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## INTEGRATION OF THE LAW OF EASEMENTS, REAL COVENANTS AND EQUITABLE SERVITUDES

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Recently in a symposium in the *Southern California Law Review*,<sup>1</sup> a number of real property authorities discussed the question of whether it is appropriate to unify the law concerning the three main kinds of servitudes—easements, real covenants and equitable servitudes.<sup>2</sup> The two principal authors agreed that unification was both feasible and desirable.<sup>3</sup> In shorter commentaries a number of other authors argued in favor of and against the proposal for unification. In my necessarily rather abbreviated commentary, I took the position that “it really does not matter whether one labels the structure as one, two, or three bodies of law,” but rather, “whether the rules in the structure make good policy sense and whether they are unnecessarily inconsistent.” Further, I stated “that the law about the various servitudes cannot be ‘unified’ in the sense that the same rules should always apply to each of them” because “[t]he rules are different and many of the variances make good sense.”<sup>4</sup> In that piece I tried to demonstrate my thesis by showing how a few selected rules of law concerning easements and other servitudes differed from each other in perfectly justifiable ways, but I left undiscussed most to the applicable rules of law. In this article, I would like to expand upon my earlier work, covering more comprehensively the law of all three types of servitudes. That is not to say that I purport herein to deal

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1. *Symposium Issue: A Unified Concept of Servitudes* 55 S. CAL. L. REV. 1177-1447 (1982).

2. Briefly defined these servitudes are the limited rights of one person in the land of another. An easement involves a right to use the other's land, a real covenant the right to insist that the other perform a land related duty, and an equitable servitude the right to control the use to which the other may put his land. Examples are, respectively, a right of way to cross over a neighbor's land, a right that a neighbor share the cost of maintaining a boundary fence, and a right that a neighbor not use his land for commercial purposes.

3. See Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177 (1982); French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982).

4. Berger, *Unification of the Law of Servitudes*, 55 S. CAL. L. REV. 1339 (1982).

with the law of this vast area exhaustively and completely. That job has already been done by the treatise writers.<sup>5</sup> Rather, I will discuss those rules where there presently is a substantial difference in judicial treatment of the various kinds of servitudes and will analyze whether those differences make policy sense. The creation, enforcement against remote parties, and termination of these interests will be treated in that order.

## I. CREATION OF THE INTEREST

### A. *Formal Requirements*

The legal formalities required in the creation of the various incorporeal interests<sup>6</sup> that are the subject of this article have a long, interesting and convoluted historical development. The English requirements of a seal under the common law and of a writing under the Statute of Frauds<sup>7</sup> formed the basic backdrop for the development of the rules of formality in this country. As they evolved in the United States, the formality rules concerning the three varieties of servitudes tended to merge but they did not do so completely. For example, in those states that continued to recognize the common-law requirement of a seal for a valid deed conveying a fee simple, a seal was also required for the creation of easements<sup>8</sup> and of real covenants.<sup>9</sup> On the other hand, such was not required in any state for the creation of equitable servitudes.<sup>10</sup> The ground for that distinction was that it had never been necessary to use a seal to create a property interest in equity. Whatever may be the state of the law in the various jurisdictions concerning this historical relic, there certainly seems to be very little point in perpetuating it any longer.

The Statute of Frauds, on the other hand, is alive and well. Most courts have held that the Statute requires a writing for creation of each of the three kinds of servitudes.<sup>11</sup> It is, however, in the realm of the various limitations on or exceptions to the application of the Statute that there is great inconsistency of treatment as between easements, real covenants and equitable servitudes. We will consider these inconsistencies next.

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5. See, e.g., 2 AMERICAN LAW OF PROPERTY, Parts 8 and 9 (A. Casner ed. 1952).

6. "Incorporeal" in this context means nonpossessory. See RESTATEMENT OF PROPERTY § 450, comments b and c (1944). That is, an incorporeal interest is one whose owner may not exclude the rest of the world from the property to which the interest attaches. Easements, real covenants and equitable servitudes are all classified as incorporeal interests.

7. See 2 AMERICAN LAW OF PROPERTY §§ 8.17, 9.2, 9.9, 9.25 (A. Casner ed. 1952) (good recital of English history on subject of seal and writing requirements as related to servitudes).

8. *Id.* at § 8.17.

9. *Id.* at § 9.9.

10. *Id.* at § 9.25.

11. *Id.* at §§ 8.19, 8.20, 9.9, 9.25; 3 R. POWELL, THE LAW OF REAL PROPERTY ¶ 407 (P. ROHAN REV. ED. 1981); 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 671 (P. Rohan rev. ed. 1981).

### B. *Informal Creation*

#### 1. Easements by Necessity and by Implication and Analogous Doctrines in the Law of Equitable Servitudes and Real Covenants

There are a number of fact patterns in which the courts say that easements may be created without being expressly provided for in a written instrument. One of these is the situation in which one person conveys land to another while retaining an adjoining piece, with the full enjoyment of one of the parcels depending upon its owner having a non-possessory right to use the other. The interests implied by the law under these circumstances fall into one of two traditional categories—easements by necessity and easements by implication. They will be considered below.

Before doing that, however, it would be useful to recall a very fundamental distinction concerning what is meant when it is said that the law “implies” an obligation. The distinction referred to is that between contracts implied in fact and those implied in law. A contract is implied in fact when the “undertaking is inferred from conduct other than the speaking or writing of words.”<sup>12</sup> Such an agreement is really just a form of an express contract because there is an actual assent, though it is in a form slightly different from the traditional express contract in words.<sup>13</sup> For example, if a steady customer, as he is leaving the store, shows some merchandise to the store owner, who is too busy to take immediate payment for the merchandise but nods assent to the customer, this constitutes an implied promise by the customer to pay the retail price of the item taken. On the other hand, a contract implied in law is not really a contract at all but involves “certain legal obligations which, because of historical accident, are enforceable in what is in form a contract action, but which are not in any real sense contractual obligations, since they are not based upon a voluntary undertaking.”<sup>14</sup> These consist of those obligations which are denominated as quasi-contractual and may arise even if the obligor has no intent or desire to be bound at all.<sup>15</sup> It would be useful to consider below whether easements by necessity and by implication fall into the category of obligations implied in fact (tacitly agreed to) or implied in law (imposed in spite of contrary intent).

12. G. GRISMORE, *PRINCIPLES OF THE LAW OF CONTRACTS* § 8 (1947).

13. On the other hand, Professor Corbin regarded all contracts as, in a sense, implied ones, on the theory all modes of assent whether by conduct or words needed to be interpreted by a “process of implication and inference.” See A. CORBIN, *CONTRACTS* § 18 (1963).

14. G. GRISMORE, *PRINCIPLES OF THE LAW OF CONTRACTS* § 8 (1947).

15. To use one of Corbin’s illustrations: “Mistakenly believing that he owns Blackacre, A pays the taxes and makes permanent improvements thereon, without the knowledge or assent of the real owner B. When B is requested to reimburse A, he positively refuses. Nevertheless, the law will in some such cases make it B’s duty to reimburse A. B’s obligation is called quasi-contract.” A. CORBIN, *CONTRACTS* § 19 (1963).

Now, assume the following facts: A conveys to B a part of Blackacre which cannot be reached from the road without passing over A's retained land. No provision is made in the deed for B's having an easement over A's parcel. Under these circumstances the courts hold uniformly that B gets such an easement by necessity.<sup>16</sup> As a requirement for such an easement, some courts mandate that it be strictly necessary for the enjoyment of the property<sup>17</sup> while others hold only that it must be reasonably necessary.<sup>18</sup> The case of the landlocked tract is only one illustration of the application of this doctrine. Another and perhaps more important one today is the conveyance of a subterranean stratum for mining or oil and gas purposes. In that situation an easement to drill or put shafts through the intervening strata is decreed by necessity.<sup>19</sup>

Two justifications for easements by necessity have been articulated: first, that such was the "intent" of the parties and that intent ought to govern; second, that granting such an easement encourages the full utilization of our land resources.<sup>20</sup> The second reason seems to be the more important. On the question of intent, it is probably true that if the parties' minds had dwelled upon the issue they would have agreed upon an easement in a landlock situation, but to say on that basis that the parties actually intended an easement is stretching it a bit. In addition, in the hypothetical above, suppose that B's land was not landlocked and, therefore, the element of necessity was missing. The fact that the parties might possibly have intended or even actually intended that B have an easement over A's land would be legally irrelevant. The Statute of Frauds would clearly prevent its creation. It is not the parties' intent to create an easement, but rather society's desire to see all valuable land in use coupled with the fact that there is *no expressed intent to the contrary* that really justifies the easement by necessity.<sup>21</sup>

On that basis, then, is an easement by necessity an interest implied in law or implied in fact? Certainly it is not implied in law in the sense that it would be imposed in spite of the putatively obligated party's expressed intent to the contrary. Neither does an easement by necessity seem to fit into the

16. See 3 R. POWELL, *supra* note 11 at ¶ 410 n.2.

17. "Therefore, a way of necessity will not ordinarily be recognized if there is another mode of access to the land, though much less convenient. . . ." 3 H. TIFFANY, REAL PROPERTY § 794 (1939). See, e.g., *Bowles v. Chapman*, 180 Tenn. 321, 175 S.W.2d 313 (1943).

18. See *Hurley v. Guzzi*, 328 Mass. 293, 103 N.E.2d 321 (1952); 3 R. POWELL, *supra* note 11 at ¶ 410 n.33.

19. See *Wall v. Shell Oil Co.*, 209 Cal. App.2d 25, 25 Cal. Rptr. 908 (1962); 3 R. POWELL, *supra* note 11 at ¶ 410 n.49.

20. See, e.g., *Hellberg v. Coffin Sheep Co.*, 404 P.2d 770 (Sup. Ct. Wash. 1965) (discussing policies underlying easement by necessity); 3 R. POWELL, *supra* note 11 at ¶ 410 nn.39, 40; *Simonton, Ways by Necessity*, 25 COLUM. L. REV. 571 (1925).

