9/16/70

Memorandum 70-106

Subject: New Topic--Conditions, Covenants, and Restrictions

SUMMARY

This memorandum presents for the Commission's consideration an analysis of a new topic--whether the law of covenants and servitudes relating to land, and whether the law governing nominal, obsolete and remote covenants, conditions, and restrictions should be revised or clarified--which the Commission decided to study at the September meeting. The memorandum contains a staff analysis of the law in the area and reaches the conclusion that, although the California law presents no problems in urgent need of reform, nonetheless statutory clarification and revision would be of substantial benefit. The memorandum requests the Commission's determination whether to drop the topic or to continue with the study. Appended is a draft request for authority to study the topic for presentation to the Legislature.

ANALYSIS

The decision to study conditions, covenants, and restrictions was based upon the assumption that the common law irrationally distinguishes between conditions and covenants and between real covenants and equitable servitudes with regard to both substantive rights and remedies available for enforcement. Further study, however, reveals that the California decisional law in this area is in a much better condition than that of most other states.

Restrictions are privately imposed limitations on land use, generally taking the form of conditions and covenants. A condition is a qualification

annexed to the estate granted in a deed, breach of which may cause a reversion of the estate to the grantor or a power of termination and right of entry in the grantor. A covenant is a promise or agreement (often contained in the conveyance), breach of which does not result in loss of title but which gives rise to a cause of action for damages or injunctive relief. Because of the harshness of the remedy for breach of condition, there is a constructional preference in favor of covenants. And even where the restriction is clearly a condition subsequent, it is strictly construed. (Code Civ. Proc. § 1442: "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created.") Covenants themselves are classified as "real" covenants enforceable at law and as servitudes enforceable in equity. See generally 14 Cal. Jur.2d, Covenants, Conditions, and Restrictions § 126 (1954).

In California, a grantor of land can dispose of it as he wishes, imposing restrictions on the use and improvement of the land, the limitations being recognized as lawful and enforceable. Ogden, California Real Property Law § 14.3 (1956); California Land Security and Development § 24.58 (Cal. Cont. Ed. Bar 1960). The grantor's right is not absolute, but it is limited by the requirement that the restrictions are not unlawful and do not violate established rules of public policy.

Under this limitation on the grantor's right to restrict the land use, there are several extremely important rules:

1. If the restriction requires an unlawful act, it is void. (Civil Code § 709.)

2. If the restriction is racial in nature, it is void. (The courts may not constitutionally enforce it. Shelly v. Kraemer, 334 U.S.1 (1948); Cumings v. Hokr, 31 Cal.2d 844, 193 P.2d 742 (1948).)

3. If the restriction is a restraint upon alienation of the property, it may be void. (Civil Code § 711: "Conditions restraining alienation, when repugnant to the interest created, are void." See also 2 Witkin, Summary of California Law Real Property §§ 161-163 (7th ed. 1960).)

4. If the restriction is a restraint on marriage, it is void. Civil Code § 710: "Conditions imposing restraints on marriage, except upon the marriage of a minor, are void; but this does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage.")

5. If the restriction delays vesting beyond the perpetuities period, it is void. (Civil Code § 715.2; note, however, that the rule against perpetuities has little application to covenants and conditions, for covenants do not create an interest in the property and are, thus, not subject to the rule, and conditions usually create reversionary interests which are by definition vested.)

6. If the restriction is merely nominal, it is void. 1 Tiffany, Real Property § 198 (3d ed. 1939). No California cases on this point appear.

7. If the restriction was impossible to perform at the time it was created, it is void. (Civil Code § 1441.)

These basic public policy restraints on the private creation of land use restrictions have apparently served rather well to eliminate the problems of trivial, irrelevant, and harmful covenants and conditions in deeds. The problem of remote and obsolete provisions, however, is not solved by these limitations upon the creation of restrictions, but rather must be solved by rules regulating the termination of validly created restrictions.

Remote restrictions. California has no general statute limiting the length of time for use restrictions on real property. Civil Code Section 718

does specify maximum terms for certain types of real property leases, but there is no comparable provision for use restrictions upon a fee. Thus, the grantor is free to specify the term during which his restriction is to apply, and, at the end of the term, the restriction terminates. This is the case with most covenants and conditions. If the grantor specifies no period, the courts will guard against remoteness by specifying a reasonable period.

> Where the duration of restrictions is not expressly limited by the parties, it will usually be implied that the duration is such as is reasonable under the circumstances of the case. [Ogden, California Real Property Law § 14.20 (1956).]

Thus, despite the lack of any statutory limitations on remote restrictions, the parties themselves may determine the length of time or, alternatively, the courts will limit the time.

Obsolete restrictions. The extent to which land use restrictions may be extinguished once they have served their purpose is evidently the focus of the complaints received and reviewed by the Commission at the September meeting. The law in this area is much more intricate than that outlined above and deserves much more careful attention and closer scrutiny.

A typical situation is a conveyance of property with a restriction on its use to residential purposes only. Fifty years later, the property conveyed, which once was in a residential district, is now in the heart of the city's commercial district. The present owner wishes to use the land for a business but is barred by the restriction. At common law, whether the owner is barred depends upon two factors: (1) the manner in which the restriction was created and (2) the process by which the issue is brought before the court.

(1) If the restriction is in the form of a condition in a deed, the court is powerless to affect the rights of the reversioners under the deed.

If the restriction merely takes the form of a covenant and it is now obsolete due to changed conditions, a court might refuse to enforce it.

(2) It is only an equity court which will refuse to enforce a covenant based on changed conditions. Therefore, if the covenant is sought to be enforced as an equitable servitude, the doctrine can be used. If the covenant is sued upon only for damages, the doctrine is inapplicable. But, if the covenant could be enforced at law for damages and the plaintiff nonetheless seeks injunctive relief, then the court is free to apply the equitable defense of changed conditions.

All these problems are eliminated in California law which does not adhere to the common law technicalities of the changed circumstances rule.

> California courts have given wide recognition to the rule that equity will not enforce a restrictive covenant if the reason or justification for it has failed because of changed conditions, or where, by reason of such change, it would be oppressive or inequitable to give effect to the restriction. [14 Cal. Jur.2d, Covenants, Conditions, and Restrictions § 113 (footnotes omitted).]

Although the cases speak of equity's denial of injunctive relief (e.g., Downs v. Kroeger, 200 Cal. 743, 254 P. 1101 (1927); Friesen v. City of Glendale, 209 Cal. 524, 228 P. 1080 (1930)), the issue can be raised regardless of whether the covenant sought to be enforced is a real covenant or an equitable servitude. Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782 (1930). The issue can be raised regardless of whether it is damages or injunctive relief which is sought:

> The question of enforceability of land-use restrictions is raised either in an action for enforcement (an injunction or damages may be sought) or in an action to remove the restrictions. One of these is an action to quiet title. The other is an action for declaratory relief to obtain a decree that the restrictions in a particular area are no longer enforceable. Next to an action to enjoin violation, the declaratory relief action is probably the most common form of litigation involving restrictions. [California Land Security and Development § 24.55 (Cal. Cont. Ed. Bar 1960) (emphasis in original).]

California's variance from the common law distinctions between covenants and servitudes so far as the application of equitable defenses is concerned is clearly and explicitly recognized by the courts.

> Whatever may be the weight of authority in other jurisdictions, the rule in this jurisdiction is well settled that the equity courts will not enforce restrictive covenants by injunction in a case where, by reason of a change in the character of the surrounding neighborhood . . . it would be oppressive and inquitable to give the restriction effect . . . . [Hurd v. Albert, 214 Cal. 15, 23, 3 P.2d 545 (1931).]

California is not alone among jurisdictions which have eliminated the covenant-servitude distinction for purposes of changed circumstances; about half of the others have done likewise. See Newman and Losey, Covenants Running With the Land and Equitable Servitudes; Two Concepts, Or One? 21 Hastings L.J. 1319, 1342 (1970).

The California courts have gone even further and applied to conditions as well as to covenents the rule that a change in the character of the neighborhood may render a restriction unenforceable. 14 Cal. Jur.2d, Covenants, Conditions, and Restrictions § 118; 2 Witkin, Summary of California Law Real Property § 221 (7th ed. 1960); V Restatement of Property, California Annotations, § 564 Special Note (1950). Cases in which deeds containing conditions subsequent with rights of reentry were denied enforcement by the courts on the basis of changed conditions include: Wilshire Oil Co. v. Star Petroleum Co., 93 Cal. App. 437, 269 P. 722 (1928); Wedum-Adahl Co. v. Miller, 18 Cal. App.2d 745, 64 P.2d 762 (1937); Brown v. Wrightman, 5 Cal. App. 391, 90 P. 467 (1907); Alexander v. Title Ins. & Trust Co., 48 Cal. App.2d 488, 119 P.2d 992 (1941); Forman v. Hancock, 3 Cal. App.2d 291, 39 P.2d 249 (1934). (N.B. Many of the above cases also have facts which could indicate waiver or unclean hands in creating the changed conditions as possible factors in the courts' decisions to deny enforcement on equitable grounds.) Simes says, however:

> But the California decisions go further, and, regardless of whether the grantor may or may not have been to blame for the change in circumstances, have recognized that the court can declare the right of entry terminated. [Simes, Restricting Land Use in California by Rights of Entry and Possibilities of Reverter, 13 Hastings L.J. 293, 307 (1962)(footnotes omitted).]

In Letteau v. Ellis, 122 Cal. App. 584, 10 P.2d 496 (1932), the court specifically rejects the condition-covenant distinction so far as the changed conditions defense is concerned. Here the property conveyed contained a racial restriction which, at the time, was deemed to be constitutionally permissible. The deed provided that breach of the condition subsequent "shall work a forfeiture of title thereof to said party of the first part, their successors or assigns." The condition was breached, plaintiff sought to recover the property, and defendant alleged changed conditions, viz., that the property had gradually become part of a predominantly black neighborhood. The court found that the conditions had so changed as to make enforcement of the restriction unconscionable and terminated the rights of the reversioners. The plaintiffs objected that the equitable doctrine of changed conditions applied only to covenants, not to conditions--"Distinctions of some nicety are drawn between conditions as such, and covenants and restrictions as to use." 122 Cal. App. at 588. The court explicitly rejected this argument:

> We find it needless to follow appellants' arguments on the technical rules and distinctions made between conditions, covenants and mere restrictions. In many, if not all, of the cases dealing with changed conditions, the terms have been used with apparent disregard of the niceties of differentiation and the reasons advanced would have application to a resulting situation, regardless of the means of its creation. A principle of broad public policy has intervened to the extent that modern progress is deemed to necessitate a sacrifice of many former claimed individual rights. The only obstacle met has been the rule of property or as termed the disinclination to disturb vested property rights. To some extent this, too, has yielded in the sense that many rights formerly

Memorandum 70-106

EXHIBIT I

Covenants Running with the Land, and Equitable Servitudes; Two Concepts, or One?

