeably. If, for instance, there has been a promise to supply heat to a neighboring building, the best remedy for breach may be an injunction to prevent the defendant from interfering with the operating system. That the covenant is affirmative does not mean that a damage remedy must follow.\textsuperscript{234} Moreover, one theory for both types of covenants is sensible for those promises containing both affirmative obligations and restrictive provisions.\textsuperscript{235} In such cases, it would be unduly rigid to decide separate parts of the covenant under different theories.

Applying the theory of equitable servitudes to affirmative covenants has the additional advantage of permitting equitable defenses against enforcement.\textsuperscript{236} The legal theory of covenants running with the land rarely allows termination of promises. Because it is a contract theory, termination is possible only under contract principles: release by the covenantee or his or her successor, modification of the agreement, or merger of the estates involved in the obligation.\textsuperscript{237} The equitable doctrine, however, allows termination under these theories,\textsuperscript{238} as well as under equitable principles: acquiescence,\textsuperscript{239} laches,\textsuperscript{240} clean hands,\textsuperscript{241} change in character of

\begin{itemize}
\item \textsuperscript{232} See 1 J. Pomeroy, Equity Jurisprudence § 68 (5th ed. S. Symons 1941).
\item \textsuperscript{233} See note 216 supra and accompanying text. See generally C. Clark, supra note 1, at 180.
\item \textsuperscript{235} See cases cited note 226 supra.
\item \textsuperscript{236} See C. Clark, supra note 1, at 184-86.
\item \textsuperscript{237} Casner, supra note 1, § 9.23.
\item \textsuperscript{238} Id. § 9.37.
\item \textsuperscript{239} The defense of acquiescence is invoked when plaintiff has failed to enforce a similar restriction against another violator. Id. § 9.38.
\item \textsuperscript{240} The laches defense is based on plaintiff’s unreasonable delay in bringing suit. Id.
\item \textsuperscript{241} The clean hands defense arises when plaintiff has committed violations similar to those allegedly committed by defendant. Id.
\end{itemize}
Although courts occasionally have indicated that these defenses would allow an affirmative promise to be extinguished, for the most part the equitable defenses are not used in a theory at law. Consequently, courts have bent the legal requirements to reach equitable results. Permitting obsolete or unfair promises to be extinguished by equitable defenses would help modernize this area of property law.

There is one problem that would be solved more effectively by statute than judicial doctrine: the encumbrances on title caused by covenants. Such burdens would be less onerous if there were statutes limiting their duration to, for example, thirty years. Such laws

242. A covenant may be terminated when the purpose for which it was established can no longer be accomplished due to changes in the neighborhood. Id. § 9.39.

244. Estoppel is invoked when defendant has relied on indications from plaintiff that he or she will not enforce the covenant. Id.

245. Abandonment is invoked when the owner of benefited land indicates that he or she intends to relinquish the benefit. Id. § 9.37.


247. See Casner, supra note 1, § 9.38.

248. See note 204 supra and accompanying text.

249. See text following note 30 supra.

would allow current owners of land to renegotiate the agreement within a reasonable period, and perhaps make adjustments for changed conditions. If a state has a strong policy against some covenants, such as those containing benefits in gross,251 there could be a statute restricting their running to an even shorter period, or forbidding them entirely. Such statutes would ensure the certainty desired by those entering into long term arrangements.

CONCLUSION

The doctrine of covenants running with the land is misunderstood and misused by modern courts. It should be replaced by the doctrine of equitable servitudes. This change would yield more logical and practical results. Cases involving real covenants would be decided using reason, rather than technical rules; the antiquated doctrine would finally be put to rest.

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