21. Even in a landlock situation, if it is clear that the parties had a parol understanding that no easement would be created, the courts do not decree one in the face of that agreement. See 3 R. POWELL, *supra* note 11 at ¶ 410 n. 40. The law will not force an easement upon unwilling parties even though it would serve the policy of encouraging the efficient use of resources.

implied in fact category, because it may be imposed even though there may be no conduct evincing an intent to create it. It is just that in the absence of any evinced contrary intent, the law chooses to infer that which will result in efficient resource utilization. The creation of an easement by necessity, then, lies in the area between the classic concepts of implied in law and implied in fact.

An easement by implication is said to be created if one party conveys a portion of a tract to another while retaining a part, the one part having in some way been used in furtherance of the enjoyment of the other, such use having been apparent at the time of the conveyance, continuous and reasonably necessary.<sup>22</sup> The device may be illustrated by the following facts: C owns Whiteacre, which is a large tract sloping downward toward the east. Across Whiteacre running from west to east there is a large drainage ditch for flowage of excess waters which accumulate in the west half of the tract. C sells the east half of Whiteacre to D. D blocks up the drainage ditch on his newly acquired parcel causing flooding on C's retained piece. Most courts hold that C may enjoin D from this activity on the ground that C has an easement by implication for drainage over D's piece of land.

There are several obvious similarities between the easement by necessity and the easement by implication. Both require that the two tracts have been owned by the same party at one time, and both require the existence of some degree of necessity. On the other hand, there are some clear differences. In the case of the easement by necessity, there are no requisites of prior use, apparenancy or continuousness but by the majority the degree of necessity required is greater, the courts usually insisting upon "strict necessity" rather than the "reasonable necessity" required for the easement by implication. As one might guess, because of the similarity of the two doctrines, there is a tendency to merge them intentionally or to confuse them inadvertently. The *Restatement of Property* has done the former, listing a group of eight factors which bear upon whether the court should declare an "easement by implication."<sup>23</sup> The easement by necessity under the *Restatement* view is

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22. See generally, 3 R. POWELL, *supra* note 11 at ¶ 411; 3 H. TIFFANY, *supra* note 17 at §§ 781-92. It should be noted that, in England and in some of the states of the United States, courts have distinguished between implication of a reserved easement and of a granted easement. In England, the courts finally settled upon a rule that no implied easement could be reserved to a grantor. *White v. Bass*, 7 H. & N. 722, 158 Eng. Rep. 660 (1862). There the rule became that only a grantee could claim the benefit of an easement by implication. In the United States, some of the courts have followed the English view, some have required a greater degree of necessity for an implied reservation (such as, strict necessity for a reservation and reasonable necessity for a grant), and some have stated that the rule concerning grants and reservations should be the same. See 3 R. POWELL, *supra* note 11 at ¶ 411, nn.34-39.

23. RESTATEMENT OF PROPERTY § 476 (1944). The eight factors are: (1) whether the claimant is the conveyor or conveyee; (2) the terms of the conveyance; (3) the consideration given; (4) whether the claim is made against a simultaneous conveyee of a common grantor; (5) the extent of the necessity; (6) whether reciprocal benefits result to the conveyor and conveyee; (7) manner of prior use; and (8) the extent the prior use was or might have been known to the parties.

subsumed under the broad concept of easement by implication. Other authorities also have treated the two doctrines as one,<sup>24</sup> while still others have considered them separate and distinct.<sup>25</sup>

If the two doctrines remain separate, the requirements of prior use, apparenancy and continuousness in the easement by implication become mere surplusage, unless the courts require strict rather than reasonable necessity for the easement by necessity. Otherwise, every easement by implication would also be an easement by necessity, because the former would require every element of the latter plus a few in addition. There would then obviously be no reason to have a separate doctrine of easement by implication. On the other hand, if the rule is that strict necessity is required to establish an easement by necessity, there would be no overlap and the doctrines might serve at least in logic, if not in policy, to complement each other.

It is submitted that the two doctrines do serve valuable and different purposes if the easement by necessity is limited to cases of strict necessity. Both doctrines rest upon the twin policies of intent effectuation and the promotion of efficient land use. In cases of strict necessity, very little in the way of corroboration of intent by other circumstances is or ought to be required. Courts recognize that most parties, if they thought about it, would probably intend that a landlocked grantee or grantor have a way in and out. On the other hand, when the necessity is not as great, more in the way of intent corroboration is and ought to be required. Such is supplied by meeting the requisites that the use be pre-existing, apparent and continuous. These three factors clearly tend to verify an intent to create an easement. Separation of the doctrines does make some sense.

Again, as in our earlier discussion of easements by necessity, we should consider the nature of the implication made by the courts. The analysis would appear to be a similar one. The courts do not require any conduct indicating an assent, so the interest cannot be said to be implied in fact. And, clearly if there is an evinced intent to the contrary, the law does not impose an obligation upon the parties;<sup>26</sup> thus, it is not an interest implied in law. the easement by implication lies in the area between implied in law and implied in fact.

Our next inquiry is whether there are any doctrines analogous to easements by necessity or implication in the law of real covenants and equitable servitudes. The answer is clearly that there are not. Suppose E owns a large parcel of land with a house on one end, and that the value and pleasurable use of the house depend upon the fact that the other part of the land is vacant, allowing a lovely view of the lake nearby. If E sells the house to F, there is no implied covenant that E will not build an apartment house on the retained vacant land. There are probably two reasons for this difference

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24. See, e.g., 2 AMERICAN LAW OF PROPERTY §§ 8.31-8.43 (A. Casner ed. 1952).

25. See, e.g., 3 R. POWELL, *supra* note 11 at ¶¶ 410, 411; 3 H. TIFFANY, *supra* note 17 at §§ 784, 792.

26. See 3 R. POWELL, *supra* note 11 at ¶ 411 n.41.

in approach between easements and the other servitudes. First, courts create easements by necessity or implication only where the need for them is quite substantial. That occurs when the very use of certain land depends upon a concomitant right to use the neighboring land as well. Courts do not create covenants by implication in analogous cases because the necessity is not as compelling when it is a claim that the use of certain land depends upon a concurrent right that neighboring land not be used in an inconsistent way. One's need for access to land or drainage from it is ordinarily much greater than his need to be free from a conflicting neighboring activity.

A second reason for the distinction between easements and other servitudes is that the courts imply easements when there is an apparent existing physical flow between two portions of the same property. For example, if one portion drains or gives access to the other, any person buying either portion would know of the relationship and might rationally assume that it would continue. That is not true in the same way where the alleged servitude is that a lack of activity will continue. Inactivity does not call attention to itself as blatantly as activity. The law concerning implication of easements does differ from that of equitable servitudes and real covenants and for very good reasons. That is not to say that there are no situations in which the law implies the existence of covenants or equitable servitudes; there are. But the circumstances of their creation are quite different from those discussed above. We turn next to a discussion of those circumstances.

## 2. The Implication of Equitable Servitudes and of Real Covenants and Analogous Doctrines in the Law of Easements

### a. The Common Scheme

Though, as mentioned above, courts do not "imply" covenants in situations similar to those where they imply easements, there are other kinds of fact patterns where they do purport to imply the existence of such promises respecting the use of land. There is much written and some confusion about just when courts will make these implications.<sup>27</sup> To clarify a few basic points: First, there is the notable failure of the courts to define precisely what they mean when they talk about implication of these servitudes. The earlier discussion of the distinction between implied in law and implied in fact with respect to implication of easements is applicable here as well. As we shall see, some courts are perhaps a little careless in using the term "implied covenant," to mean different things at different times.

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27. See 2 AMERICAN LAW OF PROPERTY §§ 9.30, 9.33 (A. Casner ed. 1952); 3 R. POWELL, *supra* note 11 at ¶ 672; annot., A.L.R. 1216 (1929); annot., 144 A.L.R. 916 (1943). The cases involve almost exclusively the creation of what were traditionally called equitable servitudes—promises as to how the property in question shall not be used. Real covenants—affirmative land-related promises—have not generally been implied, because affirmative promises have not been as often involved in the context of a common scheme where there has been an historic tendency to imply these obligations.



A second confusion lies in the fact that courts often have used very loose language to describe those situations in which they will imply an obligation. For example, in the famous case of *Sanborn v. McLean*,<sup>28</sup> the court stated:

If the owner of two or more lots, so situated to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold. For want of a better description this is styled a reciprocal negative easement.<sup>29</sup>

If one wanted to take the language of the opinion literally, it could almost be read to mean that whenever a grantor in his deed binds the conveyed parcel to a land-related covenant, this binds him to an implied in law obligation to the same running promise with respect to any parcel in the area that he still owns. Under this view, if A were to convey Blackacre to B, with a covenant that B shall build no gas station on the premises, this would, ipso facto, and without regard to intent, bind A to a similar covenant on Whiteacre, A's retained premises next door. But if A extracted the covenant to prevent potential competition from a nearby gas station, and A fully intended to open his own gas station, a holding that he was bound by an implied covenant on Whiteacre makes no sense at all. And in the same vein, suppose a case in which a grantor wants to protect the view from his three story building, and so when he conveys the property next door he extracts a covenant that the grantee shall build no higher than two stories. Surely the grantor is not bound by that promise on the parcel that has the three story building.<sup>30</sup>

Actually, neither *Sanborn* nor the case law that adopts its language<sup>31</sup> stands for any such silly proposition. *Sanborn* itself was not a case in which there were only two adjoining parcels arguably bound, but was a leading decision on the so-called "common scheme," in which numerous parcels were involved. In its factual context, the *Sanborn* language makes sense. If a developer is subdividing a large number of lots and he rather uniformly extracts a "residence only" covenant from each of his buyers, the courts, after a certain number of these transactions have occurred, and in the absence of any evidence to the contrary, will infer that all the property in the subdivision, including the land the developer still owns there, is intended to be and should be bound.<sup>32</sup> The obligation so inferred has been called by

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28. 233 Mich. 227, 206 N.W. 496 (1925).

29. *Id.* at 229-30, 206 N.W. at 497..

30. *See, e.g.,* *Stamford v. Buono*, 108 Conn. 359, 143 A. 245 (1928); *see also* Annot., 60 A.L.R. 1216 (1929); Annot. 144 A.L.R. 916 (1943).