By RALPH A. NEWMAN*
AND
FRANK R. LOSEY**

BRONOWSKI tells of the difficulty experienced by Sherpas who habitually approach Mt. Everest from opposite sides, in realizing that the two sides are faces of the same mountain.[1] The classification of restrictions on the use of land into convenants running with the land at law, and equitable servitudes, is a striking example of what Julius Stone has called categories of meaningless reference;[2] two descriptions of the same concept.

Holmes felt that the doctrine of covenants running with the land originated in implied warranties of title, which were enforceable since very early times by heirs and assigns of the covenantee.[3] The running of the benefit of a covenant restricting the use of land has been recognized since as early as the 13th century.[4] Sims thought that the closest analogy was to express warranties.[5] Other modern writers have stressed the analogy to the running of easements.[6] Support for the doctrine of the running of covenants in deeds was provided by the analogy of the running of covenants in leases, enforced at common law for and against assignees of the lessee[7] and also, after 1540, by virtue of chapter 34 of 32 Henry VIII, for and against grantees of the lessor. The covenants do not, of course, travel with each successive transfer of the land, but the successor in estate moves, with reference to the covenant, into

* Professor of Law, University of California, Hastings College of the Law.
** Third year student, Hastings College of the Law.

1. J. BRONOWSKI, SCIENCE AND HUMAN VALUES 29-30 (rev. ed. 1965).
2. J. STONE, LEGAL SYSTEMS AND LAWYERS' REASONINGS 339 (1964).
3. O. HOLMES, THE COMMON LAW 371 (1881).
4. Gifford v. Willeby, Y.B. 21 & 22 Edw. 1, f. 136 (Rolls ed. 1293).
5. Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute*, 30 CORNELL L.Q. 1, 3 (1944) (hereinafter cited as Sims).
6. *See, e.g.*, H. TIFFANY, REAL PROPERTY § 861, n.73 (3d ed. 1939) (hereinafter cited as TIFFANY).
7. BROOKE'S ABRIDGMENT, COVENANT 32 (1573).

the position of his predecessor in title. The running of covenants is a departure from the basic concept of contract law which precludes the devolution of contractual obligations without consent to the assumption of the obligation.[8]

In 1848 Lord Cottenham was faced with the problem, in *Tulk v. Moxhay*,[9] of whether a covenant could run in equity which was not of the kind that could run at common law. In that case the owner of land in Leicester Square conveyed the land subject to an agreement by the grantee to keep the park open for the use of tenants of adjoining property of the grantor. The purchaser was also to keep the park orderly and to maintain the fences. The deed to the defendant, who acquired the park through mesne conveyances, did not contain any similar covenants, but the defendant knew of the agreement. The original vendor then sought an injunction to restrain the defendant from violating the covenants in the prior deed. Negative easements were limited in English law to light, air, support and the flow of artificial streams.[10] Frequent expressions of judicial opinion had closed the category of incidents which could be attached to real property in the form of affirmative easements,[11] and a right to roam at will, such as was reserved for the grantor's tenants who lived in the neighborhood of the park, was not sufficiently definite to fall within the traditional classification of an easement.[12] In 1848 the question of whether the burden of restrictive covenants could run had not been definitely decided. Early cases had assumed that they could run,[13] but this doctrine had been repeatedly disapproved in dicta,[14] although it was not until nearly forty years after *Tulk v. Moxhay* that there was an actual decision that, except in the case of leases, the burden could not run.[15] According to accepted

8. 2 AMERICAN LAW OF PROPERTY § 9.26 (A.J. Casner ed. 1952); C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 113 (2d ed. 1947) (hereinafter cited as CLARK); O. HOLMES, THE COMMON LAW 340-41 (1881).

9. 40 Eng. Rep. 1143 (Ch. 1848). The same problem had arisen a few years earlier in Whatman v. Gibson, 59 Eng. Rep. 333 (Ch. 1838), and had been decided the same way.

10. 2 AMERICAN LAW OF PROPERTY § 9.24 (A.J. Casner ed. 1952).

11. *See* Conard, An Analysis of Licenses in Land, 42 COLUM. L. REV. 809, 826 (1942); Conard, *Easement Novelties*, 30 CALIF. L. REV. 124, 126 (1941).

12. *See In re* Ellenborough Park, [1956] 1 Ch. 131.

13. *See* CLARK, *supra* note 8, at 103-07.

14. See the authorities cited in C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND," INCLUDING LICENSES, EASEMENTS, PROFITS, EQUITABLE RESTRICTIONS AND RENTS 112, 146, 158 (1929); CLARK, *supra* note 8, at 231 n.62; 4 J. POMEROY, EQUITY JURISPRUDENCE § 1295 (5th ed. 1941); Clark, *The Doctrine of Privity of Estate in Connection with Real Covenants*, 32 YALE L.J. 123, 140 (1922).

15. Austerberry v. Oldham, 29 Ch. D. 750 (C.A. 1885). *See* TIFFANY, *supra* note 6, § 7.75; Sims, *supra* note 5, at 28.

doctrine the prohibition of the running of burdens would bar relief. Lord Cottenham, trained in the Blackstonean tradition that the common law was a closed system,[16] relied on the power of equity to provide for situations not covered by the rules of common law and granted an injunction, on the circular reasoning that a purchaser who knew of a restriction when he purchased the property would be unjustly enriched if he could resell it free from the restriction imposed in the prior conveyance. This would depend, of course, as Stone has pointed out, on whether the putative restriction had entered into the calculation of the price paid for the property.[17] In effect what Lord Cottenham did was correct the injustice of permitting a purchaser who had known of a restriction to ignore it. The decision has been interpreted in the United States, with what may have been unnecessary formalism with regard to the distinction between law and equity, as having created a new category of restrictions, those which are enforceable in equity even in the absence of a community of property interests between the parties to the covenant. This separation of restrictive covenants into two categories has led to considerable uncertainty in their enforcement. The uncertainty is due to three factors: the use of the concept of privity in different senses; the dual effect of restrictive covenants in creating a personal liability in contract and a property interest in the land which is affected by the restriction; and, perhaps the most important reason for the uncertainty which surrounds this area of property law, the introduction of a new category of restrictions which, although created by persons who had no mutual interest in the affected land and between whom there was for that reason no privity of estate, bind the land in the ownership of persons who were not parties to the original agreement. The law has not succeeded in integrating the new doctrine into existing legal institutions. There are not in reality two categories of restrictions; there are only restrictions, carrying somewhat different jural consequences depending on whether the restriction was created orally or in writing, and, occasionally, on the relationship of the parties to the affected property. The more fundamental differences in the consequences result from a misconception of the nature and purpose of the concept of privity of estate. The overall problem may be divided for purposes of analysis into problems of creation and enforcement.

16. *See* Ames, *The Origin of Uses and Trusts*, 21 HARV. L. REV. 261, 270 (1908).

17. Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 18 COLUM. L. REV. 291, 299 (1918).

I. Problems Connected with the Creation of Restrictions

A. Privity

(1) The English Treatment of Privity

In England it is well settled that the requirement of a mutual, continuing property interest other than that created by the covenant itself, to enable the burden of the restriction to run, is dispensed with in equity.[18] At law the burden of a covenant does not run except in the relationship of lessor and lessee.[19] The question of privity of estate is therefore irrelevant in actions for damages, since even if privity resulting from an easement or a reversionary interest other than that arising out of the lessor and lessee relationship were present, the burden could not run. The injustice of permitting a person who purchased property with knowledge of a restriction to ignore the rights of the property owner who was entitled to the benefit, led the English Court of Chancery to enforce the restriction by injunction, a form of remedy peculiar to that court. In equity, negative restrictions, in which the burden runs, create a property interest running not with an estate in the land but with the servient land itself, and the question of privity does not arise.[20] The equitable doctrine of the running of the burden has not been applied, in actions for damages, even since the abolition the Court of Chancery. The difference in the treatment of covenants at law and in equity was probably inevitable when law and equity were administered in separate courts. Since the abolition of separate courts of equity the disparity of treatment of covenants at law and in equity is no longer necessary, but is perpetuated by the weight of history.

(2) The American Doctrine of Privity

Since restrictions on the use of land are created by contract and the obligations of a contract cannot be assigned without consent to the assumption of the obligation, justification for the enforcement of the obligation against subsequent acquirers of the land had to be supplied from some source other than contract law. The justification has been found in the law of property, in which easements or other property in-

18. Morland v. Cook, L.R. 6 Eq. 252 (Ch. 1868); Coles v. Sims, 43 Eng. Rep. 768 (Ch. 1854); Tulk v. Moxhay, 40 Eng. Rep. 1143 (Ch. 1848); Whatman v. Gibson, 59 Eng. Rep. 333 (Ch. 1838); G. CHESHIRE, THE MODERN LAW OF REAL PROPERTY 550 (10th ed. 1967) [hereinafter cited as CHESHIRE].

19. Rogers v. Hosegood, [1900] 2 Ch. 388, 395 (privity by deed rejected). *See generally* CHESHIRE, *supra* note 18, at 536.

20. *See* Ellison v. Reacher, [1908] 2 Ch. 374, 385; CHESHIRE, *supra* note 18, at 550.

terests, although of an incorporeal nature, constitute rights in rem in favor of the owner of the interest. The requirement of privity of estate thus provides doctrinal support for the running of the burden of restrictions.[21] From a utilitarian point of view the requirement provides a control over the random accumulation of encumbrances which would be of no lasting social utility. In former times the usual purpose of restrictive covenants was to protect a residence to be retained in the family of the grantor. In modern land use planning, the purpose of restrictions is to protect communities of purchasers in developments affecting many people. The modern restrictions enhance, rather than impair, the alienability of land, and the need for such controls over the proliferation of restrictions has disappeared.

Tiffany has pointed out that although judicial statements are to be found expressing the view that new types of easements will not be recognized, courts "have quite freely allowed incidents of a novel kind to be attached to property in the form of easements, as they have of covenants."[22] It was therefore unnecessary, as Sims noted,[23] for American courts to establish a new category of restrictions which can be enforced only in the exclusive equitable jurisdiction. Restrictions which are not enforceable as covenants running with the land at law have been classified, however, as equitable servitudes; the distinction turning on whether they were created orally or in writing, and on whether or not privity was present. In suits for injunctions, courts have found no need for a doctrinal justification for the enforcement of the restriction against a subsequent owner who had not been a party to the agreement by which the restriction was created. If a doctrinal explanation of the succession of liability were needed to support the running of the restriction at law, it could be readily supplied by recognizing the covenant itself, as the English have done, as a property interest. This is the view of the nature of such restrictions favored by many authorities,[24] rendering superfluous any other form of privity of estate.

