THE AMERICAN LAW INSTITUTE'S LAW OF REAL COVENANTS

By CHARLES E. CLARK †

WRITING to Pollock in 1928, Holmes mentioned that "some cove" was trying to get him to review a forthcoming little book on covenants running with the land and went on, "It gave me a spell of the dry grins to remember and to write that very nearly half a century had gone by since that was a burning question for me."¹ In fact, it was in 1880, in the lectures which became famous as *The Common Law*, that Holmes had defined "privity of estate" in real covenants in a manner which for clarity, perspicacity, and practical point has never been surpassed.² Holmes's own departures on the Massachusetts supreme bench from these conclusions—made necessary by the force of local precedent—were understandable, but regrettable, as he himself indicates;³ and other attempts to evade

† United States Circuit Judge, Second Circuit Court of Appeals.

1. 2 HOLMES-POLLOCK LETTERS (Howe ed. 1941) 233, 234.

2. "According to the general opinion there must be a privity of estate between the covenantor and covenantee in the latter class of cases [i.e., covenants running with the land] in order to bind the assigns of the covenantor. Some have supposed this privity to be tenure; some, an interest of the covenantee in the land of the covenantor; and so on. The first notion is false, the second misleading, and the proposition to which they are applied is unfounded. Privity of estate, as used in connection with covenants at common law, does not mean tenure or easement; it means succession to a title. It is never necessary between covenantor and covenantee, or any other persons, except between the present owner and the original covenantee. And on principle it is only necessary between them in those cases—such as warranties, and probably covenants for title—where, the covenants being regarded wholly from the side of contract, the benefit goes by way of succession, and not with the land." HOLMES, *THE COMMON LAW* (1881) 404.

3. Compare, for example, his statement in *Norcross v. James*, 140 Mass. 188, 189, 191, 2 N. E. 946, 947, 948 (1885): "The privity of estate which is thus required [that an assignee may sue on the covenant] is privity of estate with the original covenantee, not with the original covenantor; and this is the only privity of which there is anything said in the ancient books"; and the statement in respect to the Massachusetts rule of covenants in aid of easements, "which is generally true, although, as has been shown, not invariably [citing the doctrine in *Pakenham's Case*]; and although not quite reconcilable with all the old cases except by somewhat hypothetical historical explanation. But the expression 'privity of estate' in this sense is of modern use, and has been carried over from the cases of warranty, where it was used with a wholly different meaning." And compare, also, somewhat similar apologies in *Walsh v. Packard*, 165 Mass. 189, 42 N. E. 577, 40

them have been at best confusing, at worst, disastrous. The latest of these is the American Law Institute's Restatement, now almost completed, which has at least been able to give a new and bizarre turn to an ancient subject.⁴

My own delvings in this subject, of course, cannot claim either the authority or the antiquity of Holmes's. I first approached it almost a quarter of a century ago in an article⁵ which later formed a substantial part of the little book Holmes so wisely declined to review.⁶ Yet, after a complete re-examination of the authorities, lately made because of the Institute's forthcoming Restatement, I have seen how much wiser Holmes was than I in treating the subject with "a spell of the dry grins." For this rather dreary and time-consuming task seems to have served only to make the restaters more intransigent in their opposition to these rather harmless property interests, while it reconvinced me of the contrary view. And now that the matter is substantially concluded, with the Institute juggernaut steadily rolling on its appointed course,⁷ there may be real doubt of the worth of devoting more good white paper to so narrow a corner of the law. Yet it is after all a rather fascinating corner, at least from the standpoint of analytic and polemic discussion, as the vast amount of time and money expended on it by the Institute indicates.⁸

L. R. A. 321 (1896). The Massachusetts rule is discussed below, see notes 25 and 26 and accompanying text *infra*; and the cases given in App. I *infra*.

4. RESTATEMENT, PROPERTY (2) (Proposed Final Draft, 1943). Of this final draft, titled Servitudes, Part I, on Easements, containing six chapters and 176 pages, was finally adopted at the Annual Meeting, May 11-14, 1943, while Part II, on Licenses, pages 177-205, and Part III, on Promises Respecting the Use of Land, four chapters, pages 206-344, were tentatively approved and referred back to the Reporter and his group for further revision and final presentation next year. See notes 53, 101, and App. II *infra*. While this printed material represents the bulk of the proposed treatment of covenants, certain additional material covering termination by eminent domain proceedings is to be included.

5. Clark, *The Doctrine of Privity of Estate in Connection with Real Covenants* (1922) 32 YALE L. J. 123. See also Clark, *Party Wall Agreements as Real Covenants* (1924) 37 HARV. L. REV. 301. (The order of citation employed in this article substantially follows that used by the writer in memoranda to the Institute, additional cases having been added.)

6. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND," INCLUDING LICENSES, EASEMENTS, PROFITS, EQUITABLE RESTRICTIONS AND RENTS (1929). Holmes in his letter refers to an intimation "that the author ran counter to some of my views." 2 HOLMES-POLLOCK LETTERS (Howe ed. 1941) 233, 234. But this was not as to Holmes's definition of privity, see note 2 *supra*, but to his overclose assimilation historically of these covenants to covenants of warranty, as well as to the later Massachusetts decisions. CLARK, *supra* at 94 *et seq.*

7. As to the scant likelihood of any substantial modification of the Restatement, see notes 53, 101 and accompanying text *infra*, as well as App. II *infra*.