31. *See* *Rieger v. Wessel*, 319 S.W.2d 855, (Ct. App. Ky. 1958); *Broeder v. Sucher Bros., Inc.*, 331 Mich. 323, 49 N.W.2d 314 (1951).

32. *See* *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925); 2 AMERICAN LAW OF PROPERTY § 9.33 n.3 (A. Casner ed. 1952); 3 R. POWELL, *supra* note 11 at ¶ 672; *Berger, A*

some of the cases an "implied reciprocal servitude." The covenant here is one implied in fact, where the necessary assent of the subdivider is inferred from his total conduct, rather than implied in law where the obligation might be imposed upon him in spite of his contrary intent.<sup>33</sup>

The existence of a scheme (also known as a uniform plan for development) is important in two other fact situations as well. In the first place, if a subdivider extracts a restrictive covenant from an early purchaser and at the same time orally represents that he will impose similar restrictions upon later purchasers in the same subdivision, this is said in most jurisdictions to bind the subdivider's retained land as an implied reciprocal servitude, and the later purchasers with actual or constructive notice of that oral agreement are bound by it, even though the deeds to them from the subdivider do not contain the covenant.<sup>34</sup> It should be noted in connection with this rule, that the courts hold that the Statute of Frauds does not bar enforcement just because the promise is not in writing.<sup>35</sup> In this case, it is quite clear that we are dealing with an express (though oral) agreement to impose the servitude by a later covenant in writing, but the agreement to do so has been breached. The courts, nevertheless, have characterized this situation as an implied servitude, presumably meaning implied in fact, but that is perhaps stretching the word "implied" quite a bit beyond its traditional meaning of conduct other than writing or speaking.

The second additional category of common scheme cases arises when the subdivider or his agent, at the time of sales negotiations with various purchasers, exhibits a map or plan which shows certain amenities, such as golf courses and tennis courts, that are represented by him as definitely planned to be a part of the subdivision. Some cases seem to hold that the representations contained in the map constitute a restrictive covenant, binding upon the developer in such a way that he cannot sell or use the property for construction of facilities which would breach those representations.<sup>36</sup> One

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*Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 198-202 (1970) [hereinafter cited as *Promises Respecting Use of Land*]. *Contra* Houghton v. Rizzo, 361 Mass. 635, 281 N.E.2d 577 (1972). On the general question of the effect of the omission from a deed of a restrictive covenant where there is a common scheme, see Annot. 4 A.L.R.2d 1364 (1949).

33. See *Promises Respecting Use of Land*, *supra* note 32 at 198-202.

34. See Tallmadge v. East River BANK, 26 N.Y. 105 (1862); 2 AMERICAN LAW OF PROPERTY § 9.33 n.2 (A. Casner ed. 1952). *Contra* Sprague v. Kimball, 213 Mass. 380, 100 N.E. 622 (1913).

35. ". . . In all of the cases applying this doctrine, there were no agreements in writing sufficient to satisfy the statute of frauds, yet in none was the absence of a written promise by the common grantor considered an obstacle to enforcement. In fact most of the cases do not discuss these statutes. However, in one case the court expressly mentioned the statute of frauds and indicated that it was inapplicable. . . ." 2 AMERICAN LAW OF PROPERTY § 9.33 n.4 (A. Casner ed. 1952). On the general question of the applicability of the Statute of Frauds to oral agreements restricting land use, see Annot. 5 A.L.R.2d 1316 (1949).

36. Ute Park Summer Homes Association, Inc., 77 N.M. 730, 427 P.2d 249 (1967); 3 R. POWELL, *supra* note 11 at ¶ 672 n.20; annot. 7 A.L.R.2d 607 (1949).

might query, however, whether those cases do not stand for a somewhat different proposition: that the courts are enforcing the oral statements concerning the amenities as an affirmative easement rather than as a restrictive covenant. That issue will be discussed at a later point.<sup>37</sup> In any case, this would again seem to be a case in which the obligation is an express one because the representations were made both orally and in writing through the map exhibited to the purchasers. Variations of the above three fact patterns involving a common scheme form the most important category of cases in which the courts hold that a covenant "impliedly" binds properties which have not been expressly bound by writing that complies with the Statute of Frauds. There are numerous cases that fit into this category.

#### b. No Common Scheme

There are a few cases, where in spite of the lack of a scheme, courts have expressed a willingness to imply a covenant in an appropriate situation. The leading case on the subject is *Rodgers v. Reimann*.<sup>38</sup> In *Rodgers*, plaintiff, prior grantee of L, sued defendant, subsequent grantee of L and W, to enforce a covenant prohibiting construction of a building of more than a certain height, contained in the land sale contract under which defendant was a purchaser. Plaintiff's and defendant's lots were directly across the street from each other. At the time of the purchases, W owned the lot adjoining the plaintiff's on the north. Defendant began erecting a structure that violated the covenant and plaintiff sued to enjoin the construction.

In holding that plaintiff could not enforce, the court indicated that the covenant was probably extracted to protect W's lot on the north, and that in order to prevail as a prior purchaser, plaintiff had to show one of three things: (1) a common scheme; (2) that he was the intended third party beneficiary of a contract between defendants and the sellers; or (3) that he met the requirements of the implied reciprocal servitude theory. The court indicated that in the absence of meeting one of those three theories there was a general reluctance to allow enforcement by a prior grantee against a subsequent grantee from a common grantor. The reason for this reluctance is that when a common grantor extracts a covenant from a first grantee there is a strong inference that the grantor is doing it for the benefit of the land nearby that he still owns; and, therefore, when he conveys to a second grantee, it is relatively clear that the latter, as new owner of the land intended to be benefited, can enforce the covenant. But an inference that the common grantor wanted to benefit the land owned by the plaintiff is more difficult to draw when the plaintiff is a prior grantee seeking enforcement against the subsequent grantee, for the simple reason that at the time of the common grantor's later conveyance, he did not own the allegedly protected land and

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37. See *infra* text accompanying note 44.

38. 227 Or. 62, 361 P.2d 101 (1961).

would ordinarily have no particular desire to benefit it. The main exception to this scenario would be the case involving a common scheme, because if the common grantor is a subdivider who is attempting to promote the sale of a residential development involving numerous lots, his intent likely would be to benefit all the land in the development, thereby making it more readily saleable.

The more important point of the *Rodgers* case from the standpoint of our present discussion is the court's handling of the implied reciprocal servitude question. The court quoted the following language from Section 9.30 of the *American Law of Property*:

. . . when the prior purchaser acquires his land in expectation that he will be entitled to the benefit of subsequently created servitudes, there immediately arises an implied reciprocal servitude against the common grantor's remaining land. If so, *then he is enforcing, not the express agreement made by the common grantor when he subsequently sells his remaining land, but his implied reciprocal servitude created by implication at the time of the conveyance to the prior purchaser.*<sup>39</sup>

It appears from the italicized language that whether the subsequent party has a written covenant in his deed is irrelevant, because the implied obligation is enforceable against him in any event. The court later added the proviso that the subsequent party had to have notice of the oral agreement as well. The *Rodgers* court further held that there was insufficient evidence of an unequivocal agreement between the plaintiff and the common grantor that the covenant would be inserted, and, therefore, ruled in favor of the defendant.

The importance of the *Rodgers* case lies in its acceptance of the implied reciprocal servitude theory in a case not involving a common scheme. In a proper case where the plaintiff makes out an oral agreement to insert a covenant in a later instrument, some courts will undoubtedly enforce this oral agreement as an equitable servitude. As in our earlier discussion, however, it is clear that in the proper terminology, the promise being enforced is an express rather than an implied one.

There also is an analogue in a non-scheme case, corresponding to the doctrine discussed above concerning the situation in which a developer shows prospective purchasers a map or plan and then is bound by the representations contained therein.<sup>40</sup> In similar manner, such a fact pattern really represents enforcement of an express undertaking rather than an implied one.

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39. *Id.* at 69, 361 P.2d at 104 (emphasis added).

40. See *Arthur v. Lake Tansi Village, Inc.* 590 S.W.2d 923 (Tenn. 1979). *Lake Tansi* involved a multi-unit development, but the court held it did not constitute a scheme at the time the plaintiffs purchased. Nevertheless, the court indicated that in an appropriate case, defendants could be estopped by their exhibition of a map or plan showing the facilities in dispute. *Id.* at 929-30.

c. Analogous Doctrines in the Law of Easements

Let us address now the question of whether there are any easement doctrines analogous to the implied covenant ones just discussed. It may be stated as a general proposition that historically there has been very little carryover from the latter area to the former. The reason for that is clear. For the most part covenants have been implied in connection with the creation of a common scheme of development. There the use of restrictive covenants of various sorts has been very prevalent. On the other hand, in the past, easements have not been used as widely to give rights to individual landowners in connection with the creation of new subdivisions.<sup>41</sup> The issues, therefore, of whether such easements could be created by some form of implication has not come up.

This situation, however, is undoubtedly changing with the adoption of certain new devices. The use of common elements such as golf courses, tennis courts, club houses, and other recreational facilities has become increasingly prevalent in connection with the creation of condominium regimes and homeowner associations.<sup>42</sup> Where there is a condominium and therefore the individual unit owners are also cotenants in the common elements, easements are not required to guarantee owner access to these recreational facilities. However, when a simple homeowner association device is used, title to the common elements is in the association, and, therefore, each owner must be guaranteed the right to use the common elements through the granting of an easement.<sup>43</sup> Normally this would be accomplished through a filed Declaration of Covenants, Conditions, and Restrictions binding upon all the properties in the subdivision. However, suppose in a particular development a Declaration were not used and reliance were placed upon the grant of easements in each individual deed, and suppose further that these easements were omitted from some of the deeds. It seems perfectly clear that a court should, on the analogy of the equitable servitude common scheme cases, hold that all the owners in the subdivision have an easement to use the common elements in the absence of express written language to the contrary. Of course the analogy is not perfect. In the covenant case, the retained property, later conveyed by the common grantor, is burdened with a covenant that is not expressly provided for in an appropriate writing; and in the easement case, the retained property is benefited by the use of the common elements that has not been expressly granted in a writing. But the fact that it is a benefit presents an even stronger argument for granting it. The innocent purchaser from the grantor argument just does not apply when

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41. Of course easements have been used to give rights to such types of organizations as telephone, sewer, water, and power companies in connection with a new subdivision. However, this is usually done by a single deed at the time of its creation, and no problem of implication of easements ordinarily arises.