For either rights or obligations of any contract to run in favor of or against persons who were not parties to the contract, there must of course be privity in the sense of succession to the interest of the promisor or the promisee, as the case may be.[25] To provide a means for support-

21. 2 AMERICAN LAW OF PROPERTY § 9.26 (A.J. Casner ed. 1952), R. POUND, THE SPIRIT OF THE COMMON LAW 23 (1921); Clark, *Privity of Estate*, 32 YALE L.J. 123, 133 (1922).

22. TIFFANY, *supra* note 6, § 775.

23. Sims, *supra* note 5, at 19.

24. See note 102 *infra*.

25. O. HOLMES, THE COMMON LAW 403-04 (1881). The devolution of the

ing the running of the obligation in covenants restricting the use of land, privity of another kind, called privity of estate, has been required.[26] In Massachusetts this kind of privity has to be supported by the presence of a continuing mutual interest, on the analogy of tenurial privity, similar to the English doctrine which confines the running of the burden at law to the relationship of lessor and lessee.[27] In the United States the term privity of estate has been used in some states in still a third sense, that of succession in interest, not between the covenantee and his successors in interest or between the covenantor and his successors in interest, but between the covenantee and the covenantor, a succession created by the conveyance of the property to which the burden is to attach, or which is to benefit from a burden on property retained by the grantor. In England until 1290, the date of Quia Emptores, a feoffment created tenurial privity between the feoffor and the feoffee, even in the case of feoffments in fee simple absolute. Since that date a conveyance of a fee has not created any continuing interest which might constitute a tie between the properties and enable a restrictive covenant to run with the land. Privity supposedly created by a conveyance constitutes moreover no control over the proliferation of restrictions, since this is the way in which such restrictions are normally established. This third conception of privity confuses the reasons for requiring succession of estate between the covenantee and his assigns and between the covenantor and his assigns, on the one hand, and a continuing relationship between the covenantee and the covenantor and their respective assigns, on the other. Transfer by deed establishes the necessary connection between the covenantee and the plaintiff, and the covenantor and the defendant, on each side of the covenant, by treating the subsequent conveyance of the benefited land as an assignment, and of the burdened land as an assumption, of the respective rights and obligations; but it provides no privity in the sense of a continuing relationship between the covenantee and the covenantor or their respective assigns. The doctrine of privity by deed is merely an empty shell without significance in providing a doctrinal explanation of the succession of lia-

---

burden of the covenant requires a succession to the covenantor's interest in the land. CLARK, *supra* note 8, at 115.

26. 2 AMERICAN LAW OF PROPERTY 409 (A.J. Casner ed. 1952); R. POUND, THE SPIRIT OF THE COMMON LAW 23 (1921).

27. Norcross v. James, 140 Mass. 188, 2 N.E. 946 (1885); Morse v. Aldrich, 36 Mass. (19 Pick.) 449 (1837); *see* Bronson v. Brown, 108 Mass. 175 (1871), where a covenant to maintain a fence was held to operate as an easement to which a covenant may attach. It seems probable that the Massachusetts requirement will be followed in Rhode Island. *See* Middletown v. Newport Hosp., 16 R.I. 319, 15 A. 800 (1888).

bility. In the United States privity by deed, sometimes called instantaneous privity,[28] is deemed sufficient, in a few jurisdictions where privity of estate is required, to support an action for damages.[29] Despite occasional judicial affirmation of the doctrine and some uncritical acceptance by textwriters,[30] it does not represent the actual state of the law.[31]

Neither the doctrinal nor utilitarian purpose of the requirement of privity of estate depends on the *relation* between the parties, the approach which some courts have taken in requiring that the restrictions, to run with the land at law, must be created (in the absence of a reversion, an easement or the relationship of lessor and lessee) by a deed conveying the property. Privity depends on the nature of the agreement and the relation of the agreement to the land. It is what the covenant contains, not the way it has been created, or the way it is to be enforced, whether in damages or by injunction, which is significant from either the doctrinal or the utilitarian point of view. This is true of agreements between landowners as well as when an easement or a reversionary interest is present, or when the covenant is contained in a deed transferring title.

The Restatement of Property establishes different criteria of privity depending on whether the burden or the benefit is intended to run. Section 534 requires, for a promise to bind successor owners, an easement held by one party in the land of the other, or that the promise must be part of a transfer of an interest in the land which is benefited or burdened; that is, the running of the burden requires one of these two kinds of privity. In the running of the benefit the Restatement dispenses, in section 548, with both tests; neither kind of privity is required. Section 542 of the Restatement provides that only succession to the ownership of the land of the person initially entitled to the benefit is necessary to support the running of the benefit. In addition, section 537 requires that, for the burden to run, it must bear a reasonable relation to the benefit. This latter requirement has been criticized on the ground that the fact may not be determined until long after the covenant was made, that the test is indefinite, and that it is wholly without authority save for occasional dicta.[32]

28. The term "instantaneous privity" is used in 2 AMERICAN LAW OF PROPERTY 368 (A.J. Casner ed. 1952).

29. See cases cited note 46 *infra*.

30. *See, e.g.*, Reno, *Equitable Servitudes in Land*, 28 VA. L. REV. 968, nn. 74-77 (1942); Sims, *supra* note 5.

31. TIFFANY, *supra* note 6, § 389. The authorities are equally divided. See notes 44-50 *infra*.

32. CLARK, *supra* note 8, at 220.

A possible explanation of the importance attributed to the incorporation of the restriction in a deed transferring title is that this is almost always the way the agreement is made. The acceptance of a deed containing the covenant is equivalent to an express agreement on the part of the grantee to perform.[33] Without the deed there would be no agreement. Another reason, expressed in a New Hampshire case,[34] is the analogy to covenants of title. The New Hampshire court quoted Judge Denio, in *Van Rensselaer v. Hayes*, who had said that "there is a certain privity between the grantor and grantee of the land . . . the same sort of privity which enables the grantee of a purchaser to maintain an action upon the covenants of title."[35] The analogy is imperfect, however, because the running of the covenant of title is supported on the ground that otherwise, as Kent has pointed out,[36] the covenantor would never be subjected to substantial damages if the covenantee sold the property before his possession had been disturbed by the holder of a paramount title, and a subsequent owner who suffered harm by the breach of the covenant could never recover damages against the covenantor. These reasons have no applicability to restrictions on the use of land because such restrictions are enforceable by injunctive relief. Moreover, covenants of title are necessarily in deeds. The deed is significant in either situation only because it contains the covenant.

The origin of the doctrine of privity by deed has been described by Judge Clark as of "dubious historicity."[37] He cites cases from the Year Books in which the benefits ran at law without a grant between the parties.[38] There is no mention of the requirement of privity in *Spencer's Case*,[39] generally regarded as the fountainhead of the doctrine. The annotation of that case in *Smith's Leading Cases*, which states that there must be a deed to establish the relationship of privity, in the absence of tenurial privity, between the covenantor and the covenantee, cites as the earliest authority *Webb v. Russell*,[40] a case decided two hundred years

33. Fort Dodge, D.M. & S. Ry. v. American Community Stores Corp., 256 Iowa 1344, 131 N.W.2d 515 (1964); Sexauer v. Wilson, 136 Iowa 357, 364, 113 N.W. 941, 944 (1907); Burbank v. Pillsbury, 48 N.H. 475 (1869); TIFFANY, *supra* note 6, § 848.

34. Burbank v. Pillsbury, 48 N.H. 475, 479 (1869).

35. 19 N.Y. 68, 91 (1859).

36. 4 J. KENT, COMMENTARIES ON AMERICAN LAW 472 (14th ed. 1896).

37. *See* 165 Broadway Bldg., Inc. v. City Inv. Co., 120 F.2d 813, 816 (2d Cir. 1951); CLARK, *supra* note 8, at 115-21; *see* O. HOLMES, THE COMMON LAW 404 (1881). Pound regards the requirement of privity by deed as an American innovation. R. POUND, THE SPIRIT OF THE COMMON LAW 23 (1921). The earliest American use of the concept is in Dunbar v. Juniper, 2 Yeates 74 (Pa. 1796).

38. *See* CLARK, *supra* note 8, at 121 n.85, 124 n.96.

39. 77 Eng. Rep. 72 (Q.B. 1583).

40. 100 Eng. Rep. 639 (K.B. 1789).

after *Spencer's Case*. In *Webb v. Russell* privity was lacking because the covenantee had no title to the benefited land for the reason that he was, as the court pointed out, a mortgagor with only an equitable interest in the land. The statement of the court was therefore pure dicta. There was moreover no supporting authority for the statement.

The assumption by some textwriters that a coveyance of land to be burdened by a restrictive covenant satisfies the requirement of privity necessary to enable the covenant to run at law rests on tenuous authority. In several states decisions upholding the running of covenants merely refer to the fact that the restriction was in a deed of conveyance.[41] Sometimes the decisions in which such references appear are based on the presence of an easement,[42] or on the presence of both an easement and a deed containing the restriction.[43] Where there is an easement, the statement regarding the necessity of a deed is of course pure dicta. Even in the absence of an easement, it is one thing to assume that privity by deed is required, and quite another thing to deny relief because of the absence of privity. Only in the latter situation would the absence of privity by deed be the reason for the decision. In suits for equitable

41. In seven states—Georgia, Iowa, Kansas, Michigan, New Hampshire, North Carolina, Wisconsin—there are dicta in cases in which the restrictions appeared solely in deeds. Reidsville & S.E.R.R. v. Baxter, 13 Ga. App. 357, 79 S.E. 187 (1913); Sexauer v. Wilson, 136 Iowa 357, 113 N.W. 941 (1907); City of Iola v. Lyle, 164 Kan. 53, 187 P.2d 378 (1948); Mueller v. Banker Trust Co., 262 Mich. 54, 247 N.W. 103 (1933); Burbank v. Pillsbury, 48 N.H. 475 (1869); Herring v. Wallace Lumber Co., 163 N.C. 481, 79 S.E. 876 (1916); Woolscroft v. Norton, 15 Wis. 217 (1862). The significance of the dictum in Burbank v. Pillsbury, *supra*, is weakened by the subsequent decision in that state of Pratte v. Balatos, 99 N.H. 430, 113 A.2d 492 (1959), which applied the doctrine of running covenants to chattels, where neither transfer by deed nor an easement can be involved.