8. Work on the division of Servitudes of the Property Restatement commenced October, 1934. While no public announcement of the Reporter's salary is made, it is commonly understood to be \$5,000 a year, with research and clerical assistance also provided. To this must, of course, be added the travel expenses of the Reporter and his Advisers, *honoraria* to the Advisers, and final expenses of preparation for printing. It can hardly

Moreover, it affords a prime case study of Institute methodology. And the result suggests once more how difficult is the attempt to combine all the varied and fluid developments of all the courts of all the different sovereignties of this country into one uncompromising black-letter statement to represent "the law" and how that backbreaking task tends in final solution to lead to a one-man product, though authenticated and stamped by the official seal of the Institute. An attempt to recount this bit of recent American legal history may, therefore, be justifiable.

THE ISSUES INVOLVED

Controversial issues concerning the law of real covenants arise out of the attempted transfer of obligations involving land with the transfer of the land itself. May the benefit or the burden of a covenant entered into by a landowner pass to some person to whom he thereafter transfers the title? Although earlier history tends to approach this problem as involving a land interest, such as, say, an easement,⁹ a modern view has been to re-emphasize the difficulties early found in the law of ordinary contracts and in the law of assignments of choses in action, which has been recognized so haltingly and so comparatively recently in Anglo-American history. Those who share this view think of the problem as one of rationalization or justification (if not restriction) of the transfer of covenant obligations to strangers. But it is now familiar law that a vast quantity of agreements which have some intimate relationship to land conveyed will pass with that land, so that enforcement can be had between parties other than the original contractors. Perhaps most familiar is the negative restriction on the use of land which has been so major a factor in urban development of real estate in the past decades; and the transfer of the benefit at least of various other covenants, such as payment for the use of easements, party walls, and the like, is thoroughly recognized.

Nevertheless, many have thought, and the Restatement accepts the view, that there are substantial limitations—beyond those of form, intent, and nature of the covenant as personal or real—which restrict or deny the transfer of the burden of covenants with the land. Hence the conclusion has been reached that while the *benefit* of real covenants, as well as the *burden* of negative restrictions, should run quite freely, the law should put various obstacles—obstacles admittedly unrelated to the parties' intent—in the way of the transfer of affirmative obligations. The subject

be doubted that the total cost of this Restatement will exceed \$100,000 (of which probably at least one-half should be attributed to the subject of covenants). Text writers in this field will doubtless compare ruefully the meager returns from the small books ordinarily needed to cover the subject with this rather munificent outlay.

9. Compare HOLMES, *THE COMMON LAW* (1881) 392 *et seq.*

matter of this paper is, therefore, a consideration of the validity of the distinctions thus made and the Institute's justification in taking them up and in amplifying and expanding them.

Before considering these matters in detail, the writer must assert his own belief that these distinctions, stated as abstract and general propositions applying to all real covenants, are quite unsupportable. They appear to be based at most on a kind of emotional fear that a purchaser of property may perhaps be rendered bankrupt through the enforcement of an obligation he had never intended to assume, coupled with the view that a negative restriction on land utilization is, if not desirable, at least comparatively harmless since it can only lessen or destroy the owner's value in such property. Needless to say, all of us may think up weird academic cases; and, of course, a person can be brought to financial ruin by a lawsuit. As a practical matter, it is hard to say whether financial ruin might be brought about more quickly by a judgment for damages for failing to repair a roadway or a fence than by one for an injunction (enforceable by a jail sentence for contempt) compelling the taking down of an apartment house built contrary to restriction.

There can be little doubt that generally speaking an injunction has been considered a more drastic remedy than a judgment for money damages; indeed, the latter is favored largely for that reason, except where necessity points to the former.¹⁰ It is not now usual to lay down general rules making the validity of land interests turn on such speculation, or, indeed, to outlaw, out of hand and before the case has arisen, what parties naturally and understandably may wish to do.¹¹ About the only clear-cut prohibition of this sort now thoroughly supported is the Rule against Perpetuities. That rule is now of well-settled antiquity; its objective is desirable and widely supported; and it at least attempts means adapted to its end and objective.¹² But in view of all the questions it has occasioned, one may doubt that a court would think to create it now without legislative support. Certainly its history suggests pause before we create much more doubtful, uncertain, and uncanalized prohibitions against the intent of landowners as to real covenants.

But, whatever the vague and extensive fears expressed as to these land interests, the fact of the matter is that the cases do not lend support

10. See RESTATEMENT, TORTS (1934) §§ 938, 944-51; RESTATEMENT, CONTRACTS (1932) §§ 358-80.

11. A recent holding supporting freedom of contracting in the absence of a clear showing that a statute (there the Copyright Act) is restrictive is to be found in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U. S. 643 (1943), *aff'g* *M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F. (2d) 949, 953, 954 (C. C. A. 2d, 1942).

12. Even this rule may now be doubtful and serve only the function of confusion. See Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest* (1943) 52 YALE L. J. 203, 254.

for them. With almost inconsequential exceptions the cases involve simple, practical agreements, where decision certainly need not be difficult. In spite of all fears the chief questions arising as to affirmative covenants seem to be almost entirely restricted to four classes of simple promises: (1) those to keep in repair certain physical structures of the covenantee (to repair fences, walls, roads, and so on); (2) those for the adjustment of rights in party walls, that is, walls on the boundary line and intended to be used by the adjoining landowners; (3) those for the adjustment of water rights and for the payment of charges with respect thereto; and (4) those to pay assessments to cover any of these matters. In Appendix I to this article an attempt is made to include all the American cases on privity; certainly all those cited in his support by the Reporter or relied on by others in this connection are there.¹³ The reader is asked to note how few there are which deviate at all from some phase of a simple and helpful type of agreement for the adjustment of rights for the mutual advantage of adjoining landowners. About the only other cases at all numerous concern early covenants by railroads for stations at certain places in return for land conveyed—which in general satisfy the requirements here discussed and are no longer practically important in view of the strict supervision of railroads—and covenants to prevent business competition on certain property, which are, of course, a type of negative restriction on use. And a court can easily find sufficient scope to take care of such few covenants as desirably should not run, under existing and well-settled rules, as to formality of the agreement, intent of the parties, touching and concerning of the promise (that is, real as against personal covenants), and particularly proof of loss, actual or threatened, to the suing party.¹⁴