42. See W. HYATT, *CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW* 323-326 (1981).

43. *Id.* at 324.

he is receiving a benefit instead of a burden. Nevertheless, I have found no case that has implied an easement under these circumstances, probably because the use of a declaration has become so prevalent, and aberrational subdivisions are becoming less common.

There is one area of significant overlap between implication of covenants and implication of easements which has already been adverted to<sup>44</sup> and should be further discussed. The area of overlap involves the case in which during the negotiations prior to a sale, the developer or his agent shows prospective buyers a map or plan, that indicates that certain amenities such as golf courses will be constructed in a defined area, and later on there is a breach by the developer of those oral understandings. The cases can be read to hold that in those circumstances, there is created in the purchasers a private right in the nature of an implied covenant or implied easement to use the area according to the representations contained in the plat.<sup>45</sup>

The obvious question to ask is whether according to the received tradition such a right would be classified as an affirmative easement or as a covenant. The answer is that it contains elements of both. Since an easement involves a right to use land owned by another, clearly one would classify as an easement the right of unit owners to use certain common elements for defined recreational purposes. On the other hand, it is clear that this relationship also contains an implicit promise to construct whatever facilities (such as a golf course) as are shown on the map, and this certainly takes on the aspect of an old-fashioned affirmative covenant running with the land at law. Thus, we have here a very clear case in which the same fact pattern will give rise to both an "implied easement" and an "implied covenant." However, as was indicated above, in view of the oral statements accompanying these transactions, it would probably be more accurate to denominate them as express rather than implied.

### 3. The Easement by Prescription and Analogous Doctrines in the Law of Equitable Servitudes and Real Covenants

We now examine the rules of prescription as a means of creating easements, equitable servitudes and real covenants. The law has had an

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44. See *supra* note 36 and accompanying text.

45. See, e.g., *Ute Park Summer Homes Association, Inc.*, 77 N.M. 730, 427 P.2d 249 (1967); *Putnam v. Dickinson*, 142 N.W.2d 111 (N.D. 1966); see also *Prescott v. Edwards*, 117 Cal. 298, 49 P. 178 (1897). In *Case v. Morrisette*, the District of Columbia Court of Appeals held that plaintiff owners in the subdivision were entitled to a mandatory injunction ordering the construction of a parking lot shown on a filed plat. *Case v. Morrisette*, 475 F.2d 1300 (D.C. Cir. 1973).

There is also an extensive line of cases that holds that when a deed of conveyance itself describes the granted parcel as bounded by certain streets or refers to a map on which are shown certain facilities such as streets or parks, the grantee gets an affirmative easement to use such facilities. See 3 R. POWELL, *supra* note 11 at ¶ 409. These would clearly seem to be expressly created easements by any measure and are not the subject of the present discussion.

interesting and differing development in England and the United States that merits careful study and analysis. In summary, the doctrine of prescription has been used in England to create both the traditional affirmative easement, as well as what has been called there "negative easements," which are those devices more appropriately denominated as equitable servitudes or restrictive covenants. On the other hand, in this country, the doctrine of prescription historically has been used to create affirmative easements but not any other varieties of servitudes.

First let us illustrate the affirmative easement about which both English and American courts are in agreement. If A wrongfully crosses B's land throughout the statutory period for adverse possession, and A's acts meet the requirements that they be hostile, open, notorious, continuous and uninterrupted, A gets a prescriptive affirmative easement to continue crossing. In England,<sup>46</sup> this doctrine probably started as a rule that a use continuing from the year 1189 to the date of the suit was conclusively presumed to be valid.<sup>47</sup> Later, the courts combined a rebuttable presumption of validity with the above rule where the use had continued as long as living man could remember.<sup>48</sup> Still later, the English courts developed the fiction that a grant of the easement had been made and lost where an adverse use had continued for the statutory period of adverse possession.<sup>49</sup> This was true even though it was conclusively proved that no such grant had ever been made.

In the United States, the lost grant fiction has for the most part been ignored. Most modern courts in dealing with the doctrine describe it as an analogy from the statute of limitations for the recovery of possession of land.<sup>50</sup> For this reason, the courts use the statutory period for adverse possession and require generally the same elements necessary to establish title by that means. The theory behind creation of the affirmative easement by prescription is that A, the person unlawfully crossing, is committing a trespass for which B, the owner of the land being crossed, has a cause of action, and if B does not bring a suit within the period of the adverse possession statute, he is barred from doing so later, A's trespass thereby ripening into a permanent legal right. In justification of the rule, it can be argued that A's openly wrongful act calls B's attention to the fact that unless he sues, A's acts may indeed ripen into a permanent easement.

It is the development in England of the prescriptive *negative* easement that is most interesting, because it is clear that, in such case, the use that is barred is in no way adverse in the traditional sense, and, therefore, the

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46. For a discussion of the English history; see 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 166-71 (3d ed. 1923) and 7 HOLDSWORTH, HISTORY OF ENGLISH LAW 345-50 (3d ed. 1926).

47. 2 AMERICAN LAW OF PROPERTY § 8.48 (A. Casner ed. 1952).

48. *Id.* at § 8.49.

49. *Id.* at § 8.50.

50. *Id.* at § 8.52.

above policy justification does not really apply. In England, for example, if C, as owner of a house, received light in his windows from across D's adjacent unimproved land for more than 20 years, C got a prescriptive negative easement that D not build on his land in such a way as to prevent C from getting sufficient light to have "the comfortable use and enjoyment of his house. . . ." <sup>51</sup> This was to be judged upon a standard of the "ordinary notions of mankind." <sup>52</sup> C got the easement even though obviously D had no cause of action against C to be barred for C's receipt of the light. The negative easement for light was a well-established fixture of English law known as the doctrine of ancient lights. This doctrine was not adopted in the United States except in a few jurisdictions, and those jurisdictions later repudiated it. <sup>53</sup> And properly so, for allowing the acquisition of a prescriptive right without the requirement of hostility was an unjustified departure, because it meant that important limitations upon a person's use of his own property could be imposed without his ever being in a position to suspect that they might be. The mere receipt of light by one person is not the kind of hostile act that calls another person's attention to the fact that he had best use, or forever lose, his right to erect a building which will cast a shadow. Rights to do acts on someone else's land can be acquired by prescription by actually doing them. Rights that a neighbor not do something on his own land by their nature should not be so acquired. The English now appear to have reached a similar conclusion with the passage of the Rights of Light Act of 1959, <sup>54</sup> which provides that a prescriptive easement for light can be prevented by merely filing a simple notice in the appropriate place.

The same conclusion also obviously applies to the creation of a real covenant. There is no conceivable way that one person could get a prescriptive right that another pay him a ground rent or make a repair on neighboring property. The mere performance of a particular act for the benefit of another has never been held as a matter of law to create a perpetual right that that performance continue infinitely into the future. (Of course, it is true that continued performance by a contracting party of a particular act, not expressly required by the contract, might be held by a court to be a binding interpretation of its terms. But prescription is a right arising outside of contract.)

To summarize, the rules about prescription as a mode of creation of the various kinds of servitudes differ markedly from one device to the other. Prescription as a means of establishing an affirmative easement makes eminently good sense, but it has absolutely no place in the creation of an equitable servitude or a real covenant.

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51. *Colls v. Home and Colonial Stores, Limited*, 29 Appeal Cases 179, 208 (1904); see C. GALE, *EASEMENTS* 277-94 (12th ed. 1950).

52. *Colls v. Home and Colonial Stores, Limited*, 29 Appeal Cases 179, 208 (1904).

53. See P. GOLDSTEIN, *REAL PROPERTY* 706 (1984).

54. 7 & 8 Eliz. II, Ch. 56 (1959); see G. CHESHIRE AND E. BURN, *MODERN LAW OF PROPERTY* 524 (1982).



#### 4. The Easement by Estoppel and Analogous Doctrines in the Law of Equitable Servitudes and Real Covenants

Assume the following set of facts: E and F were adjoining landowners. Thinking he was working completely on his own land, F built a driveway from the street to a garage clearly located on his land. However, in doing so he innocently built the driveway so that it encroached substantially upon E's property. At the time construction began, E was completely aware of the encroachment; nevertheless, she said nothing and permitted F to proceed. As soon as F completed construction of the driveway and began to use it, E ordered him off and instituted suit to enjoin the trespass. Most courts hold for F, saying that E is estopped from asserting her claim by reason of her failure to protest at a time when by doing so, she could have prevented F's substantial expenditures.<sup>55</sup> One way of characterizing the interest created in F is to call it an easement by estoppel.<sup>56</sup> It should be noted in this connection, however, that courts often are not careful in these cases to define whether the interest acquired by estoppel is a possessory fee simple or merely an easement.<sup>57</sup> And in still other cases, it is clear that the court is holding that the mistaken trespasser is acquiring a fee simple.<sup>58</sup>

No matter what the characterization, however, it is reasonably clear that there is no direct analogue in cases involving real covenants and equitable servitudes. Those kinds of interests are not acquired by estoppel in the same way. The reason becomes clear upon examination of the factual contexts in which the various interests arise. Thus, in the case of an easement by estoppel, the doer (whose activities result in the other party's being estopped) is a person who benefits from the doing: e.g., building a driveway and thereafter claiming to have a continuing right to use it. On the other hand, the doer in the case of the real covenant is ordinarily an obligor. He is performing an act that is burdensome to him, such as paying a fee or maintaining some property. It makes no sense to talk about his acquiring a "permanent right" to continue doing an onerous act based on the other party's silent acquiescence in the activity.

And in the case of the typical equitable servitude, there is no act which a party can claim he has a right to continue; rather, he must, if anything, point to another person's inactivity as a ground for the alleged estoppel. Does it make sense to say that because X has in the past refrained from building commercial structures upon his land, his neighbor, Y, may rely upon that inactivity and insist upon a continuing right that no commercial structure ever be built there? Or taking the most extreme case, suppose that Y, in reliance upon X's failure to build, constructs an expensive home on

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55. See 3 R. POWELL, *supra* note 11 at ¶ 411 n.50.