42. In four states—Georgia, Kansas, Nebraska and Pennsylvania—there are dicta in decisions which are based on the presence of an easement: A.K. Ry. v. McKinney, 124 Ga. 929, 53 S.E. 701 (1906); Southworth v. Perring, 71 Kan. 755, 82 P. 785 (1905); Nebraska Loyal Mystic Legion v. Jones, 73 Neb. 342, 102 N.W. 621 (1905); Bald Eagle R.R. v. Nittany Valley R.R., 17 Pa. St. 284, 33 A. 239 (1895). But note the weak effect of the dicta in view of the prior decision in Horn v. Miller, 136 Pa. St. 640, 20 A. 706 (1890), dispensing with privity.

43. In three states—Georgia, Indiana and Wisconsin—there are dicta in cases in which there was both a deed and an easement. Georgia S. R.R. v. Reeves, 64 Ga. 492 (1880); Hazlett v. Sinclair, 76 Ind. 488 (1881); Crawford v. Witherbee, 77 Wis. 419, 46 N.W. 545 (1899).

In Smith v. Kelley, 56 Me. 64 (1868), the dictum appears in a case in which the covenant was construed as personal.

Dicta of current significance requiring privity by deed are to be found in 11 states: Iowa, Kansas, Michigan, Oklahoma, Georgia, North Carolina, Wisconsin, Tennessee, Nebraska, Indiana and Maine. In these states there have been no holdings on the question of whether privity by deed will provide the basis for the running of the covenant at law.

enforcement the requirement of privity has been discarded in 12 states—Alabama, Idaho, Indiana, Michigan, New Jersey, New York, Maryland, Missouri, Oregon, Rhode Island, Washington and, by statute, in California.[44] No case has been found in which equitable enforcement has been denied because of the absence of privity. In actions for damages the requirement of privity has been eliminated in six states—in Illinois, New York and Pennsylvania by judicial decision, in Minnesota and New Mexico by strong dicta, and in California by judicial interpretation of a statute.[45] In seven states—Missouri, Nevada, Oregon, Rhode Island, Texas, West Virginia and Wyoming—the requirement of privity has been retained in actions for damages[46] in actual holdings or, in Nevada, by explicit dicta. In all seven states except Rhode Island the requirement of privity has been found to be satisfied by a conveyance. The Supreme Court of Rhode Island, which accepts the requirement of privity in actions for damages, rejects the doctrine of privity by deed.[47] The requirement of privity has been eliminated both at law and in equity in New York[48] and California.[49] In Missouri, Oregon and

44. Jabeles & Colias Confectionary Co. v. Brown, 147 Ala. 593, 41 So. 626 (1906); Wayt v. Patee, 205 Cal. 46, 269 P. 660 (1928) (pursuant to CAL. CIV. CODE § 1486); Twin Lakes Improvement Ass'n v. East Greenacres Irrigation Dist., 90 Ida. 281, 409 P.2d 390 (1965); Haslett v. Sinclair, 76 Ind. 488 (1881); Meade v. Dennistone, 173 Md. 295, 196 A. 330 (1912); Ericksen v. Tapert, 172 Mich. 457, 138 N.W. 330 (1912); Sharp v. Cheatham, 88 Mo. 498 (1885); Brewer v. Marshall, 19 N.J. Eq. 537 (1868) (Beasley, C.J.); Trustees of Columbia College v. Lynch, 70 N.Y. 440 (1877); Fitzstephens v. Watson, 344 P.2d 221 (Ore. 1959); Town of Middletown v. Newport Hosp., 16 R.I. 319, 15 A. 800 (1888); Pioneer Sand & Gravel Co. v. Seattle Constr. Co., 102 Wash. 608, 173 P. 508 (1918).

45. Miller & Lux, Inc. v. San Joaquin Agricultural Co., 58 Cal. App. 753, 209 P. 592 (1922) (by statute); Roche v. Ullman, 104 Ill. 11 (1882); Shaber v. St. Paul Water Co., 30 Minn. 179, 183, 14 N.W. 874, 875 (1883) (explicit dicta as to the running of the burden); Pillsbury v. Morris, 54 Minn. 492, 56 N.W. 170 (1893); Bolles v. Pecos Irrigation Co., 23 N.M. 32, 38, 167 P. 280, 283 (1917) (strong dictum); Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938); Trustees of Columbia College v. Thatcher, 87 N.Y. 311, 319 (1882) (dictum); Horn v. Miller, 136 Pa. St. 640, 20 A.2d 706 (1890).

46. Sharp v. Cheatham, 88 Mo. 498 (1885); Wheeler v. Schad, 7 Nev. 204 (1871); Fitzstephens v. Watson, 218 Ore. 185, 344 P.2d 221 (1959); Town of Middletown v. Newport Hosp., 16 R.I. 319, 15 A. 800 (1888); Panhandle & S.F. Ry. v. Wiggins, 161 S.W.2d 501 (Tex. Civ. App. 1942); Hanxthal v. St. Lawrence Boom & Mfg. Co., 53 W. Va. 87, 44 S.E. 520 (1903); Lingle Water Users Co. v. Occidental Bldg. & Loan Ass'n, 43 Wyo. 41, 297 P. 385 (1931).

47. Town of Middletown v. Newport Hosp., 16 R.I. 319, 327, 15 A. 800, 803 (1888)

48. Trustees of Columbia College v. Thatcher, 87 N.Y. 311 (1882) (privity eliminated in equity); Trustees of Columbia College v. Lynch, 70 N.Y. 440 (1877) (privity eliminated at law).

49. Miller & Lux Inc. v. San Joaquin Agricultural Co., 58 Cal. App. 753, 209 P.

Rhode Island privity is dispensed with in equity but is required at law.[50] In Massachusetts mutual and continuing privity in the form of an easement or other property interest beside that created by the covenant itself is required.[51] Privity of estate has thus been dispensed with in actions for damages in six states. In seven states privity of estate is required in such actions. Six states have found privity in the act of conveyance of property by a deed in which the restriction was incorporated. Authority is unanimous in eliminating the requirement of privity in equity. In actions at law the authorities are about equally divided, and too sparse to provide any controlling weight of authority.

3. Privity at Law and in Equity

Is there a distinction as to the requirement of privity at law and in equity? That privity is required at law and not in equity has been assumed by many authorities.[52] The discarding of the requirement of privity in suits for equitable relief has been explained on precisely opposite grounds. Stone explains the distinction on the ground that the rule dispensing with privity rests on the doctrine of protection of the restriction in equity as a contractual right.[53] Reno explains the distinction on the ground that the covenant itself is recognized in equity as a property interest and establishes a mutual and continuing interest in the burdened property which makes other privity unnecessary in suits for equitable relief.[54] Pomeroy has a still different explanation of the distinction: that equity enforces the promise when the common law for any technical reason does not.[55] The same explanation has been advanced by Jessel, M.R.,[56] in two decisions. The problem of whether privity is a prerequisite to enforcement of a restrictive covenant is not, however, a technicality, such as, for example, the form in which the covenant is ex-

592 (1922) (privity eliminated at law); Wayt v. Patee, 205 Cal. 46, 269 P. 660 (1928) (privity eliminated in equity).

50. Sharp v. Cheatham, 88 Mo. 498 (1885); Fitzstephens v. Watson, 218 Ore. 185, 344 P.2d 221 (1959); Town of Middletown v. Newport Hosp., 16 R.I. 319, 15 A. 800 (1888).

51. See text accompanying note 27 *supra*.

52. 4 J. POMEROY, EQUITY JURISPRUDENCE § 1295 (5th ed. 1941); Ames, *Specific Performance For and Against Strangers of a Contract*, 17 HARV. L. REV. 174, 177 (1904); Reno, *Equitable Servitudes In Land: Part I*, 28 VA. L. REV. 951, 972-73 nn. 74-77 (1942); Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 18 COLUM. L. REV. 291, 297 (1918).

53. Stone, *supra* note 52, at 306.

54. Reno, *supra* note 52, at 976, *see* 2 AMERICAN LAW OF PROPERTY § 9.26 (A.J. Casner ed. 1952); Pound, *The Progress of the Law, 1918-1919, Equity*, 33 HARV. L. REV. 813, 814 (1920).

55. POMEROY, *supra* note 52, §§ 689, 1295, 1342.

56. *See* London & S.W. Ry. v. Gomm, L.R. 20 Ch. D. 562, 582-83 (1880).

pressed, a circumstance which equity might disregard. It is a question of substantive policy, turning on the relative weight to be attributed to the effect of the restriction as aiding the development of land, and its effect on impairing alienability. If informally created restrictions were to be recognized only in equity, they could be enforced in the absence of proof of damage, in the exclusive equitable jurisdiction.[57] If a covenant which runs with the land at law were to be enforced specifically, this could be only on the ground that damages would not constitute an adequate remedy. In the one case the absence of a legal remedy would be irrelevant. In the other, this circumstance would be the crucial factor in determining the right to equitable relief. This anomalous result is a typical illustration of what we have tried to eliminate by abolishing the separate court of equity. The same agreement should no longer create two kinds of obligations, depending on the form of the agreement; one obligation which binds the defendant to pay damages, the other only to abstain from the proscribed use of the land. In the United States it is only in Missouri, Oregon and Rhode Island that a distinction has been explicitly drawn between enforcement at law and in equity with respect to privity. Since privity by deed is not privity in reality, because the grantor and the grantee cannot both be the owners of the land at the same time,[58] even at the moment of delivery of the deed, it is unlikely that the requirement of privity by deed will be adopted in the uncommitted states. It remains to be seen whether in Alabama, Maryland, Michigan, New Jersey and Washington, states in which privity by deed has been dispensed with thus far only in equity, the requirement will be retained in actions for damages. Except in Oregon, no state has recognized the requirement of privity by deed within the past 27 years.

Owners of different parcels of land can create easements by agreement, but restrictions on the use of land are not included in this category of property interests. In agreements between landowners restricting the use of property the burden and benefit are placed on their respective properties, just as in easements, but these interests are differently classified. The law should attach no different results to restrictions which do not fall within the traditional category of easements. The difference between easements, which run with the land, and restrictions on the use of land, is so thin as to be purely arbitrary. Sometimes the factual situations overlap.[59] If a right of way or a party wall constitutes the neces-

57. POMEROY, *supra* note 52, § 1342.

58. Lord Brougham said in Keppell v. Bailey, 39 Eng. Rep. 1042, 1048 (Ch. 1834), that there is no privity of estate in a transfer by deed.