It is submitted that an exclusive concern for the effects of a money judgment—not shared as to other remedies—is unreal in the light of history, as well as of practical business policies. The adjustment of debts, through the now manifold devices offered by the Bankruptcy Act, or, as perhaps more often, through compromise with a creditor who is willing to take half a loaf in preference to 10 per cent or none at all, is too well known to arouse so much opposition as the Institute has shown. There is no reason why all covenants to repair roads and fences, for example, should be visited with a disapproval not accorded to covenants requiring the

13. App. I, pp. 731-36 *infra*.

14. This simple requirement of proof of injury will do away with most, if not all, of the horror cases of various sorts envisaged by the Reporter. Conceivably, of course, a breach of contract without a showing of actual loss justifies an award of nominal damages only. RESTATEMENT, CONTRACTS (1932) § 328. How far that rule should be applied in a land case is not clear, and practically, there is little danger of a suit for merely nominal damages unless there is something more at stake.

building of only a highly expensive residence or the selling to certain kinds of persons only.¹⁵

The matter assumes a further air of unreality when it is recalled that the drastic remedy of forfeiture of the estate may be made readily applicable by creating obligations of this general nature in the form of conditions subsequent or of conditional limitations on the estate granted. Nonperformance of a condition subsequent gives the grantor or his representative a right of re-entry, while an estate granted on limitation expires with the happening of the specified event, which may be made the failure of the holder of the estate to perform an agreed-upon act.¹⁶

Finally, there seems no a priori reason for making a complete differentiation between the running of the benefit and the running of the burden of real covenants. If, indeed, the objections to the running of the burden of real covenants are only logical and historical, they are equally applicable to the running of the benefit of real covenants. If the objections are truly on the ground of policy, it is submitted that we cannot know what is desirable policy until we have the concrete case.¹⁷ Just as there are cases where mutual property adjustments point to the desirability of the running of certain burdens, so it seems obvious that certain benefits should not be allowed to pass. The situation becomes particularly anomalous if the benefit is allowed to run while the burden is not, contrary to the parties' intent that both should run mutually. Suppose various landowners get together and make a covenant to provide for the ex-

15. RESTATEMENT, PROPERTY (2) (Proposed Final Draft, 1943) § 87, comments *d-g*, does provide that the restriction must be neither illegal nor unreasonable, and the latter is left very vague.

16. RESTATEMENT, PROPERTY (1936) §§ 23-25, 154-55. In case of doubt a provision is to be construed as a condition, rather than a covenant. *Los Angeles University v. Swarth*, 107 Fed. 798 (C. C. A. 9th, 1901); *Plymouth v. Carver*, 16 Pick. 183 (Mass. 1834).

17. It is believed that the chief objection to this kind of encumbrance is not its original grant, which may, indeed, facilitate opportunities for sale and transfer, but its long-continued duration after its utility to the parties has ceased. Indeed, suggestions made for legislative reform to the Property Section of the A. B. A. have been favorably received. See Clark, *Limiting Land Restrictions* (1941) 27 A. B. A. J. 737, with form of statute providing for termination in the absence of renewal and discussing model statutes from Massachusetts and Minnesota. The suggestion was referred to the National Conference of Commissioners on Uniform State Laws, which, it is understood, has a committee on the subject. See also Rhodes, *Real Property Restrictions in Connecticut* (1943) 17 CONN. B. J. 12, 24-28. A far-reaching statute of this type has recently been passed in Wisconsin. Wis. Stat. 1941, § 330.15, as amended; (1942) Wis. L. Rev. 258-79. Final decisions as to policy are, of course, not easy to make, but it is perhaps important that those interested in modern housing developments and community planning protested that the writer's suggestions might prove too drastic. So a limitation was added to the proposed statute to allow of continuance of the restrictions by majority action of the group involved. See Clark, *supra* at 741 and note 30, the latter giving references showing the importance of restrictions in such developments.

pense of irrigating their respective pieces of land and for the payment of future upkeep and cost of the irrigation. X, one of the landowners, sells out to Y and departs to another country. An absolute rule of law to the effect that Y gets the benefit of all the covenants of his neighbors as to the irrigation, but assumes no contractual obligation in the premises, seems not merely highly anomalous, but quite arbitrary.¹⁸ The distinctions thus attempted are but modern and confused ideas which are not substantially buttressed in case authority and not deserving of perpetuation in an American corpus juris.

CONFUSION OF THE CASES

Notwithstanding historical claims to the contrary, these questions did not assume importance in the cases until comparatively modern times.¹⁹ In 1789, a reactionary and dullish judge, Lord Kenyon,²⁰ purely by way of dictum and without citation of cases, asserted, in what is still the most cited authority for the point, that "it is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties."²¹ So insignificant is the case itself as an authority and so far removed from anything practically affecting our law that it is, indeed, surprising it should have been picked up and so often cited since.²² At any rate, the idea that there must be some nebulous binding tie called "privity of estate," which is something other and additional to the contract itself, but existing between the covenanting parties, before the covenant will be allowed to run, has had some vogue, as the later discussion herein shows,

18. The water-right cases are referred to in note 69, and App. I *infra*.

19. The historical material is discussed in notes 78-83 and accompanying text *infra*.

20. Compare 6 WIGMORE, EVIDENCE (3d ed. 1940) §1858 ("this reactionary"); 8 *id.* §2217; Bordwell, Book Review (1929) 38 YALE L. J. 838, 839 ("a lawyer of very narrow training who was inclined to go off half-cocked") (reviewing CLARK, *loc. cit. supra* note 6).