56. *Id.*

57. See, e.g., *Bright v. Michel*, 242 Miss. 738, 137 So.2d 155 (1962); *McClintic v. Davis*, 228 S.C. 378, 90 S.E.2d 364 (1955).

58. See, e.g., *Alcorn v. Linke*, 257 Iowa 630, 133 N.W.2d 89 (1965).

his land, and then X decides to use his property for an industrial plant. Upon what may it be said that Y has relied? The most that could be argued is that when X sees that Y is building the house, he has a duty to tell Y that some day he may build a commercial structure nearby that Y might regard as an inconsistent use.

The law has never imposed such a duty, because here, unlike the case of E being estopped from preventing the use of F's encroaching driveway, it is possible for the two uses to coexist. That is, residential and industrial uses conceivably may adjoin, even though that might not always be the most desirable situation. But it is not even physically possible for E to have full use of her property while F has a driveway easement over part of it. Thus, E must stop F from building in a timely manner, or the courts, forced by the physical inconsistency to choose between the two interests, are impelled to decree that E lose some rights to her land. But where, as in the case of equitable servitudes, the physical inconsistency does not exist, the courts are content to allow the two uses to coexist. Once again we find that the law of easements does and necessarily should differ from corresponding cases concerning equitable servitudes and real covenants.<sup>59</sup>

## II. ENFORCEMENT BY AND AGAINST REMOTE AND ORIGINAL PARTIES

### A. *Remote Party Enforcement*

#### 1. In General

There are many important differences in the rules about remote party enforcement among the three types of servitudes. They relate to a number of discrete issues all of which fall within the general inquiry of just what circumstances are legally required for the benefit or burden of a servitude to "run" to a new owner or possessor of land. In servitude law, when it is said that the benefit runs to a new owner or possessor, it means that that new party can enforce the servitude even though he has received no express agreement that he may. Likewise, when it is said that the burden runs to the

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59. Another type of easement by estoppel also should be mentioned. If one party orally gives permission to another to use certain realty, and the latter in reliance thereupon expends substantial sums upon his own or the permittor's land, a permanent easement by estoppel may arise to the extent such is necessary to realize on the expenditure. See 3 R. POWELL, *supra* note 11 at ¶ 411 nn. 47-49. Does the same rule apply to an equitable servitude? Suppose, A were to ask his neighbor, B, whether B planned to build a commercial building upon his land and B said he planned to keep the property residential forever. Suppose further that A in reliance on B's statement builds a dwelling on his land. In such a case it probably could be said that an equitable servitude by estoppel arose. Indeed, these facts are not very far from the case above described in which a purchaser relies on the oral representations of a developer concerning the use of the land in the subdivision. See *supra* note 45 and accompanying text. Perhaps a better characterization of the result would be to call it a covenant by estoppel.

new owner or possessor, it means that he is bound to obey or perform the servitude just as if he had expressly agreed to do so.

The alternative to the statement that a benefit or burden runs to remote parties is that the benefit or burden is "personal." A benefit is personal when transfer of ownership or possession of property by the originally benefited party does not automatically pass the right to enforce the servitude. A burden is personal when the transfer of the ownership or possession of property by the originally burdened party does not automatically pass the burden to the new owner or possessor. In this part of the article we discuss just what circumstances will evoke the judicial response that the benefit or burden of the servitude runs, and what will evoke the alternative response.

It should be noted that often different terminology is used to describe the phenomenon of running benefits or burdens in connection with the various kinds of servitudes. Thus the issue of whether the "benefit runs with the land or is personal" in real covenant and equitable servitude law is sometimes said in easement law to be whether the easement is "appurtenant or in gross." An appurtenant easement is created for the purpose of benefiting the owner of the dominant estate as possessor, whereas an easement in gross is created for the purpose of benefiting an easement owner individually and not in connection with his use of any particular piece of land.<sup>60</sup> The classic example of an easement in gross (or personal easement) is a railroad's right of way running from one terminus to another over lands belonging to others. In such a case, since the easement is not appurtenant to the enjoyment of any particular piece of land owned or possessed by the railroad, conveyance of title to, or transfer of possession of, any realty it happens to own or possess would not automatically transfer its rights in the easement. In that sense then the easement in such case can be said to be personal.<sup>61</sup> But the word "personal" can be used in another sense: to mean that the benefit cannot be transferred to another party at all, either *inter vivos* or at death. The two uses of the word should not be confused. Merely because an easement in gross is said to be personal should not necessarily call for the result that it cannot be transferred to another person.<sup>62</sup> The question of whether easements in gross ought to be assignable should be decided on its own merits as a matter of sound policy. We turn now to a discussion of the major rules concerning remote party enforcement.

## 2. The Required Relationship of the Parties to the Land or Other Parties

In this subsection we discuss the relationships of the parties to the land and to other parties, that are required by law for the benefit or burden to

60. 3 R. POWELL, *supra* note 11 at ¶ 405 nn.28-35.

61. *Id.* at ¶ 405 n.37.

62. Professor Powell pointed out in this treatise:

Calling an easement in gross "personal" has some dangers. Some "personal" rights are nonassignable and die with the owner. Some courts have held easements in

run to persons not signatory to the original arrangement. Generally these have to do with two matters: (1) whether the remote person must be a successor of an original party to the deal creating the servitude, or whether it is sufficient that he merely be in possession of the land affected; and (2) what kinds of relationships must exist between the original parties to the servitude for the benefit or burden to run to remote individuals. We turn next to the first of these two issues.

a. Vertical Privity or Possession—Is a Relationship Between the Original Party and the Present Occupant Required?

Discussion of this issue involves a fundamental distinction between real covenants on the one hand, and easements and equitable servitudes on the other. In the law of real covenants, when it is said that the benefit of a covenant “runs with the land,” it is meant that a person who in ordinary course gets *title* to that land may enforce the promise, even though he has received no express assignment of the right to do so.<sup>63</sup> And when it is said that the burden of a covenant “runs with the land,” that signifies that a person who in ordinary course gets *title* to that land is personally liable to perform the promise even though he never expressly agreed to do so.<sup>64</sup> The rule requires that the remote party succeed to the identical ownership interest of the original party to the arrangement. This succession of interest from an original to a remote party is known as vertical privity of estate and is a traditional fixture of the law in this area.<sup>65</sup> Without this privity, the rule is clear that at law the remote party can neither enforce, nor have enforced against him, real covenants running with the land.

In contrast, the traditional rules concerning remote party enforcement of easements have quite a different basis. Unlike the real covenant area, the rights and duties accompanying the dominant and servient tenements of an affirmative easement are based upon *possession* of and not ownership of those tenements.<sup>66</sup> Thus, the possessor of a dominant tenement, whether he be an owner, an adverse possessor with no title at all, or a tenant for years, may use an easement appurtenant to the land he possesses. Likewise, any possessor of a servient tenement, no matter what his claim of ownership might or might not be, must permit an easement holder to use the burdened land in the manner contemplated by that easement. The rules concerning

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gross thus nonassignable. No justification for that result can be drawn from the use of the word personal when it is merely used as an antithesis of the word appurtenant.

*Id.*

63. See RESTATEMENT OF PROPERTY § 541 (1944); 2 AMERICAN LAW OF PROPERTY § 9.19 (A. Casner ed. 1952).

64. See RESTATEMENT OF PROPERTY § 530 (1944); 2 AMERICAN LAW OF PROPERTY § 9.18 (A. Casner ed. 1952).

65. See J. DUKEMINIER AND J. KRIER, PROPERTY 1025-30 (1981); *Promises Respecting Use of Land*, *supra* note 32 at 193-195.

66. C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH “RUN WITH LAND” 65 (2d ed. 1947).

enforcement of equitable servitudes are similar to those involving easements. There, too, it is not necessary to show succession to the interests of the original parties for subsequent parties to be able to enforce or to have enforcement available against them. Possession is generally enough.<sup>67</sup>

Of course, it should be noted that the net result of attaching benefits or burdens to possession is often the same as attaching them to ownership. For example, if land which is the dominant tenement of an easement appurtenant is conveyed to X in fee simple, the easement automatically and without mention passes to X as new possessor, just as the benefit of any real covenant passes to him as new owner. The fact that one interest goes to X in his possessor role and the other in his owner role is not important, because he meets both requirements. On the other hand, there are cases in which possession and ownership are separated for one reason or another, and this distinction therefore can become very significant. For the most part, these occur in the following two situations: (1) when an original party or his successor conveys to another some interest less than the original party or successor (such as, O, the fee owner, conveys a life estate or estate for years to T who takes possession); or (2) an adverse possessor takes over from an original party or his successor. The question raised by all this is whether it makes any sense to distinguish between these various kinds of servitudes on the vertical privity issue, or, whether the law ought to be unified in such a way as to merely require possession before benefits and burdens run to remote parties.

Perhaps the best way of approaching an answer to the problem is by way of a hypothetical fact pattern. Assume that the A Corporation, a residential developer, sells to B, Blackacre, a house and lot which is part of a large townhouse development known as Fairwoods. In the deed to B there are the following agreements: (1) that B shall use the premises for residence purposes only; and (2) that B shall pay \$150.00 per month to the Fairwoods Residence Association for the maintenance of the common areas of golf course, swimming facilities, etc. In addition, B's title is subject to various easements already granted by A Corporation to the telephone, power, water and sewage companies. A sells other parcels in the subdivision to scores of purchasers both prior and subsequent to the sale to B. B is in possession of Blackacre for a number of years, using the property for residence purposes, regularly paying the required \$150.00 per month and in no way interfering with the various easements. B finally leases Blackacre for five years to T. The lease agreement is silent with respect to the real covenant, equitable servitude and easement. T is a plumber who, in breach of the covenants and easements, uses the property for a plumbing supply business, refuses to pay the \$150.00 per month, and interferes with the various easements by attempting to cut the various lines and pipes.