59. Covenants were held to constitute property interests in the nature of ease-

sary connection to enable the interests to run, then any useful restriction, for example one to confine construction to private homes, should be given the same effect. Restrictions created by agreement between landowners give rise to mutual interests in the burdened property, and should run with the land just as do restrictions which fall into the category of easements of the traditional kind. This is the effect which is given in England to restrictive covenants under the formula that the covenant creates a property interest running, not with an estate in the land, but with the servient property itself.[60]

The assumption that privity by deed is dispensed with only in equity is thus no better supported by either reason or authority than the assumption that privity by deed is necessary at law. In a closely analogous situation both Lord Brougham[61] and Lord Eldon[62] have urged that no equitable charge should be allowed which would not have been a legal charge if properly created. The assumption of a difference in the treatment of privity in equity and at law reflects an outmoded duality of approach to law and equity. To say that privity is required at law but is dispensed with in equity is merely to describe the jural phenomenon, not to state a reason for the disparity based on the nature of the remedy which is sought. If it is so unfair for a subsequent acquirer, other than a bona fide purchaser, to violate the restriction, that the absence of privity will not constitute a bar to injunctive relief, it would seem to be equally unfair when the plaintiff seeks relief in damages. The moral basis of the equity doctrine is sound; but in modern times moral sensitivity is no longer considered to be an attribute possessed by a judge only when he is asked to grant an equitable remedy. There is no reason historically, logically or from the viewpoint of social utility why the restriction, if it is to run in equity, should not run under the same circumstances at law; why it must, if it is to run at law, be based on privity of estate; still less, why the running at law should rest on an assumed privity which is not privity in fact.

ments in State v. Mulloy, 332 Mo. 1107, 61 S.W.2d 741 (1933), and in Porter v. Johnson, 232 Mo. App. 1150, 115 S.W.2d 529 (Kansas City, Mo. Ct. App. 1938). In Fitzstephens v. Watson, 218 Ore. 185, 344 P.2d 221 (1959), an "easement deed" from one landowner to another from whom he had recently purchased the property was held to have created both an easement to draw water from a reservoir, and a covenant to maintain the reservoir and a pipeline for furnishing water. In Farmers High Line & Reservoir Co. v. New Hampshire Real Estate Co., 40 Colo. 467, 92 P. 290 (1907), an agreement between landowners to provide water for irrigation was held to have created an easement and a covenant.

60. CHESHIRE, *supra* note 18, at 550.

61. Keppell v. Bailey, 39 Eng. Rep. 1042, 1053 (Ch. 1834).

62. Duke of Bedford v. Trustees of British Museum, 39 Eng. Rep. 1055, 1059-62 (Ch. 1882).

B. The Relationship of the Restriction to the Land

Another type of control against the spread of restrictions required that the covenant must be closely related to the land which it affects. As to circumstances in which the benefits and burdens are permitted to run, *Spencer's Case*,[63] decided in 1583, a case involving the running of covenants in a lease, required that covenants must touch or concern the land. This indefinite formula has given rise to endless interpretation and criticism. No attempt at closer definition was made in the case, and it is open to question whether the covenant to pay rent, the principal kind of covenant contemplated by chapter 34 of 32 Henry VIII, enacted 43 years before, did not itself fail to meet the test, since such a covenant does not affect the land directly. Since the decision in *Spencer's Case*, the requirement has been greatly relaxed in both England and the United States. In England it has been sufficient since 1925 that the agreement relate to the land.[64] In the United States, Clark[65] and Powell[66] accept the test proposed by Bigelow,[67] that the promisor's legal interest as owner is rendered less valuable, or the promisee's legal interest as owner rendered more valuable, because of the promise. Section 1468 of the California Civil Code provides that for a covenant to run, it must be to do or to refrain from doing some act on the land. Covenants not to compete are held to come within all the usual tests.[68] The requirement of relationship to the land makes requirement of privity in any form unnecessary as a control.

As in applying the requirement of privity, the Restatement of Property makes a distinction, depending on whether the running of the burden or of the benefit is involved, in the required relationship of the covenant to the land. Section 537 requires, for the burden to run, that the promise must benefit the promisee in the physical use or enjoyment of the land possessed by him or that the consummation of the transaction of which the promise was a part will benefit the promisor in the physical use or enjoyment of the land he possesses. For the benefit to run, section 543 requires that the promise must be in respect to the use of the land by the promisee either by constituting an advantage in the use of his land in a physical sense, or by decreasing the commercial competition in his use of it, or by constituting a return to him of the

63. 77 Eng. Rep. 72 (K.B. 1583).
64. Law of Property Act of 1925, 15 & 16 Geo. 5, c. 20, § 78.
65. CLARK, *supra* note 8, at 93.
66. 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 675 (recomp. ed. 1968).
67. Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639 (1914).
68. National Union Bank v. Segur, 39 N.J.L. (10 Vroom) 173 (1877).

price for a use of the land by the promisor. The provision that a promise which decreases the commercial competition will suffice for the running of the benefit, a provision which does not appear in Section 537, dealing with the running of the burden, relaxes the required relationship of the covenant to the land to this extent. The requirement of section 543, comment (f), that the covenant, for the benefit to run, "must make the use more satisfactory to his physical senses" is relaxed, in the case of the running of the benefits, to include covenants which restrict competition in the use of the land.

C. The Necessity that the Restriction Affect Land

In a few states equitable servitudes in chattels attached to a business are recognized, because the chattels have acquired "the smell of the soil."[69] No jurisdiction has extended the doctrine of legal covenants to chattels, possibly because of the difficulty of determining the existence of the restrictions, since the recording acts do not apply to chattels. It is incongruous for the law to reach different results depending on the way the restriction is to be enforced. Either equity has gone too far in recognizing the running of restrictions on chattels, or the law has not gone far enough.

D. The Necessity of a Writing

The word "covenant" meant originally a written contract under seal.[70] Both deeds and agreements between landowners are covenants if the necessary formal requirements are met. With the elimination in almost all states of the requirement of a seal,[71] this leaves as the only differences in the manner of creation of covenants running with the land at law, and equitable servitudes, the need for a writing,[72] and in a few states, in the absence of a continuing privity of the tenurial kind, privity in the form of a deed. Restrictions affecting the use of land are commonly found in deeds, in both England and the United States, and equitable servitudes created otherwise than by deed are rare. The re-

69. Pratt v. Balatsos, 99 N.H. 430, 13 A.2d 492 (1955); see Chafee, *Equitable Servitudes in Chattels*, 41 HARV. L. REV. 945 (1928); Chafee, *The Music Goes Round and Round: Equitable Servitudes and Chattels*, 69 HARV. L. REV. 1250 (1956); Fratcher, *Restraints on Alienation of Legal Interests in Michigan Property: III*, 50 MICH. L. REV. 10, 17 (1952); *see also* National Phonograph Co. v. Menck, [1911] A.C. 336 (P.C.) (equitable servitude applied to patent); DeMattos v. Gibson, 45 Eng. Rep. 108 (Ch. 1859) (equitable doctrine applied to a ship).

70. TIFFANY, *supra* note 6, § 848.

71. 5 POWELL, *supra* note 66, ¶ 672.

72. TIFFANY, *supra* note 6, § 848.

quirement of a writing in the case of covenants creating or transferring interests in real property arises from the provisions of the Statute of Frauds,[73] compliance with which may be excused when enforcement of an equitable nature is sought. To establish a personal right to damages there must be in some states a conveyance, and where this is required, a deed is necessary because of the requirement of the law of property in addition to the requirement of the Statute of Frauds. The absence in other states of any requirement of privity enables restrictions to be created orally[74] or by implied agreement.[75] Servitudes can even arise from the outward appearance of a tract of land which is being developed.[76] In some jurisdictions the absence of the requirement of a writing is explained on the ground that restrictions originate in contract.[77] The provision of the Statute of Frauds requiring contracts which need not be performed within a year to be in writing[78] is not applied in some jurisdictions because the servitudes terminate with a change in the character of the neighborhood, which may happen within a year.[79] In those jurisdictions equitable restrictions need not be in writing to comply with the Statute of Frauds. Thus a servitude, although it is an interest in land, can be created otherwise than by deed because it originates in contract. The equitable enforcement of restrictions which have been created informally is possible even in states which require privity by conveyance where enforcement is sought in damages. The fact that equitable servitudes can be created informally is considered by Pound to be the distinctive feature of the doctrine, which constitutes, in his words, "an equitable appendage to the common law as to servitudes."[80] There are, however, jurisdictions which require that the restrictions must, like other interests in land, be in writing.[81]

---

73. 29 Car. 2, c. 3, § 3 (1677).

74. *See* Thornton v. Schobe, 79 Colo. 25, 243 P. 617 (1925); CLARK, *supra* note 8, at 178; TIFFANY, *supra* note 6, § 860.

75. TIFFANY, *supra* note 6, § 860 n.54; Sims, *supra* note 5, at 27-28.

76. Tallmadge v. East River Bank, 26 N.Y. 105 (1862); Pound, *The Progress of the Law, 1918-1919, Equity*, 33 HARV. L. REV. 813, 816 (1920).

77. Reno, *Equitable Servitudes in Land: Part I*, 28 VA. L. REV. 951, 966 (1942).

78. 29 Car. 2, c. 3, § 4(5) (1677).

79. *E.g.*, Isaacs v. Schmuck, 245 N.Y. 77, 156 N.E. 621 (1927); Bull v. Burton, 227 N.Y. 101, 124 N.E. 111 (1919); Amerman v. Deane, 132 N.Y. 36, 75 N.E. 961 (1904); Trustees of Columbia College v. Thatcher, 87 N.Y. 311 (1882); Trustees of Columbia College v. Lynch, 70 N.Y. 440 (1877); *see* 2 AMERICAN LAW OF PROPERTY § 9.22 (A.J. Casner ed. 1952); CLARK, *supra* note 3, at 174, 184 n.60; TIFFANY, *supra* note 6, § 875; RESTATEMENT OF PROPERTY § 564 (1944); Pound, *supra* note 76, at 819, 821.

80. Pound, *supra* note 76, at 814.

81. Stamford v. Vuono, 108 Conn. 359, 143 A. 245 (1928); Flynn v. N.Y., W. &

If one of the functions of a conveyance, which requires a deed, is to establish a relationship between the covenantor and the covenantee with respect to the land, such a relationship can be created by agreement without a deed. The problem of the creation of restrictions apart from a conveyance arises in two situations; in agreements among landowners, and in enforcement between landowners of restrictions imposed by a common grantor who has failed to incorporate the restriction in each deed. The requirement of a writing is arguable. The reason why this requirement is eliminated in equity in various situations is the extreme hardship that would result if the requirement of a writing were to be enforced, for example where there has been substantial change in position in reliance on an oral contract. In restrictions on the use of land no such hardship ordinarily exists. There is however some justification for equity to relax the requirement of a writing in comparatively infrequent situations, such as oral agreements among landowners for restrictions on the use of their land. In the far more common situation, where the restriction is incorporated in the conveyance, it will always be in a deed. It is probably because restrictions are usually found in deeds conveying interests in fee that it has been thought by American textwriters that the succession of ownership of the burdened property from the covenantee to the covenantor is sufficient to support the running of obligations in personam.[82] If the circumstances justify the enforcement of a restriction made by agreement between landowners, there is no reason why enforcement should be denied because the restriction was *not* contained in a deed conveying a fee.