21. Webb v. Russell, 3 T. R. 393, 402, 100 Eng. Rep. 639, 644 (K. B. 1789). A few earlier statements, as in Bally v. Wells, 3 Wils. K. B. 25, 95 Eng. Rep. 913, Wilm. 341, 97 Eng. Rep. 130 (K. B. 1769), do not attempt to define the phrase and are consistent with Holmes's view, note 2 *supra*. See CLARK, *op. cit. supra* note 6, at 72, 98.

22. This was a covenant to pay rent and to repair, made by the defendant lessee with the mortgagor; and the court adopted the premise, long since repudiated, Municipal Permanent Investment Bldg. Soc. v. Smith, 22 Q. B. D. 70 (1888), that the mortgagor was a stranger to the land because he had conveyed away his legal title. Of course, *on that premise*, the benefit of the covenant would not run, for it was obviously in gross, as was so held in allowing recovery by the original promisee. Stokes v. Russell, 3 T. R. 678, 100 Eng. Rep. 799 (K. B. 1790), 1 H. Bl. 562, 566, 126 Eng. Rep. 323, 325 (Ex. 1791). It is time that the blight of *Webb v. Russell* as a restriction on modern American law is removed and the earlier English cases are given their proper weight. See CLARK, *op. cit. supra* note 6, at 97, 98, 121; and Bordwell, *loc. cit. supra* note 20.

and is now to be enshrined as the fundamental requirement of the Restatement.

Quite naturally there has been the greatest dispute as to what privity of estate means. As Holmes pointed out so clearly in *The Common Law*, the only privity, outside of the privity of the contract itself, which has any sense is the privity by way of succession to the landholding of one of the original contracting parties.²³ Thus, where the covenant has been between *A* and *B*, and *X* buys the land of *A*, the covenantor, *X* can properly be said to be in privity of estate with *A*. And when *Y* buys the land of *B*, the covenantee, *Y* is in privity of estate with *B*. That is a logical and an understandable rule.²⁴ But there is nothing to be said, either logically or practically, for some requirement that *A* and *B* shall have a mystic bond before they can formally contract in such a way as intentionally to bind their respective assignees.

If such a bond were to be required between the contracting parties, of what could it consist? In Massachusetts there developed a view that privity must be by way of "substituted tenure" and that the contracting parties must have some other tie, if not that of the land itself, as in the case of landlord and tenant, then at least of an easement, to which the covenant should attach itself.²⁵ This appears to have been an attempt to approximate the feudal system and the doctrine of subinfeudation, which was abolished by the statute *Quia Emptores* in 1290. As has often been pointed out, there is, therefore, little to be said for it logically, because its historical analogy is far-fetched, to put it mildly. Possibly a little more may be said for it on practical grounds as it seems on the surface to have some measure of fireside equity; a binding covenant between landowners cannot run as an encumbrance unless the parcels of land involved are bound to each other by some already existing encumbrance, such as an easement. Upon reflection, however, one cannot perceive why this should be so. If a binding covenant is loathsome, how does it become any more attractive if the parties already have an inconsiderable easement? Or if the parties solemnly covenant that certain things should be mutually performed, why is it that their own solemn declaration must be conditioned upon their having taken pains then or earlier to create a covenant? As a matter of fact, outside of some dicta, the Massachusetts rule seems to have had no vogue in other states.²⁶

23. See note 2 *supra*.

24. Restated as section 83, RESTATEMENT, PROPERTY (2) (Proposed Final Draft, 1943).

25. *Morse v. Aldrich*, 19 Pick. 449 (Mass. 1837), is the early and leading case; for later ramifications of the rule, see App. I *infra*.

26. The case of *Gilmer v. Mobile & M. Ry.*, 79 Ala. 569 (1885), is often cited in support; but the rather weak dictum there seems quite dissipated by later cases, as shown in App. I *infra*. Other cases, including some of the early New York cases and *Lingle Water Users' Ass'n v. Occidental Bldg. & Loan Ass'n*, 43 Wyo. 41, 297 Pac. 385 (1931),

Another rule, to which greater lip service is paid, is to the effect that there must be some conveyance between the parties to uphold the covenant. Here, while the supporting dicta are more numerous, actual enforcement of its requirements have been few. The two old leading instances of such enforcement, one from Maine and one from Nevada, are good illustrations of what it would mean if the rule were to be enforced generally. In both the parties appear to have forgotten to include the covenant at the time they made their conveyance. In one it was executed one day, and in the other it was executed six days, after the conveyance.²⁷ Why a covenant in every respect sufficient as to form should be invalid to fulfill the intent of the parties to it because it happens to be made not in the conveyance, but one day thereafter, is hard to understand. It has been suggested that this requirement does insure deliberation on the part of the parties before they assume burdensome obligations.²⁸ But that it would have such an effect is, at best, sheer guesswork, and actually this rationalization of the rule has never been thought of or suggested in any of the cases which have considered the matter. In practical fact, it would seem that the parties must have shown more deliberation to enter into a contract as a separate transaction after a conveyance has been completed than to make it merely as one of the several made as a part of the conveyance itself. The act thus to be required has no natural connection whatever with the result assumed for it in the law. It is not the kind of thing which a layman would think of doing; nor does the requirement have any logical or reasonable connection with their acts. Its only effect is to put a premium on the activities of conveyancers, for obviously those in the know would satisfy all formalities by an exchange of mutual deeds in order thus to obtain the conveyance to which the covenant might attach.