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67. See 2 AMERICAN LAW OF PROPERTY § 9.26 (A. Casner ed. 1952) (no privity is necessary in equity between original covenantor and covenantee); *id.* at § 9.31 (no privity is necessary between covenantor and his successor); *id.* at § 9.27 (no privity is necessary between covenantee and his successor). *But cf.* RESTATEMENT OF PROPERTY § 547, comments c, d, and e (1944).

The law on this subject is quite clear. As explained above, T, as possessor, may be enjoined from operating the business and from interfering with the various easements, but T is not personally liable to pay the \$150.00 per month, in the absence of his agreement to do so. A mere possessor of land is bound by equitable servitudes and easements affecting it, but he must be in privity of estate with the original promisor, if he is to be held personally responsible to perform real covenants that touch and concern that land. In this context, that means that T must succeed to B's identical estate, a fee simple, or he is not bound to perform the promise. It might be asked whether it is rational to make this distinction, or whether, perhaps, the law ought to be unified in one way or the other. In answer one can make a pretty good argument that the rules as presently constructed make eminently good sense, and that unification of them would be a mistake. On the one hand, if we are going to have a workable system of consensually created land use controls, we certainly cannot allow a restrictive covenant to be violated just because the owner decides to rent the burdened property to a tenant. The possessor just has to be bound. The same rule would have to apply to an existing, valid easement; an easement should not be effectively ended just because the servient property is put under a lease.

On the other hand, an entirely different issue is presented in the real covenant area. There the problem is not whether the servitude will effectively terminate if we hold that the possessor is not bound; because, unlike the burden of an easement or an equitable servitude, it is in the nature of the burden of a real covenant (a promise to perform an affirmative act) that either B, the fee owner, or T, his tenant, can perform it. The question of upon whom the law should cast the burden, therefore, does not automatically answer itself. Rather, one must consider what makes policy sense in the peculiar economic context in which the facts arise.

To illustrate, it has already been noted that in the above hypothetical the law says that T is not bound to pay the \$150.00 a month, because he is not in privity of estate with the promisee. B, on the other hand, is obviously still bound. Should a tenant be bound to perform the land-related promises of his landlord when the tenant has not undertaken to be? The answer, I submit, lies in the expectations of the parties and of the community in general. Most persons would assume that a promise to pay the monthly common area maintenance fee in a residential transaction is the obligation of the owner of the individual parcel as owner, and that, therefore, the burden should not pass with a mere transfer of possession to a tenant. On the other hand, suppose the promise to keep the front of the premises swept clean each day. In that situation, it would appear that the obligation was meant to be performed by the person in possession and anyone, including T, would understand that.<sup>68</sup>

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68. In *Promises Respecting Use of Land*, *supra* note 32 at 203-206, I took the same position with respect to the analogous assignment-sublease distinction and said that one should decide the issue of whether the burden should run by giving "effect to the normal or usual understandings of the community with respect to the remote-party liability issue [to] prevent unexpected and unexpectable liability." *Id.* at 206.

The same analysis might apply where the owner of property subject to a real covenant gave a long-term net lease to a commercial tenant. In a net lease, the intent of the parties is that the tenant assume all the normal obligations of the landlord, including payment of taxes and property insurance and repair of the building, while the landlord is essentially a passive investor whose only responsibility is to continue to pay any mortgage obligation he might have on the land.<sup>69</sup> In that situation, it would not be untoward to hold that the tenant, as the person who bears the everyday expenses of running the building, has an obligation to perform those covenants of the landlord that touch and concern the land. Such a one might be an obligation of the owner-landlord of a building in a shopping center to contribute to a fund for maintenance of the common parking area. If the lease were silent on the question (as it ordinarily would *not* be), it might seem appropriate to hold the tenant liable to perform that kind of promise.

Thus, one may criticize as overly broad the all or nothing rule that unless the technical requirements of vertical privity of estate are met, the burden of a real covenant cannot run to a successor. Still, as above noted, there are many cases in which it is inappropriate for the burden to run to a possessor just because he is in possession, while in other cases, the possessor ought to perform the burden. Therefore, it can be said that the rules about privity and possession in the three types of servitudes cannot sensibly be "unified."

#### b. Horizontal Privity—What Relationship Between the Original Parties is Required?

The second main issue involving party relationships, upon which the various servitudes differ, relates to the question of what kinds of links must exist between the original parties to the servitude, in order for the benefit or burden to run to persons remote from it. The rules as to easements and equitable servitudes are relatively simple to state. No relationship other than the agreement itself is required.<sup>70</sup>

In the area of real covenants, however, the law has formal "horizontal privity of estate" requirements. It is not important here to go into all the details of the development of these rules in England and the United States. This has been done elsewhere many times before.<sup>71</sup> Suffice it to say that in England the rule was that there had to be a tenurial relationship between the original parties (such as landlord-tenant or life tenant-remainderman) for the benefit or burden to run to remote parties.<sup>72</sup> In the United States, some

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69. H. HOAGLAND, L. STONE, & W. BRUEGGEMAN, *REAL ESTATE FINANCE* 287 (6th ed. 1977).

70. See 2 *AMERICAN LAW OF PROPERTY* § 9.26 (A. Casner ed. 1952) (discussing equitable servitudes); 3 R. POWELL, *supra* note 11 at ¶ 407 (discussing easements).

71. See 2 *AMERICAN LAW OF PROPERTY* § 9.11 (A. Casner ed. 1952); 5 R. POWELL, *supra* note 11 at ¶ 673[2][c]; C. Clark, *supra* note 66 at 111-121; *Promises Respecting Use of Land*, *supra* note 32 at 193-95.

72. See *Keppell v. Bailey*, 2 Myl. & K. 517, 39 Eng. Rep. 1042 (Ch. 1834)..

states seem to follow the English rule requiring tenurial privity,<sup>73</sup> while others require a simultaneous and mutual interest such as an easement in the same parcel,<sup>74</sup> and still others require at most, that a deed between covenantor and covenantee, transferring title to one of the affected parcels, contain the covenant that is to run.<sup>75</sup> Dean Clark severely criticized the horizontal privity requirements,<sup>76</sup> and rightly so. The basic justification for all these formal requirements is to put roadblocks in the way of the title encumbrance that results from a system of running affirmative promises. But this proves too much, for restrictive covenants, enforceable as equitable servitudes without any privity requirement at all, are much more common and tend to cloud the title just as severely. If the requirement of privity is unnecessary with respect to the more commonly used device, then, a fortiori, it is superfluous in the less common one. The important point is that both kinds of devices serve useful purposes in a system of consensual land use control and there appears no reason to make the use of one more difficult than the other.<sup>77</sup>

Most of the modern commentators similarly have argued for the elimination of the horizontal privity requirement in the real covenant area,<sup>78</sup> and it is submitted that this is indeed one of the places in which the law of easements, equitable servitudes, and real covenants could be integrated to good effect.

### 3. Intention and Touch and Concern and Their Easement Counterparts

#### a. Intention

The courts still state universally that one of the requirements for the benefit or burden of a real covenant or equitable servitude to run with the land, is that the original parties to the promise must have had an intention that it so run.<sup>79</sup> That formulation, however, is a vast oversimplification, if not a misstatement of, the rule as it has evolved. First of all, in many of the cases, the parties are silent on whether or not they intended the covenant to run with the land; faced with this silence, most courts infer intent from what they think most parties would have intended under the circumstances.<sup>80</sup> I

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73. See, e.g., *Costigan v. Pennsylvania Railroad*, 54 N.J.L. 233, 23 A. 810 (1892); *Petersen v. Beekmere, Inc.*, 117 N. J. Super. 155, 283 A.2d 911 (1971); *McIntosh v. Vail*, 125 W. Va. 395, 28 S.E.2d 607 (1943).

74. See, e.g., *Shade v. M. O'Keefe, Inc.*, 260 Mass. 180, 156 N.E. 867 (1927); *Morse v. Aldrich*, 56 Mass. (19 Pick.) 449 (1837).

75. The vast majority of the states seem to follow this view. See 3 R. POWELL, *supra* note 11 at ¶ 673[2][c] n.113.

76. See C. CLARK, *supra* note 66 at 117.

77. See *Promises Respecting Use of Land*, *supra* note 32 at 194.

78. See, e.g., *Browder, Running Covenants and Public Policy*, 77 MICH. L. REV. 12, 21-26 (1978); *Newman and Losey, Covenants Running With the Land; Two Concepts or One?* 21 HAST. L. J. 1319, 1330 (1970); *Stoebuck, Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 880 (1977).

79. See *Promises Respecting Use of Land*, *supra* note 32 at 173-179.

80. *Id.*



have argued elsewhere that this is exactly the same process courts go through when they determine whether the benefit or burden of a promise "touches and concerns" the land. That is, in my view the touch and concern test is merely a way for the courts to decide whether most persons in the position of parties in the case before them would intend that the benefit or burden run with the land.<sup>81</sup> In such a situation, therefore, it can be said that courts are unconsciously looking to the same test of community expectation to determine whether the purportedly separate requisites of intention and "touch and concern" are met.

There are, of course, cases in which the parties expressly say what their intent is with respect to the running question. Most often this express intent takes the form of a written statement in the instrument creating the servitude that it is intended that the benefit or burden of the promise run to remote parties. Customarily this is expressed by stating explicitly that the heirs, administrators, executors, and assigns of the parties may enforce, and are bound by, the agreement. If that expressed intent accords with what the court believes most parties would intend under the circumstances (the benefit or burden touches and concerns the land), the court will give effect to that expressed intention.<sup>82</sup> On the other hand, if the expressed intent is contrary to what the courts view as the usual understandings of the community, the court will refuse to follow an intent that the benefit or burden shall run and they will follow an intent that the benefit or burden shall not run. This, of course, is just another way of saying that in order for a covenant to run, both the intention and touch and concern tests must be met.