II. Problems Connected with the Enforcement of Restrictions

A. Enforcement in Damages

What we mean when we say that a covenant runs at law is that there is a right to damages for breach of the covenant. In seven states it is only when privity is present that restrictions are enforceable in damages.[83] In most cases damages would be only nominal,[84] and such actions are infrequent. In six states restrictions are enforceable in damages even when they were created by agreement between landowners and no privity existed.[85] In all states where the question has

B.R.R., 218 N.Y. 140, 112 N.E. 913 (1916); Allen v. Detroit, 167 Mich. 464, 133 N.W. 317 (1911); CLARK, *supra* note 8, at 178 n.33; TIFFANY, *supra* note 6, § 858.

82. Sims, *supra* note 5, at 3 n.190.

83. See cases cited note 46 *supra*.

84. *See*, e.g., Fourth Presbyterian Church v. Steiner, 86 App. Div. (79 Hun) 314, 318, 29 N.Y.S. 488, 490 (1894).

85. See cases cited note 45 *supra*.

arisen restrictions are enforceable in equity even in the absence of privity.[86] One might speculate as to the possible effect of the absence, when the doctrine originated, of a recording system, on the establishment of a rule limiting the running of covenants to those contained in conveyances, since this limitation narrowed the title search to inquiry from former owners in the chain of title. The difference in remedy is of practical significance only in affirmative restrictions, where damages can be more readily computed. Negative restrictions, which comprise by far the largest number of restrictions, are almost invariably enforced by injunction, since the purpose of the restriction is to preserve the value of all the property in the development against impairment from any source. The personal obligation created in conveyances is limited to owners at the time of the breach.[87] It seems not unlikely that underlying the insistence in a few states that enforcement in damages is to be limited to restrictions in conveyances is the feeling that controls must be established because damages, if collectible from a remote owner at some later time, may soar to an amount which would cause extreme hardship to the current owner when the breach occurs. The problem could be handled, however, including liability resulting from a breach of an agreement between landowners, in the same way as in the computation of damages for breach of covenants of title.[88] The most anomalous feature of the theory which limits the right to enforcement in damages to cases in which the obligation was created by conveyance, is the refusal in several states to recognize that any right to damages can arise out of the tortious interference with the property right of the covenantee or his successors in interest; that is, the right in rem. Such a remedy is available if, for example, the owner of an easement is excluded from its use.[89] There is as much reason for imposing a running personal obligation in agreements between landowners as in covenants in deeds conveying title. The language of the restriction is the same in each situation, and the purpose in each situation is identical. This intention fails, however, in some states, unless it has been expressed in connection with the conveyance of a fee, so as to establish the relationship thought to be necessary to enable the personal obligation to run. The right to damages for violation of the property interest created by

86. See cases cited note 44 *supra*.

87. 5 POWELL, *supra* note 66, ¶ 680 nn.6-7; 2 AMERICAN LAW OF PROPERTY §§ 9.5, 9.18 (A.J. Casner ed. 1952); Ames, *Specific Performance For and Against Strangers to the Contract*, 17 HARV. L. REV. 174, 178 (1904).

88. *See* Hunt v. Hay, 214 N.Y. 578, 108 N.E. 851 (1915); Pitcher v. Livingston, 4 Johns. 1, 18 (N.Y. 1809) (Kent, C.J.).

89. Tide-Water Pipe Co. v. Bell, 280 Pa. 104, 124 A. 351 (1924).

the restriction has been recognized in other states in actions between landowners,[90] where there is no privity except that created by the agreement itself.

If the additional control over the proliferation of restrictions provided by the requirement of privity is desirable in order to prevent the running of the obligation to pay damages for breach of the covenant, it is equally desirable in order to prevent the running of the obligation in rem; but since almost all restrictions are created in connection with conveyances, the requirement is of no practical utility. Clark,[91] Pound[92] and Sims[93] feel that there should be enforcement in damages even in the absence of privity. In cases of interference with easements, damages are granted as a matter of course.[94] That the restriction was created otherwise than by a deed of conveyance should lead to no different result than when it was created in the course of a conveyance. It has been held in only six states, however, that damages are obtainable where the restriction was created by agreement between landowners.[95] There is also an important dictum of Lindley, L.J., indicating that such damages might be granted in an appropriate case.[96] The recognition of a right to damages would eliminate the only important difference in the consequences attaching to restrictions depending on the manner in which they were created.

1. The Necessity of Benefit Appurtenant in Enforcement in Damages

There are scattered decisions to the effect that in covenants which run with the land at law the benefit is not tied to ownership of land, and runs in gross.[97] Servitudes cannot run in gross[98] except in New York.[99] If the distinction can be rationalized, it may rest on the re-

90. See cases cited note 45 *supra*.

91. CLARK, *supra* note 8, at 116, 128.

92. *See* R. POUND, THE SPIRIT OF THE COMMON LAW 23 (1921).

93. Sims, *supra* note 5, at 33.

94. *See, e.g.*, Tide-Water Pipe Co. v. Bell, 280 Pa. 104, 124 A. 351 (1924).

95. See cases cited note 45 *supra*.

96. Hall v. Erwin, 37 Ch. D. 74, 80 (Lindley, L.J., 1887), answering argument of Warmington, Q.C.: "He has not used the property in violation of the covenant." *Id.* at 77.

97. Bald Eagle Valley R.R. v. Nittany Valley R.R., 171 Pa. St. 284, 33 A. 239 (1895).

98. In equity the plaintiff must own land in the neighborhood. Los Angeles University v. Swarth, 107 F. 798 (9th Cir. 1901); Forman v. Safe Deposit & Trust Co., 114 Md. 574, 80 A. 298 (1911); Formby v. Barker, [1903] 2 Ch. 539 (alternative holding); *see* RESTATEMENT OF PROPERTY § 550, comment *c* at 3275-76 (1944). *Contra*, Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913), *criticised in* 9 ILL. L. REV. 58 (1916); TIFFANY, *supra* note 6, § 864, at 495.

99. Lewis v. Gollner, 129 N.Y. 227, 29 N.E. 81 (1891).

luctance of equity to enforce agreements if no useful purpose will be served; that is, only where the benefit accrues to the plaintiff by reason of his ownership of benefited land.

B. Specific Enforcement

When the remedy of enforcement in damages is inadequate, restrictions which run with the land at law are enforceable by injunction to restrain their violation. When there is no personal obligation, the absence of damage is immaterial. In jurisdictions in which restrictions are not enforceable in damages because of the absence of privity of estate, they are enforceable only by injunction or by a decree for specific performance. The distinction has been attributed to a different approach to the nature of the restriction at law and in equity. If enforcement between remote parties rests on contract principles, the right to damages arises. If it rests on ownership of a property interest, there is no right to damages for breach of contract, the obligation of which might attach to the owner of the burdened property; there is only a property interest,[100] protected against violation in equity, but which gives no right of a contractual nature to damages. It will be seen that this explanation of the distinction rests on a theory of the nature of the restriction exactly the opposite of the theory which supports the running of the burdens in equity without other form of privity.[101] Distinguished scholars have reached opposite conclusions as to whether restrictions on the use of land rest on contract or on interests in property.[102] Stone, who favors the contractual explanation, has said that "[a]ll so-called equitable 'easements' or 'servitudes' have their origin in contract, expressed or implied, and their nature and extent depends upon the extent to which equity will compel compliance with the contract . . . by and for third persons whose acts or omissions may in some way affect the rights

100. 2 AMERICAN LAW OF PROPERTY § 9.26 (A.J. Casner ed. 1952); *see* Reno, *Equitable Servitudes In Land: Part I*, 28 VA. L. REV. 951, 976 (1942).

101. See text accompanying note 54 *supra*.

102. The following authorities favor the contract theory: TIFFANY, *supra* note 6, § 861; Ames, *Specific Performance For and Against Strangers to the Contract*, 17 HARV. L. REV. 174, 177-79 (1908); Stone, *The Equitable Rights and Liabilities to Strangers to a Contract*, 18 COLUM. L. REV. 291, 294-96 (1918).

The following authorities favor the property interest theory: CLARK, *supra* note 8, at 173; G. CLARK, EQUITY § 96 (1924); Burby, *Land Burdens in California: Equitable Land Burdens*, 10 S. CAL. L. REV. 281, 286-87 (1937); Clark, *Equitable Servitudes*, 16 MICH. L. REV. 90, 92-93 (1917); Pound, *The Progress of the Law, 1918-1919, Equity*, 33 HARV. L. REV. 813 (1920); Walsh, *Equitable Easements and Restrictions*, 2 ROCKY MT. L. REV. 234 (1930). Powell feels the contract theory is no longer adequate. POWELL, *supra* note 66, ¶ 671.

acquired by the covenant or contract creating the servitude."[103] Ames, who also adopts the contractual explanation, states that the equitable relief is concurrent with the legal remedy in covenants that run at law. In agreements, whether under seal or by parol, enforceable at law only between the immediate parties, the jurisdiction of equity in favor of or against third parties is exclusive.[104] Clark, although he favors the real property explanation, has pointed out that an action for damages will lie, if specific performance is not possible, against subsequent acquirers, under the contract theory, although not under the property interest theory.[105] We may conclude from these statements that the term "equitable servitude," whether regarded as an outgrowth of contract or as a property interest, is a symbolic expression of the obligation to honor a restriction on the use of land, however created, by a decree for specific enforcement, as in cases of interference with easements. The question has never been answered satisfactorily, or even raised except by Judge Clark,[106] why the reasons for granting equitable relief in the enforcement of restrictions created by agreement between landowners are not equally relevant with regard to granting relief in damages, or why the reasons for granting relief in damages in the enforcement of restrictions created by deeds conveying the property are not equally relevant in the enforcement of restrictions created by agreement between landowners.