THE INSTITUTE'S SOLUTION

It will be noted that the two rules of privity of estate discussed above—the Massachusetts rule of privity by substituted tenure, and the other,

do not discriminate between this and other types of privity. But perhaps *Middletown v. Newport Hospital*, 16 R. I. 319, 15 Atl. 800 (1888), is the nearest to a direct dictum in favor of the Massachusetts rule. Compare strong criticism in *Burlank v. Pillsbury*, 48 N. H. 475 (1869). For the facts of these and other cases cited in the notes hereinafter, see App. I *infra*.

27. *Smith v. Kelley*, 56 Me. 64 (1868); *Wheeler v. Schad*, 7 Nev. 204 (1871).

28. By one of the Advisers. See App. II *infra*. Mr. Sims has also suggested that the requirement is salutary, as preventing the too frequent exercise of the power to bind land and restricting it to those cases only "where the covenant figures in the general value of the land in a sale." SIMS, COVENANTS WHICH RUN WITH LAND (1901) 28. The writer repeats what he said in CLARK, *op. cit. supra* note 6, at 99: "Why is mere frequency of use a vice, and why is a covenant figuring merely in the general sale price of land more desirable than one bought and paid for separately?" And is not this guesswork, too?

of so-called privity by deed—are logically inconsistent and unrelated in anything other than their destructive intent, although they may overlap. They proceed on different assumptions and require different circumstances for their respective operations. What should be done with two such strange and unlike animals?

What the Institute did was, first, to include both in its Restatement, and in a single black letter at that. So we have the following, which in clause (a) sets forth the Massachusetts rule in substance, and in clause (b) the rule of privity by deed:

“§ 82. Privity between Promisee and Promisor.

“The successor in interest to one who has made a promise respecting the use of his land is not liable as a promisor upon the promise, unless

- (a) the promise is made in the adjustment of the mutual relationships arising out of the existence of an easement held by one of the parties to the promise in the land of the other, or
- (b) the transaction of which the promise is a part includes a transfer of an interest either in the land benefited by or in the land burdened by the performance of the promise.”²⁹

The above is thus an either-or proposition, so that compliance with either subdivision will satisfy the main requirement. But this is not only a curious way to state a prohibition (in view of the unlike qualities of the two propositions); it is not an effective way of fulfilling the Institute's avowed objective of discouraging and getting rid of these unwholesome land encumbrances. Since, indeed, almost all covenants turn out to satisfy one or the other of these requirements, only a very small residue of occasional covenants, prepared either by naïve and trusting laymen or by the dumbest of lawyers, can be upset. Something more drastic was, therefore, necessary.

And that brings us to the Institute's second line of defense against this treacherous enemy, to be found in another section, 85. This, I submit, is the most unusual Restatement yet framed—in its origin without case precedent, in its persistence against unanswered criticism and objection from many distinguished minds, and in its obvious blunderbuss effect in rendering all affirmative real covenants doubtful. It is as follows:

“§ 85. Promises ‘Touching and Concerning’ Land.

“A promise respecting the use of land of the promisor can bind as promisors the successors of the original promisor only if

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

29. RESTATEMENT, PROPERTY (2) (Proposed Final Draft, 1943) § 82. This was Chapter 2, section 5, of RESTATEMENT, PROPERTY (2) (Council Draft No. 1, 1943).

the benefit of the promisor in the physical use or enjoyment of land possessed by him and

- (b) the burden on the land of the promisor bears a reasonable relation to the benefit received by the person benefited."³⁰

Now we may note, first, that this is a masquerader, appearing under a mask of apparent respectability and currying favor and support by reason of its false garb. It is set forth as the rule of "touching and concerning," a well-settled rule that the agreement must have something to do with the land, must in a metaphorical phrase "touch or concern" it, and must not be merely personal and collateral, in order to be a matter of land contract in any event. But actually the "touching and concerning" rule is not stated here; in fact, it appears elsewhere, but only as a kind of introductory note to the entire Restatement of this subject.³¹

Next, it is a curiosity because not a single authority anywhere has been brought forth in actual support of this section. Indeed, the Reporter claims it only as a kind of distilled essence of the cases and as the logical end towards which they tend. Many have been fooled into believing that the large number of cases dealing with the "touching and concerning" requirement do support it; but, as hereinafter pointed out, only a limited analysis is needed to demonstrate that this is a different kind of requirement, a requirement of a binding tie of some vague nebulous character between the plaintiff and the defendant.³² That the Institute should revert to such a subterfuge in an endeavor to get support for the unsupportable is one of the more questionable details of this involved story.

Going further, the two separate parts into which the section is divided must be considered. The section as a whole has received the disapproval of the Advisers and the Executive Committee, and clause (b) has met with disfavor, if not formal disapproval, wherever it has been presented; and yet the material still stands a tribute to the pertinacity of the Reporter and the valiant support given him by the Director.³³ Clause (a) is reminiscent of the Massachusetts rule already stated in the earlier provision, since, in effect, it requires the tying of the promisor's estate in land to that of the promisee and thus prohibits covenants in gross. Thus it serves to take back the alternative grant made by clause (b) of 82.

30. RESTATEMENT, PROPERTY (2) (Proposed Final Draft, 1943) § 85. This was Chapter 2, section 8, of RESTATEMENT, PROPERTY (2) (Council Draft No. 1, 1943).

31. *Note on use of phrase "Promises Respecting the Use of Land,"* RESTATEMENT, PROPERTY (2) (Proposed Final Draft, 1943) 208-10, which attempts a rationalization of the distinction between real and personal covenants, but pointedly avoids all mention of the historic and important doctrine of "touching and concerning." See discussion *infra* at 723-25.

32. See discussion *infra* at 724. Compare the confusion at the Annual Meeting by this use of a well-settled doctrine, with many supporting cases to uphold this pure novelty, App. II *infra*.