With respect to easements, courts occasionally talk about original party intention when they are attempting to decide whether a benefit or burden is assignable or automatically runs with the possession of certain land.<sup>83</sup> Most often, however, the opinions do not directly mention this factor. Still, the underlying concept of intent really pervades the entire discussion of the running question, for, almost universally, the decisions look at whether the easement was "created for the purpose of benefiting the owner of the dominant estate as [its] possessor,"<sup>84</sup> (where the easement is said to be appurtenant), or whether it was for the purpose of benefiting the easement owner individually, and not in connection with his use of any particular piece of land, (where it is said to be in gross). Obviously, when courts examine purpose they are at least in part examining the intention of the parties who originally set the easement up. A use has no impersonal "purpose" aside from the individuals who create and utilize it. The intention of

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81. *Id.* at 219-220.

82. *Id.* at 179.

83. *See, e.g.,* *Miller v. Lutheran Conference & Camp Ass'n.*, 331 Pa. 241, 200 Atl. 646 (1938). "There does not seem to be any reason why the law should prohibit the assignment of an easement in gross if the parties to its creation evidence their intention to make it assignable." *Id.*

84. 3 R. POWELL, *supra* note 11 at ¶ 405 n.29.

the owner of the easement to use the burdened land may either be in connection with, or not in connection with, his possession of neighboring land. The intention question, therefore, is just as important in the easement area as it is in the other servitudes areas.<sup>85</sup>

#### b. Touch and Concern

It is well established that the burden of a real covenant does not run to the promisor's successor in title unless the burden "touches and concerns" the property that has been conveyed to the successor.<sup>86</sup> Likewise, the law holds that the benefit of a real covenant does not run to a successor in title of the promisee unless the benefit "touches and concerns" the property that has been conveyed to that successor.<sup>87</sup> To illustrate, suppose that A, owner of the two adjoining tracts, Blackacre and Whiteacre, sells Whiteacre to B. In the deed to B, the grantee covenants: (1) to pay for one-half of the repairs necessary to maintain an existing fence dividing the two properties; and (2) to buy A's antique car for \$10,000. Assume further, that A now conveys Blackacre to C and B conveys Whiteacre to D. Can C enforce either promise? Is D personally liable to perform either promise?

The law is that C can enforce the first promise but not the second. The benefit of B's promise to help maintain the fence touches and concerns Blackacre in such a way that C, as successor owner of it, can enforce the promise against the owner of Whiteacre. However, the promise to buy the car does not benefit A as owner of Blackacre, but is a collateral promise that just happened to be inserted in the deed. No one would expect that such a benefit would run to the new owner. Therefore, the law says that the benefit does not touch and concern Blackacre and only A can enforce it.

A similar analysis applies to the burdens. The burden of B's promise to maintain the fence relates to B's status as owner of Whiteacre and, therefore, is said to touch and concern that property. It follows that D, as the new owner of Whiteacre, is liable to pay for maintenance of the fence just as if he had made the promise himself. On the other hand, the promise to buy the car does not relate to B's interest as owner of Whiteacre, and no one would think that the new owner would be responsible to perform it. Therefore, the burden does not touch and concern that land and D is not liable to perform the promise unless he has expressly agreed to do so.

As I have noted before, the touch and concern requirement is a means of giving:

85. It should be noted that the question of intention is administered in different ways for the various servitudes. In the case of real covenants and equitable servitudes, the courts place upon the party alleging that the covenant runs, the burden to show an intent that it run. That is not true in the easements area where, when they are in doubt, the courts indulge in the presumption that the easement is appurtenant. *See, e.g.,* Todd v. Nobach, 368 Mich. 544, 118 N.W.2d 402 (1962); *see also* 3 R. POWELL, *supra* note 11 at ¶ 405 n.32.

86. *See* 2 AMERICAN LAW OF PROPERTY §§ 9.4, 9.13 (A. Casner ed. 1952).

87. *Id.*

effect to the intent that most people would probably have if they thought about the issue [of whether the benefit or burden runs] and thereby protect[ing] subsequent parties against unexpected and unexpected liability. Touch and concern is a device for intent effectuation, through which the law conforms itself to the normal, usual or probable understanding of the community.<sup>88</sup>

It follows that touch and concern looms as an important issue only when the alleged servitude is ambiguous in its relatedness to the land involved, for when there is a clear, close relation, most parties would assume that the burden or benefit would pass with transfer of ownership. This ambiguity most often exists with respect to a real covenant because of the nature of the undertaking involved: that is, a promise to perform some affirmative act. Some of those promises, such as the doing of a physical act on the premises, are clearly land-related and would meet the touch and concern requirement.<sup>89</sup> Many of the promises, however, involve the payment of money, which by its nature is an equivocal act. Promises to insure leased property, pay taxes or assessments on the leased or adjoining property, pay for the maintenance of common areas, and pay for the grantor's obligations for existing improvements all present difficult problems of whether the burden ought to run to remote parties. Touch and concern thereby becomes an important issue with respect to them.

The issue of touch and concern, however, generally has not been accorded central importance in the analysis of cases involving equitable servitudes and affirmative easements. Equitable servitudes invariably involve negative covenants—promises with respect to how land should not be used. Such promises clearly do touch and concern the land, so the courts of equity, for the most part, have not stated nor found it necessary to state touch and concern as a separate requirement.<sup>90</sup> There are, however, a few cases which have dealt expressly with touch and concern in equity. They have arisen mostly in the area of covenants against competition, where there has been a split of authority as to whether the benefit of such promises touch and concern the land involved.<sup>91</sup> In the overwhelming number of cases, touch and concern is a mostly unarticulated, yet underlying, requirement for the running of equitable servitudes.

Affirmative easements require a slightly different approach. Since they involve rights to use servient land, it is absolutely clear, by any analysis, that their burden would always touch and concern that land and would bind a new possessor of it. It is understandable, therefore, that the courts do not

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88. *Promises Respecting Use of Land*, *supra* note 32 at 208-09.

89. *Id.* at 220-22.

90. *Id.* at 216-19.

91. See *Norcross v. James*, 140 Mass. 188, 2 N.E. 946 (1885) (covenant does not touch and concern land). The famous case of *Norcross* decided by Mr. Justice Holmes was overruled by *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 390 N.E.2d 243 (1979). For a collection of cases holding that such a covenant does touch and concern see 97 A.L.R.2d 4, 72-75 (1964).

discuss touch and concern with respect to the running of the burdens of affirmative easements. Nor, for that matter, does one find such discussion with respect to the running of benefits, though the concept is clearly implicit in determining whether an easement is appurtenant or in gross. As was noted in the above discussion of intention, that determination is based on the question of whether the easement was created for the purpose of benefiting the owner of the dominant estate as possessor or merely as an individual. Just as the concepts underlying intention and touch and concern are closely related in the real covenant area, they are similarly related in the easement area. It is interesting and revealing that the courts have not felt impelled to separate the questions of intention and touch and concern in dealing with the problems of the running of the benefits of affirmative easements. They speak of a nebulous "purpose" for the easement. It is my contention that in doing so, they are unconsciously merging into one the two concepts of original party understandings (intention) and the inferred community expectation (touch and concern).

In summary, it might be said that, although the requirement of touch and concern is almost universally ignored by the courts in the affirmative easement and equitable servitude areas, the policy underlying the requirement is implicit in determining the question of remote party enforcement as to all servitudes. It would be possible, therefore, to integrate the rules with respect to the question of touch and concern.

### *B. Liability of the Original Parties*

There is an interesting contrast in the way the law of the various servitudes handles the liability of the original party to the arrangement that created the servitude, after he no longer has an interest in the property subject to it. The problem is simple with respect to easements and equitable servitudes. There the originally burdened party is not liable to perform after his interest in the property subject to the servitude ends. Thus, if L, owner of Greenacre, conveys an easement over it to M and later sells the fee simple to N, L is not responsible if N wrongfully refuses to allow M to cross Greenacre under the easement. Likewise, if X, the former owner of property which he promised would be used for residence purposes only, sells the property to Y, and Y builds a commercial building on the premises, X is not legally responsible. Only Y, the breaching party, is liable in damages or injunction.

The law is more complex, however, with respect to affirmative covenants at law. On the one hand, a tenant who assigns his leasehold interest in land to an assignee is still bound on his promise to pay rent, and if the assignee fails to pay, the tenant-assignor must make good, although he has an action over against the assignee.<sup>92</sup> On the other hand, a person buying in fee simple and promising to pay a monthly assessment to an association for maintenance

of common areas is not liable for obligations accruing after he sells the property to another.<sup>93</sup> The reason for the difference is clear. In the landlord-tenant situation, when the landlord rents the property, he is relying upon the credit of the tenant for the entire lease period, and the tenant should not be able to escape that liability just by assigning the lease. With a fee simple, however, it is well understood that the first buyer will not own the property forever, and it is contemplated that he will pay the assessments only as long as he is an owner. Further, unlike the lease, the assessment is a potentially infinite obligation which, if it were held to bind the original promisor forever, would render the assessment device useless. Nobody would buy property subject to such an onerous personal obligation. The rules on original party liability are not uniform with respect to the different servitudes, nor should they be. The differences in legal result make good sense. They stem from the fact that, although servitudes of different types may be similar and related to each other, there are enough differences in origin, economic function, and community expectation concerning them, that opposing yet sound rules about them can appropriately evolve.

### III. TERMINATION OF SERVITUDES

Many of the rules concerning termination have essentially equal application to each of the kinds of servitudes, because the policy underlying the rules is just as applicable to one kind of servitude as another. Among these would be rules involving the consent or implicit agreement of all the parties, and situations in which it is deemed unfair to enforce, after certain conduct of the owner of the servitude relied upon by the servient party. In general, then, any of the three servitudes may be terminated by: the expiration of the term agreed to by the parties at the time of the creation of the servitude;<sup>94</sup> a release from the appropriate owner of the dominant interest;<sup>95</sup> merger, that is, ownership of the dominant and servient interest by the same person;<sup>96</sup> estoppel, that is, conduct of the dominant owner inconsistent with the existence of the servitude reasonably and detrimentally relied upon by the servient owner;<sup>97</sup> and abandonment, that is, an intentional relinquishment of rights under the servitude.<sup>98</sup>

There are some other grounds for termination that are not clearly applicable to all varieties of servitudes. These would include change of

93. *Id.* at § 9.18 n.1.