III. Similarities in the Principles Governing the Enforcement of Covenants Running with the Land and Equitable Servitudes

A. Running of the Burden

Under conditions deemed appropriate in each state, the burden of a restrictive covenant runs both at law and in equity.[107] In the United States the great weight of authority enforces affirmative obligations.[108] There is a sharp division of authority between England and the United States on the question of whether a distinction should be drawn in the

103. Stone, *supra* note 102, at 294-95.

104. Ames, *supra* note 102, at 177.

105. *See* CLARK, *supra* note 8, at 172.

106. *Id.* at 209-10.

107. *See* TIFFANY, *supra* note 6, § 859 n.46. Sims reports that up to 1944 there was no distinction in the United States in the running of the benefits and burdens in equitable restrictions or legal covenants in 28 states. Only New Jersey, New York, Virginia and West Virginia held that the burdens could not run in covenants created by deed, or where an easement existed. Sims, *supra* note 5, at 27.

108. TIFFANY, *supra* note 6, § 859 n.46. *See generally* POWELL, *supra* note 66, ¶ 676-77.

running of the benefits and burdens, or as to the circumstances under which the benefits and burdens, respectively, may run. In England only benefits run at law except in the relationship of landlord and tenant,[109] although the burden of a negative covenant is enforced in equity against subsequent acquirers other than bona fide purchasers.[110] In New York the former doctrine that only negative restrictions run with the land either at law or in equity has been so qualified as to have become almost obsolete.[111]

B. The Effect of Notice

At common law the absence of notice does not relieve subsequent acquirers from liability in damages where the restriction has been created in such form that the burden of the restrictions runs with the land at law.[112] When the suit is for specific relief, in the case of either covenants running with the land, or equitable servitudes, subsequent bona fide purchasers will take free from restrictions of which they had no knowledge; but it is impossible to see why the result should not be the same with regard to liability in damages. Agreements between neighboring landowners or unilateral declarations of restrictions must in most states be recorded, as instruments relating to or affecting the title to real property,[113] and their record therefore gives notice to subsequent grantees of the burdened property. Restrictive agreements, whether created informally or formally, are recordable if they are in writing, as almost all of them are. The effect of the recording acts is to give notice to later acquirers of the burdened property if the instrument is recorded, and in states where the search must extend to deeds from the common

---

109. CHESHIRE, *supra* note 18, at 534-37.

110. Tulk v. Moxhay, 41 Eng. Rep. 1143 (Ch. 1848). In England only negative restrictions run. Haywood v. Brunswick Permanent Bldg. Soc'y, 8 Q.B.D. 403 (1881).

111. Miller v. Clary, 210 N.Y. 127, 103 N.E. 1114 (1913), where the court held that affirmative covenants will not be enforced; this has been drastically modified by later decisions. Nicholson v. 300 Broadway Realty Corp., 7 N.Y.2d 240, 164 N.E.2d 832, 196 N.Y.S.2d 945 (1959); Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938).

New York has explicitly recognized many exceptions to the general rule laid down in *Miller v. Clary, supra*. *E.g.*, Morgan Lake Co. v. New York, N.H. & H. Ry., 262 N.Y. 234, 186 N.E. 685 (1938); Morehouse v. Woodruff, 218 N.Y. 494, 113 N.E. 512 (1916).

112. TIFFANY, *supra* note 6, § 850; Abbott, *Covenants in a Lease Which Run with the Land*, 31 YALE L.J. 127, 131 (1921).

113. Bogan v. Saunders, 71 F. Supp. 587 (D.D.C. 1947); Wayt v. Patee, 205 Cal. 46, 269 P. 660 (1928); Wootton v. Seltzer, 83 N.J.E. 163, 90 A. 701 (1914); TIFFANY, *supra* note 6, § 863 n.94.

grantor,[114] to deny effect to the prior instrument if it was not recorded, thus obliterating any practical distinction as to the effect of notice in covenants running with the land and in equitable servitudes. The distinction is still of significance in jurisdictions where the title search need not be extended to the contents of prior deeds from a common grantor.[115] The danger that subsequent purchasers might not be aware of restrictions in prior deeds, where the developer neglects to incorporate similar restrictions in later deeds,[116] and where the obligation of the title searcher extends only to instruments in the direct chain of title, can be easily avoided by insistence that the developer follow a simple procedure. Where a tract index is in effect, a plan of the proposed development should be recorded against the entire tract, which would give notice to all purchasers by placing the restriction in the direct chain of title to each lot in the tract. A prudent purchaser of a lot could easily insist that such a method be followed. Another method, and one which would be effective even in a jurisdiction where there is no tract index, would be to make a conveyance of the entire tract to a straw man by a deed containing the restrictions, followed by a reconveyance of all except a single lot, to prevent a merger, placing the restrictions in the direct chain of title of each lot subsequently sold. The remaining lot could be sold separately. This method would give reciprocal effect to

114. Bauby v. Krasow, 107 Conn. 109, 139 A. 508 (1927); Finley v. Glenn, 303 Pa. 131, 154 A. 299 (1931); W. WALSH, REAL PROPERTY § 312, at 675 n.17 (1930); McDougal, *Summary of Answers to Property Questionnaire*, AALS HANDBOOK OF PROCEEDINGS 268, 276 (1941): "The growth of the doctrine of notice has rendered practically obsolete the old common law doctrines of covenants." *See* Wool v. Scott, 140 Cal. App. 2d 835, 96 P.2d 17 (1956); McNeill v. Gary, D.C. App. 399 (1913); Wiegman v. Kusel, 270 Ill. 520, 110 N.E. 885 (1915); Lowes v. Carter, 124 Md. 678, 93 A. 216 (1915); Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925); King v. Union Trust Co., 226 Mo. 351, 126 S.W. 515 (1910); Reed v. Elmore, 246 N.C. 221, 98 S.E.2d 360 (1957); Jones v. Berg, 105 Wash. 69, 177 P. 712 (1919); Nottingham Patent Brick & Tile Co. v. Butler, [1883] 15 Q.B.D. 261, [1886] 16 Q.B.D. 632; CLARK, *supra* note 8, at 183; TIFFANY, *supra* note 6, § 863; Note, 14 MICH. L. REV. 119 (1915); 14 AM. JUR. COVENANTS, *Reservations and Conditions* § 319 (1938). 20 AM. JUR. 2d *Covenants, Reservations and Conditions* § 309 nn.1-4 (1965) lists Iowa, North Carolina, Virginia, Georgia, Massachusetts, Florida, Colorado, Kentucky, Michigan and California as being in accord. In Annot., 16 A.L.R. 1013 nn. 6, 7, 9 (1922), it is stated that there was at that date some authority for the view, citing cases from New Jersey, Minnesota, and North Carolina. *See generally* 21 CORNELL L.Q. 479 (1936).

115. *E.g.*, Hancock v. Gumm, 151 Ga. 667, 107 S.E. 872 (1921); Glorieux v. Lighthipe, 88 N.J.L. (3 Gummere) 199, 96 A. 94 (1915); Academy of the Sacred Heart v. Bochm Bros., 267 N.Y. 242, 196 N.E. 42 (1935); Hayslett v. Shell Petroleum Corp., 38 Ohio App. 164, 175 N.E. 888 (1930). *See generally* 21 CORNELL L.Q. 479 (1936).

116. *See* Hancock v. Gumm, 151 Ga. 667, 107 S.E. 872 (1921).

the restrictions between the various purchasers, regardless of the order in which they purchase. The drastic limitation on the right to specific enforcement of equitable servitudes or of covenants running with the land at law established in *Tulk v. Moxhay*, in favor of purchasers in good faith, has thus ceased to be significant, as a result of the recording acts. The only qualifications to this result are in states in which the obligation of title search extends only to instruments in the direct chain of title and not to deeds of other property retained by the common grantor. In such states the method of conveyance of the tract to a straw man would be necessary.

C. Division of Authority as to Termination

The authorities are divided as to the effect of change in the character of the neighborhood in terminating the obligation to pay damages for breach of the covenant, or the in rem obligation attaching to the land. Even where the personal right to damages remains to create a cloud on the title, there is little likelihood of a judgment for a substantial amount of damages, for the same reason that the change in the character of the neighborhood defeats the right to specific protection of the right created by the restriction. Since equity will not grant what are regarded as its extraordinary remedies unless they serve a useful purpose, equitable servitudes cannot be enforced specifically if the neighborhood has changed to such an extent as to make the restrictions no longer useful in preserving the general character of the development. Since damages will still lie, however, in a few states, the personal obligation of the successor in interest to the original promisee remains to threaten violators with a lawsuit, and therefore the servitude remains an encumbrance on the title, making it unmarketable.[117]

IV. A Comparison of the Doctrines of Creation and Enforcement of Restrictions at Law and in Equity

The differences between covenants running with the land at law, and equitable servitudes, are in the manner of their creation and in the principles of law which are applied in actions for damages as distinguished from suits for specific relief. The fact that some equitable modifications of early common law rules concerning restrictive cove-

117. Trustees of Columbia College v. Thatcher, 87 N.Y. 311 (1882) (no enforcement in equity); TIFFANY, *supra* note 6, § 875 nn.1, 6. *Contra*, at law, Bull v. Burton, 227 N.Y. 101, 124 N.E. 111 (1919); Amerman v. Deane, 132 N.Y. 355, 30 N.E. 741 (1892); McClure v. Leaycroft, 183 N.Y. 36, 75 N.E. 961 (1904); Trustees of Columbia College v. Lynch, 70 N.Y. 440 (1877); *see* 4 J. POMEROY, EQUITY JURISPRUDENCE § 1295 (5th ed. 1941); Pound, *supra* note 102, at 821.

nants have not been applied in actions for damages should cause no surprise, as this phenomenon is not peculiar to the law of restrictive covenants. What is surprising is the extent of the acceptance of equitable doctrines in actions for damages for breach of the covenant.

A. Similar Doctrines

Equitable doctrines which have been accepted, in the United States, in the enforcement of covenants running with the land in damages are (1) the effect given to the running of burdens, even those which require affirmative action by the owner of the burdened land;[118] (2) the relaxation of the requirement of a close connection between the restriction and the land which is burdened;[119] (3) the protection, due to the effect of the recording acts, of bona fide purchasers;[120] (4) the reciprocal enforcement of rights and obligations created by transfers of lots in a tract which is being developed in a uniform manner,[121] regardless of the order of acquisition of the lots;[122] and (5) the relaxation of the form in which the intention that restrictions referring to things not in being must be expressed.[123]

B. Dissimilar Doctrines

The equitable doctrines which have not been adopted in covenants running with the land when damages are sought are (1) the requirement that the benefit must be appurtenant[124] and (2) the elimination of the requirement of a writing.[125]

C. Division of Authority

There is a fairly even division of authority (1) on the effect of change in the character of the neighborhood in terminating the restric-

118. See text accompanying notes 107-11 *supra*.

119. See text accompanying note 15 *supra*.

120. See text accompanying notes 112-15 *supra*.

121. Health Dep't v. Riggs, 252 S.W.2d 922, 925 (Ky. Ct. App. 1952); Doll v. Moise, 214 Ky. 123, 282 S.W. 763 (1926).

122. Health Dep't v. Riggs, 252 S.W.2d 922, 925 (Ky. Ct. App. 1952); Schmidt v. Palisade Supply Co., 84 A. 807 (N.J. Eq. 1912); Chesbro v. Moers, 233 N.Y. 75, 80, 134 N.E. 842, 843 (1922); Renals v. Cowlishaw, [1878] 9 Ch. D. 125, *aff'd*, [1879] 11 Ch. D. 866.