33. See App. II *infra*.

Since even that was not enough, the now famous clause (b) has been devised to give the *coup de grâce* to these covenants. By it any affirmative covenant, even of the simplest kind, is rendered doubtful, subject to some vague and nebulous requirement of equality of bargaining results, to be settled only by a court adjudication, perhaps years later, made for the one particular case. Thus the clause makes all covenant titles uncertain and defective.

Although the writer has tried to discover a respectable parentage for this latest requirement, he has found none. Perhaps there is a faint analogy between it and the idea of benefit and detriment in the law of consideration in contracts, but it is well-known that even in that doctrine there is no attempt to measure the values received by the respective parties. Perhaps, too, the clause is fairly reminiscent of the ordinary requirement (one which ought to have gone far to quiet the restaters' fears of inequitable decisions) that a plaintiff must show injury, actual or threatened, before he may recover; but it is obvious that the operation of that rational, effective, and comparatively clear-cut principle is quite other than the blunderbuss effect of this rule.³⁴ Apparently it can mean only that the court shall try to see if the defendant got as good a bargain as the plaintiff—obviously a hopeless task for any court and one which can be made sensible only by saying in effect that practically no covenant should run. In view of all the vicissitudes which this section, and particularly its clause (b), has experienced, it does seem surprising that there appears to be no modification of the program to announce it as the law of the land.³⁵

So bizarre is the formulation of statement of "living law" which results from the combination of these two sections that perhaps it can be best illustrated by analogy. Let us suppose a requirement that for the burden of a real covenant to run the original promisor must either (a) have had red hair or (b) be able to write his name; provided, however, that no such covenant will run in any event unless he (a) is redheaded and (b) also gets a very good bargain from the promisee. Of course, a "very good bargain" is not precise; perhaps we may substitute "as much as, if not more

34. See note 14 *supra*.

35. See notes 53, 101, and App. II *infra*. It may be noted, too, that in accordance with the Reporter's objective of discouraging all running covenants, he has followed the minority view of *Norcross v. James*, 140 Mass. 188, 189, 2 N. E. 946 (1885), that the burden of a covenant not to conduct a certain business on described land does not run. RESTATEMENT, PROPERTY (2) (Proposed Final Draft, 1943) §85, comment *f*, and illus. 1; *cf. id.* §87, comment *f*. The cases are divided as to whether the restriction is in restraint of trade, but it is upheld as not unreasonable in many well-considered cases, *e.g.*, *Flynn v. New York, W. & B. Ry.*, 218 N. Y. 140, 112 N. E. 913 (1916); *Natural Products Co. v. Dolese & Shepard Co.*, 309 Ill. 230, 140 N. E. 840 (1923). Other cases are cited in App. I *infra*. See also Walsh, *Conditional Estates and Covenants Running With the Land* (1937) 14 N. Y. U. L. Q. REV. 162, 171; (1933) 11 CHI-KENT REV. 122; (1924) 33 YALE L. J. 447; (1927) 37 YALE L. J. 125; Clark, *op. cit. supra* note 6, at 84, 150; 3 TIFFANY, REAL PROPERTY (3d ed. 1939) 482.

than, the promisee can get out of the land." It is submitted that such a complex of requirements corresponds well with that actually set forth, both in its remoteness from the realities of how parties act and the complicated machinery by which ultimately all burdensome covenants are rendered doubtful.

In setting forth these requirements of the Restatement, the attempt is made to follow what, after repeated explanations by him, is understood to be the Reporter's intent and meaning, without considering critically the language employed in the two sections. At least, however, it should be pointed out that the form of expression is vague and unclear and presents many problems of interpretation. Thus, the natural reading of clause (a) of 82 suggests that the easement must already be in existence, not created by the covenant; and adjustment of "mutual relationships" appears to require something more extensive than merely one simple promise. Hence the provision is easily susceptible of an interpretation more harsh than even the Massachusetts rule. On the other hand, the word "transaction" of clause (b) of 82 suggests something broader than "contained in a deed of conveyance" and might cover a promise made several days later, while the transfer may be of any interest and of any form or manner. Suppose a party to the covenant utilizes the occasion of its execution to make a gift out of his estate in the land to his wife for life, or a lease to a tenant; the stated requirements are met. And, of course, in accordance with the illogical premises assumed, it makes not a whit of difference whether the benefit of the deed (or easement, if any) runs with the benefit of the covenant or quite opposite to it.

Again, section 85 has been objected to as unintelligible, and the draft originally presented to the Council was sent back because no one could understand it.³⁶ Even as refashioned, it has confusions beyond its intended vagueness of scope. Thus, the Reporter has denied that it has the effect—so notable a feature of the Massachusetts rule—of preventing the running of covenants in gross, that is, where one end is personal. But it seems indisputable that each party must have an interest in land. That is stated as to each one in so many words in clause (a), though there the requirement might perhaps be interpreted as only an alternative one; but the intent to make the requirement double-barreled is made clear in clause (b), where the burden on the promisor's land is balanced against the benefit received by the promisee *in the use of his land*.³⁷ Hence, outside of the covenants so usual in leases³⁸ and outside of perhaps a very oc-

36. At the meeting of the Council in February, 1943. See App. II *infra*.

37. This phrase is not formally repeated in clause (b). But it is clearly to be understood there, as, indeed, is expressly stated in comment *b* to section 85. See also *Note on use of phrase "Promises Respecting the Use of Land," loc. cit. supra* note 31.