94. See 3 R. POWELL, *supra* note 11 at ¶ 422 n.1; 5 R. Powell, *supra* note 11 at ¶ 678.

95. See 3 R. POWELL, *supra* note 11 at ¶ 423 n.1; 5 R. Powell, *supra* note 11 at ¶ 679[1] n.10.

96. See 3 R. POWELL, *supra* note 11 at ¶ 425 nn.1-3; 5 R. Powell, *supra* note 11 at ¶ 679 [1] nn.3-4.

97. 3 R. POWELL, *supra* note 11 at ¶ 425 nn.10-16; 5 R. Powell, *supra* note 11 at ¶ 679[1] nn.43-46.

98. 3 R. POWELL, *supra* note 11 at ¶ 423 nn.8-32; 5 R. Powell, *supra* note 11 at ¶ 679[1] nn.31-33.

conditions<sup>99</sup> and prescription.<sup>100</sup> A few words might usefully be said concerning them. It is well established that courts will refuse to enjoin violations of equitable servitudes (restrictive covenants) when there has been such a change of neighborhood conditions "as to make it impossible [any] longer to secure in a substantial degree the benefits sought to be realized" by the covenant.<sup>101</sup> Thus, if an area is already completely commercial, courts generally will not enforce a residence-only restrictive covenant. The reason for this rule is clear. Overall economic efficiency would suffer from enforcement of a covenant when the plaintiff would not benefit from, but the defendant would be harmed by, performance. In these cases, there has been a tendency for some courts not only to refuse injunctive relief but also to terminate the covenants completely so that not even damages are available for their breach.<sup>102</sup> In that sense, one can say that change of conditions is a defense to a real covenant because enforcement at law is precluded. However, one does not find authority applying the changed conditions doctrine in those terms to a real covenant involving an *affirmative* promise, such as one to pay money. Of course, the traditional contract doctrines of impossibility of performance and frustration of purpose are clearly applicable to such situations. Thus, if a party wall were destroyed, a promise to pay money to contribute to its maintenance might be discharged under those well-established contract rules.<sup>103</sup>

However, the contract doctrines described above are clearly distinguishable from the changed conditions doctrine, because the former involve situations in which the plaintiff would be benefited by performance of the covenant. The essence of the contracts argument is that, because of unforeseen circumstances, defendant would be unfairly harmed if he is forced to carry out the original agreement. The whole gist of the changed conditions defense, on the other hand, is that the plaintiff really has nothing to gain by winning the lawsuit, if, for example, the neighborhood has already changed in such a way that an additional violation of a restrictive covenant would not make any real difference in the area. Then, should the doctrine of changed conditions apply to affirmative promises just as it does to negative ones? The answer is a qualified yes—qualified because in most such cases the doctrine probably will not be applicable as it does not fit the most important and common type of affirmative promises, those involving engagements to pay money. It would be difficult to imagine a case in which

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99. 5 R. POWELL, *supra* note 11 at ¶ 679[2].

100. 3 R. POWELL, *supra* note 11 at ¶ 424 nn.1-9.

101. See *Osborne v. Hewitt*, 335 S.W.2d 922, 925 (Ky. 1960).

102. See 5 R. POWELL, *supra* note 11 at ¶ 679[2] nn.67 (and cases cited therein); annot. 4 A.L.R.2d 1111, 1117-29 (1949).

103. Under traditional rules of the law of easements, mutual easements for support of a party wall terminate upon destruction of both of the premises that are tied to the party wall and all obligations thereunder would likewise be discharged. 5 R. POWELL, *supra* note 11 at ¶ 691 nn.1-6.

the plaintiff would not benefit from receiving such performance. However, the situation is probably different with respect to the other major kind of affirmative real covenants, those involving the performance of physical acts such as keeping leased premises in repair, or supplying water to neighboring land. There one could hypothesize rare situations in which the performance of the promised act is no longer beneficial to the covenantee, such as, when the plaintiff, covenantee of a promise to supply water, is now being supplied free water by the city. There seems no reason not to apply the doctrine of changed conditions to that kind of situation, as well as to the more common case of an absolute negative or restrictive covenant.

One might also ask whether the doctrine of changed conditions applies to the termination of affirmative easements. Certainly one will not find the doctrine described as a ground for termination in the classic authorities on the law of easements. However, here as in the case of affirmative covenants, one could imagine a situation in which the owner of an easement no longer benefited from it, and, therefore, the changed conditions rule might in theory apply. Suppose, for example, that plaintiff, easement owner, no longer needs his right of way to the street over defendant's land, because a new street abutting plaintiff's property has been constructed. Should the court grant an injunction against defendant's interference with the easement? If the right of way was created by the doctrine of necessity rather than expressly created by deed, the result is clear that the easement is terminated, and the injunction would be granted.<sup>104</sup> The rule is not stated as a question of whether conditions have so changed that the easement owner is not longer substantially benefited by it, but, rather, as a question of whether the "implied purpose" of the easement has been so served that the easement has expired by its own terms.<sup>105</sup> In the words of Professor Powell:

Easements may also sometimes be created in terms, for the accomplishment of a specified purpose. In such situation, the determinable easement expires when the specified purpose ceases to be accomplishable or has been accomplished. Easements created by necessity have an implied purpose to make possible the utilization of the dominant land, and such easements expire as soon as this necessity disappears. Easements created by other forms of implication or by prescription, present special problems. As in the case of determining the extent to such easements, it is necessary to resort to the facts of the creating conduct, to see whether one can reasonably infer therefrom a purpose which, simultaneously, accounts for the easement's existence and curtails its duration. If such a purpose is found the easement expires on the purpose ceasing to be accomplishable or being fully accomplished.<sup>106</sup>

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104. 3 R. POWELL, *supra* note 11 at ¶ 422 n.9.

105. *Id.*

106. *Id.*

It would seem then, that the doctrine of changed conditions exists in the law of easements but under a different label—that the purpose of the easement has been accomplished. One could argue, therefore, that this is an area in which some integration of the rules is possible.

Prescription is the other ground for termination that ought to be discussed in a bit more detail. In the traditional literature, the easement is the only servitude that may be terminated on that ground. Under the rule, if the servient tenant unequivocally bars the owner of an easement from using it for the statutory period of adverse possession, the easement is extinguished.<sup>107</sup> Thus, if the land, over which an easement is authorized, is fenced off and is used in a manner completely inconsistent with the continuance of the easement, the prescriptive period begins to run, and, if that state of affairs continues for the required length of time, the easement ends. The purpose of the rule, like most rules of prescription, is to put an end to potential disputes and allow an existing peaceful state of facts to continue. This of course is the notion of prescription as a doctrine of repose. More specifically, ending easements by prescription promotes the simplification and resolution of titles to land by terminating an encumbrance upon the servient property and thereby makes it more alienable.

Certainly the same concept could be used in connection with the other two kinds of servitudes. Thus, if the owner of land subject to a restrictive covenant builds a gas station and remains there for the statutory period, one could argue that he acquires a right by prescription to continue the violation, and that the servitude is thereby extinguished. However, one does not find the authorities discussing the matter in those terms. The reason undoubtedly is that other doctrines such as estoppel, waiver, and laches, fill the gap and make the separate use of prescription unnecessary. One could also make the same argument with respect to affirmative real covenants. For example, if a covenantor wrongfully refuses to perform a promise to pay for the maintenance of a party wall for the statutory period of adverse possession, there seems no reason not to apply the prescription rule.<sup>108</sup> But courts do not generally do so. Again, perhaps the explanation is that there are so many other modes of termination that come into play.

In summary, one can say that, for the most part, each of the rules concerning termination of servitudes, are as applicable to one kind of servitude as to another. Indeed, in some cases in which a doctrine (such as change of conditions) is not formally applicable, the courts may apply it under a different label (such as, the purpose of the servitude has been served). In the area of termination, some integration of the rules for the various servitudes is indeed possible and feasible.

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107. 3 R. POWELL, *supra* note 11 at ¶ 424 nn.1-9.

108. Indeed, one could argue that the statute of limitations for contractual promises is applicable. *See Chesapeake & Ohio Ry. Co. v. Willis*, 200 Va. 299, 105 S.E.2d 833 (1958).



## IV. CONCLUSION

I started out by asking whether it was feasible and desirable to attempt an integration of the law of the three basic kinds of servitudes upon real property—the real covenant, easement, and equitable servitude. For a variety of reasons, I believe the answer is no, that there are just too many impediments in the way of a meaningful integration. If one examines the law of these areas in a systematic way, I think it is clear that many of the variances in result have a basis not alone in sterile history but in sound contemporary policy.

There are substantial differences in the rules concerning creation of the various servitudes. Thus, easements by necessity and implication have no counterpart among the other servitudes for the good reason that no strong necessity exists to create them in the same way. Similarly, easements may be created by prescription but the other servitudes may not be. It is absolutely inappropriate to create covenants and equitable servitudes by prescription because the element of hostility necessary to create prescriptive rights is necessarily completely missing in the factual context in which these servitudes arise. And easements by estoppel also have no counterpart in the other two servitudes because the fact patterns giving rise to an estoppel cannot arise.

The most important and interesting problems in the law of servitudes concern the question of remote party enforcement, and in this area too complete integration of the rules is not desirable. To be sure, the unnecessary rules concerning horizontal privity could be unified to eliminate the requirement completely. And the notions of intention and “touch and concern,” though not now expressly applicable to easements, are applied to them all in principle. But the rule of vertical privity—that in order to be bound a remote party must succeed to the identical estate of the original obligor—has application in sound policy only to real covenants. It is absolutely unworkable to try to apply it to restrictive covenants and affirmative easements. In those cases, it is clear that all persons in possession, whether owners or not, must be bound, or the servitude would not truly achieve its purpose.

The law also must distinguish between the different servitudes with respect to the question of the liability of the original parties to a servitude after they have conveyed away their servient tenement. It is appropriate that liability cease when the servitude is a restrictive covenant or an easement, but the question is much more complex in the case of an affirmative covenant.

In conclusion, the law of servitudes could be simplified by the elimination of some of its unnecessary or irrational distinctions, but many of the variances in the rules are based upon sound policy and are supported by community expectation. An attempt to unify the rules for the sake of simple symmetry would do infinitely more harm than good.