123. The word "assigns" is no longer necessary. *See* Sexauer v. Wilson, 136 Iowa 357, 113 N.W. 941 (1907); Maher v. Union Stockyards Co., 55 Ohio App. 412, 9 N.E.2d 995 (1936); 2 AMERICAN LAW OF PROPERTY § 9.10 (A.J. Casner ed. 1952); Bordwell, *English Property Reform and its American Aspects*, 37 YALE L.J. 1, 25 (1927). A few states still adhere to the old rule. *See* 2 AMERICAN LAW OF PROPERTY, *supra* § 9.10 n.3.

124. See text accompanying note 97 *supra*.

125. See text accompanying note 72 *supra*.

tion,[126] (2) as to the application of restrictions to chattels,[127] and (3) as to the requirement of privity of estate in order to enable the restrictions to run at law.[128] On this question the great majority of states are uncommitted.

Conclusion

Many of the problems which have created uncertainty in the doctrines which are applicable to restrictive covenants are due to the distinction between the personal and real relationships which are involved. The most important differences are the elimination of the requirements of a writing and of privity of estate between the parties to the covenant when equitable enforcement is sought, and the limitation, in a few states, of enforcement in damages to situations in which there is privity. As a practical matter this method of enforcement is rare. In most of the states which require privity for enforcement against remote parties in damages, privity may be supplied by the incorporation of the restriction in a deed conveying the property. Restrictions in covenants running with the land at law are enforceable in damages against the covenantor or his successors in ownership of the burdened land as long as they own the property. In equitable servitudes there is no personal liability in damages, and the enforcement of the obligation is only by injunction or by a decree for specific performance against acquirers with notice or who have not given value. The distinction as to the effect of notice is largely eliminated by the recording acts. Restrictions created otherwise than in writing are not enforced in damages but only by specific remedies. When equitable relief is sought, both the requirement of a writing and the requirement of privity are discarded. In some states a change in the character of the neighborhood discharges the restriction in equity but not at law.

"The so-called equitable restriction," as Justice Loring has pointed out, "results from the fact that equity will enforce the agreement against those taking with notice in favor of the then owner of the land to be benefited. Equity does not enforce the agreement because there is an equitable restriction."[129] The recognition, already extended in some states, of a right to damages for violation of the property interest created by the restriction, corresponding to the remedy if the owner of an easement is excluded from its use,[130] would remove the only substantial dis-

126. See note 117 & accompanying text *supra*.

127. *See generally* Chafee, *Equitable Servitudes in Chattels*, 41 HARV. L. REV. 945 (1928); Chafee, *The Music Goes Round and Round: Equitable Servitudes and Chattels*, 69 HARV. L. REV. 1250 (1956).

128. See cases cited notes 45-46 *supra*.

129. Bailey v. Agawam Nat'l Bank, 190 Mass. 20, 23-24, 76 N.E. 449, 451 (1906).

130. *See* Tide-Water Pipe Co. v. Bell, 280 Pa. 104, 124 A. 351 (1924).

crepancy in the remedies available to enforce restrictions whether created in writing or otherwise.

Whether the restriction is affirmative or negative, or created in writing or orally, the doctrinal basis for enabling the personal obligation to run can be supplied by regarding restrictions as property rights in the affected property. The benefit of the restrictions to large segments of the community justifies the relaxation of controls which might have the effect of limiting the proliferation of such restrictions.[131] It is unlikely that the equitable doctrine eliminating the requirement of privity of estate will be rejected in the uncommitted states in actions for damages. The further result of a complete harmonization of the rules allowing recovery in damages with the rules governing specific enforcement may reasonably be anticipated.

Roger Traynor, retired Chief Justice of the Supreme Court of California, has likened outmoded principles to a tortoise whose progress is slowed by the weight of accumulated incrustations. There is no reason except the dead weight of history which prevents the fusion, in this area of law, of equitable doctrine into the principles which govern the enforcement of restrictions in damages, nor for preserving the dual classification of restrictions on the use of land. We do not classify contracts in different categories according to whether they are enforceable specifically or in damages; nor do we classify separately leases for a year or less from those for a longer period because one kind of lease must be in writing. The obligation to pay damages for breach of a restriction should be recognized in restrictions which are created informally and therefore are treated as enforceable only by injunction or decrees for specific performance. It is to be hoped that the application of equitable doctrine in the enforcement of restrictions, whether in damages or specifically, will soon be uniform. The peak of the mountain is already in sight of those who explore the paths of covenants running with the land at law, and equitable servitudes. When the paths finally converge, it will be at the peak of the same mountain.

131. In Morland v. Cook, L.R. 6 Eq. 252, 266 (Ch. 1868), Romilly, M.R. drew the distinction between a covenant which is merely a burden, and one which provides for a corresponding advantage. The effect on curbing excessive proliferation is discussed in Brewer v. Marchelt, 18 N.J. Eq. 337, *aff'd* 19 N.J. Eq. 537 (1868).

Memorandum 70-106

EXHIBIT II

A STUDY TO DETERMINE WHETHER THE LAW OF COVENANTS AND SERVITUDES RELATING TO LAND AND WHETHER THE LAW GOVERNING NOMINAL, REMOTE, AND OBSOLETE COVENANTS, CONDITIONS, AND RESTRICTIONS ON LAND USE SHOULD BE REVISED

Two devices by which a landowner can restrict the uses to which the land is put after he conveys it are conditions and covenants contained in the deed of transfer. Such limitations are widely used in modern urban communities as a form of private land-use planning. The undesirable social and economic consequences of unlimited private restrictions on land use, stemming in part from the tendency of privately imposed restrictions to become anachronistic on ineffective to accomplish the purpose for which they were created, have been widely recognized.[1]

In California, however, restrictions on the use of land are recognized as fully enforceable so long as they do not violate law or public policy.[2] This general right of the landowner to impose such restrictions as he chooses, limited only by policy considerations, has led to difficulties where the restrictions serve no useful function and serve only to hamper free transferability and development of the land.

There appears to be no prohibition in California of merely nominal covenants and conditions--those which are of no substantial benefit to the

---

1. See, e.g., Restrictions Voluntarily Imposed On The Use of Land, Report of the New York Law Revision Commission for 1958 at 211-374 (1958).

2. Ogden, California Real Property Law § 14.3 (1956).

grantor but simply hinder land use. In some states, case law indicates that unreasonable or capricious restrictions are unenforceable.[3] In other states, statutes have invalidated nominal restrictions.[4]

There is, further, no general limitation in California on remote land use restrictions--those which may have been of some value when created in an earlier era. California does place restrictions upon the remote vesting of property interests[5] as well as upon the duration of leases,[6] but these restrictions do not apply to covenants and conditions. Thus, a grantor is free to create binding restrictions of indefinite duration (although, if he fails to specify any term, a court will read in a reasonable period[7]). Many states have solved this problem by making reversionary interests attached to the condition subject to the rule against perpetuities or by making all covenants and servitudes subject to a limitation period varying from 20 to 40 years.[8]

A final problem is that the California law regulating obsolete covenants and conditions is unclear. Generally, a court of equity will grant relief

---

3. See 1 Tiffany, Real Property § 198 (3d ed. 1939).

4. E.g., Minn. Stat. Ann. § 500.20(1) (1947); Wis. Stat. Ann. § 230.46 (1957).

5. Civil Code § 715.2.

6. Civil Code § 718.

7. Ogden, California Real Property Law § 14.20 (1956).

8. E.g., Conn. Gen. Stat. § 45-97 (1960); Fla. Stat. Ann. § 689.18 (1969); Maine Rev. Stat. Ann. Tit. 33, § 103 (1965); Minn. Stat. Ann. § 500.20(2) (1947).

from private land use restrictions if conditions have so changed since their creation that enforcement of them would be oppressive or inequitable.[9] The cases are not explicit, however, that, in California although changed conditions is an equitable defense, it is available in legal as well as equitable proceedings regardless whether the action is for damages for breach of a real covenant to enjoin violation of an equitable servitude or to quiet title or declare interests in the property.[10] Furthermore, while in California, unlike most other jurisdictions, the doctrine of changed circumstances is applicable to conditions as well as to covenants,[11] there is some doubt whether this rule is unanimous[12] and whether it operates to invalidate only rights of reentry and not possibilities of reverter.[13]

In addition to these gaps and uncertainties in the California law relating to both the creation and extinction of private land use restrictions, the California law of real covenants generally is unsatisfactory. The law presently distinguishes between real covenants running with the land which are enforceable at law and equitable servitudes based upon notice

---

9. See 14 Cal. Jur.2d, Covenants, Conditions, and Restrictions § 113 (1954).

10. California Land Security and Development § 24.55 (Cal. Cont. Ed. Bar 1960).

11. 14 Cal. Jur.2d, Covenants, Conditions, and Restrictions § 118 (1954).

12. Strong v. Shatto, 45 Cal. App. 29, 187 P. 159 (1919), suggests the opposite result. This case was questioned by the Supreme Court in Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782 (1930). A later case reaffirmed the rule that conditions as well as covenants are subject to the changed circumstances doctrine without, however, mentioning Strong; see Letteau v. Ellis, 122 Cal. App. 584, 10 P.2d 496 (1932).

13. See Simes, Restricting Land Use in California by Rights of Entry and Possibilities of Reverter, 13 Hastings L.J. 293, 307-309 (1962).

enforceable in equity. Although the two concepts appear to be in reality identical,[14] they entail differing legal rights, defenses, and remedies resulting frequently in arbitrary results depending on classification.

Because of these anomalies and inadequacies in the law, the Commission requests authority to study whether the law of covenants and servitudes generally, and whether the law governing remote, nominal, and obsolete covenants, conditions, and restrictions on land use should be clarified or revised by statute.

---

14. See, e.g., Newman and Losey, Covenants Running With the Land, and Equitable Servitudes; Two Concepts, or One? 21 Hastings L.J. 1319 (1970).