38. Covenants between landlords and tenants have met with much less disfavor upon the part of writers and others, often attributed to the existence of the statute of 32 HEN. VIII, c. 34 (1540) [*cf.* 1 TIFFANY, REAL PROPERTY (3d ed. 1939) §125; 3 *id.* §848)],

casional case beyond those involving a lease where both promisor and promisee have separate estates in the *same* land, the section necessarily presupposes and requires the tying together of two separate pieces of land.³⁹

Just as this complicated arrangement is designed to catch case support of various types for the set purpose of invalidating a certain group of covenants by indirect, rather than direct, prohibition, so the arrangement of Part III of the Restatement as a whole is made unnecessarily complicated to this same end. Part III contains some 180 pages of attempted differentiation, with much repetitive statement, as to the running of burdens, the running of benefits, the difference in situation "in equity" from that "at law," the remedy of "lien," and so on. Not only is this wasteful; it is actually misleading, as suggesting opposing lines of law beyond any logical or practical justification in the situation and distinctions in the precedents of a picayunish sort—such as that case X is not really opposed to section 82, for it is all covered in sections 95 or 88 or 87 or somewhere else. A simple, consolidated statement of, say, twenty-five pages might have been made to cover all that is proper to be said here with much greater accuracy and undoubted clarity, once the purpose of forming a superstructure upon which to scatter the cases was given up. Reference has already been made to the unreality of now making a sharp distinction in statement between "equity" and "law" or between injunction and damages; now it is necessary to say something particularly of section 88, entitled "Lien."⁴⁰

That section seems to the writer to be of the subterfuge nature which to him is so distasteful a feature of this Restatement. On the surface it seems to accord a simple and effective remedy for the enforcement of covenants (by lien on the land) so as to make the remedy of a money judgment seem unnecessarily harsh to the parties. If the remedy by lien were freely available, it might be argued that the money judgment was unnecessary, though hardly that it was by nature harsher than the lien. But, of course, it is rarely available, except as a step in enforcing a judgment; that is, the money judgment is, by history and by practice, a necessary condition precedent, save in the rare cases where a statute may have specially accorded the remedy⁴¹ or the parties may have contracted for it. The fact is that, generally speaking, this is not a separate remedy, but only a step in the enforcement of judgments; and it does not ap-

although, as suggested in note 83 *infra*, there is a tendency to overemphasize the effect of this statute. See Bigelow, *The Content of Covenants in Leases* (1914) 12 MICH. L. REV. 639, (1914) 30 L. Q. REV. 319. Covenants in leases are excluded from this Restatement. RESTATEMENT, PROPERTY (2) (Proposed Final Draft, 1943) *Scope Note*, 207.

39. Cases *contra* are particularly noted in notes 70-72 *infra*.

40. RESTATEMENT, PROPERTY (2) (Proposed Final Draft, 1943) § 88.

41. Compare Nebraska and California in notes 63, 64, and App. I *infra*.

pear to have been similarly played up in other Restatements—Contracts, Torts, for example—where it was available.⁴² To give it this substantial place and format here is illusory and misleading.

A word more should be said as to the lien by contract of the parties. One wonders, in view of the drastic nature of this remedy and the interdiction put upon the parties' desires by other parts of this Restatement, how it came to be treated with such exceptional favor. In truth, there is very little law on the particular subject, presumably because it is not a natural remedy for the parties to seek and, moreover, a covenantor would be very foolish to promise it. For in character and extent it seems much more drastic than the money judgment or other encumbrances, such as a mortgage; these, when upheld, are at least precise and definite in extent. The nature of the notice, conveyed by recording acts, of such an agreement for lien and its validity against subsequent takers require careful consideration. Presumably the lien must operate from the time of the original agreement, duly recorded; there is no later document to give any notice. Hence it might be effective to secure definite water rates—as in the few cases where it seems to have been granted by statute⁴³—or other definite recurring payments. It is seriously to be doubted whether it can be made a general remedy for breach of contract against bona fide purchasers, although the Restatement says broadly and simply that "it is sufficiently a conveyance to come within the operation of the recording acts."⁴⁴

Before passing to a more detailed consideration of the case law, perhaps it is incumbent on the writer to avoid the charge of being merely destructive in his criticisms by stating how he thinks the law should be formulated. But this he has done so extensively elsewhere⁴⁵ that a brief statement should suffice. Of course, he does not believe in a single black letter; the attempt to compress fluid law of many jurisdictions into one arbitrary statement is bound to mislead more than it clarifies. That is an old story, not to be repeated here.⁴⁶ Any statement of the better rule, however, should omit both sections 82 and 85 entirely, should rely only on the privity by way of succession to the estate of one of the parties, as set forth by Holmes and section 83 of the Restatement,⁴⁷ and should be simply and concisely stated as an integrated whole for benefit and burden and for the various remedies available to all.

42. Compare RESTATEMENT, CONTRACTS (1932) § 326.

43. See notes 63, 64, and App. I *infra*.

44. RESTATEMENT, PROPERTY (2) (Proposed Final Draft, 1943) § 83, comment f. That a judgment lien is statutory only, see *Wells v. Benton*, 108 Ind. 585, 8 N. E. 444, 9 N. E. 601 (1886).

45. See, e.g., CLARK, *op. cit. supra* note 6, cc. 4, 5; Clark, *supra* note 5, 32 YALE L. J. 123, 37 HARV. L. REV. 301.

46. See Clark, *The Restatement of the Law of Contracts* (1933) 42 YALE L. J. 643.

47. Compare notes 2, 24 *supra*.

While this is believed to be the conclusion pointed to both by the authorities and by sound policy,⁴⁸ it should be added that other forms of statement might be made which would express a different policy and yet not be lacking in intellectual frankness. A statement that no affirmative real covenants, or only certain named ones, would run would have the support of at least a few precedents;⁴⁹ and it would present the issue in an entirely straightforward fashion.

THE CASE LAW

Every lawyer is trained in the game of "the weight of authority"; to distinguish away your opponent's cases and build up all those glancing in your direction is a sign of the legal mind. In a field of such diverse thought as has developed here, it would seem not very worth while to play this game, beyond relying upon this divergence as a freeing, not an inhibiting, factor—one which allows us some scope to work out a "better rule" and does not paralyze all efforts at clarity and policy-stating. But since the Institute so definitely maintains its purpose to state "existing law" as shown by authority, the rest of us should certainly be ready to follow along; for, as the writer firmly believes, the precedents do not fairly support either or both branches of section 82, or section 85 at all, and a fortiori, if not concededly, the resulting combination in its totality pictures a law that never was on sea or land or in any jurisdiction or dominion.

It happens that we have at hand a direct picture of how the Institute views its own activities, for Judge Goodrich, the Institute's Adviser on Professional Relations, in reporting the action of the Annual Meeting on this issue, says just a bit smugly that "the fundamental policy of the Institute" "was made clear in the action taken." "The issue presented was whether the *classic* and *accepted* requirement of privity be retained. Though there was disagreement with the principle, it was accepted as *what the law was* rather than what it should be, since the function of the Institute was, wherever possible, to restate the law *not to make it*."⁵⁰ One might suggest with all deference that this is putting it on a bit thick. Waiving queries as to other Restatements, now perhaps ancient history,⁵¹ or

48. See note 17 *supra*.

49. See jurisdictions referred to in notes 61, 62 *infra*.

50. Goodrich, *American Law Institute Annual Meeting* (1943) 29 A. B. A. J. 353, 356 (italics added). Of course, these claims for the Institute are not unusual; compare reference to some of them in McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform* (1942) 55 HARV. L. REV. 1077.

51. Thus COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942), is essentially devoted to a challenge of the "as-isness" of the Conflicts Restatement. To the writer the crowning example of defying modern law still is RESTATEMENT, PROPERTY (1936) § 27, and illus. 2, that a grant "to B forever" and "to B in fee simple" in each

even as to some rather wild departures from precedent and desirable practice in the part on easements just adopted by the Institute (notably with respect to the assignability of easements in gross⁵²), such a portraiture by no stretch of consideration can apply to section 85. Indeed, Judge Goodrich practically concedes as much, for later he attempts a paraphrase of that section (showing as much difficulty as everyone else in understanding it) which he introduces with the masterly understatement that it is "a problem on which the state of authorities was less certain."⁵³

But even with respect to the "accepted principle" of section 82, let us see how thoroughly it does represent the law "as is." In a game where there are no clearly formulated rules, perhaps no holds are to be considered barred; but if there are any, it would seem that they have not troubled the Reporter, for he has carried both the collecting and the distinguishing away of authorities to unusual extremes. Reference has already been made

case gives *B* only an estate for his life—a rule which rather doubtfully may be supported by the law of a *single* state.

52. Over the advice of distinguished Advisers—as shown in earlier drafts, though, rather curiously, no dissent is noted in section 40 and the following sections of the Proposed Final Draft—easements in gross, "if of a commercial character," are alienable, and if non-commercial, are only alienable depending on the manner or terms of their creation. Such an asserted distinction between commercial and non-commercial easements is unknown to the law, there being no precedents for it; and it is believed to be demonstrably unworkable and merely confusing. When is a right of way commercial and when is it not? Would the alienability of a right of way to a private garage depend upon whether an adjoining house is lived in by the owner or rented, or whether it is a two-family house, an apartment house, or some other sort of residence? This highly original departure from the law, now finally adopted by the Institute, will, if followed by the courts, tend to make all these interests quite indefinite and uncertain and require the meaning of each to be passed on by a court before its title can be certified. In fact, the entire subject of easements and licenses as restated has many defects and inconsistencies with ordinary views, and has already brought forth criticisms in the law reviews, *e.g.*, the attempted restriction of easements to some peculiar kind of grant, thus distinguishing away what should be the completely assimilated so-called executed license, the doing away with the commonly used term "profits," the use of the term "license" misleadingly as defining a recognized legal interest apart from easements or other servitudes, whereas it is but a grant of permission which may have varying results dependent on the particular facts, and so on. Compare acute criticism by Conard, *An Analysis of Licenses in Land* (1942) 42 COL. L. REV. 809, 828. See also Conard, *The Requirement of a Sealed Instrument for Conveying Easements* (1940) 26 IOWA L. REV. 41, *Words Which Will Create an Easement* (1941) 6 MO. L. REV. 245, *Easements, Licenses and the Statutes of Frauds* (1941) 15 TEMP. L. Q. 222, *Unwritten Agreements for the Use of Land* (1942) 14 ROCKY MT. L. REV. 153, 294, *Easement Novelties* (1942) 30 CALIF. L. REV. 125. The result is that the Restatement of Easements and Licenses is almost as confusing and upsetting to property law as is the Restatement of Covenants. Although the writer's name is carried as Adviser, he had nothing to do with this part of the Restatement.

53. Goodrich, *American Law Institute Annual Meeting* (1943) 29 A. B. A. J. 353, 356. He goes on to say that the statement by the Reporter was "approved," though it is quite clear that this was not the fact, at least as to clause (b) of 85. See App. II *infra*.

to the careful arrangement of sections and subsections to catch all possible citations, whether mutually consistent or not, in support of restrictions and to distinguish away (as in another section) cases which are opposed. That is the keystone of his analysis of case authority. Of course, the greater amount of material he relies on must be dicta because so very few covenants have actually been outlawed. If, of course, the judge has specifically relied on some rule of privity as justifying his affirmative holding, that must be considered some authority for a belief that it is necessary, although even there it is not a decision. But it should not be enough that the judge has made some confused reference to privity, not distinguishing interparty privity from the recognized privity by succession, or that careful, even pedantic, analysis might have found some ground, other than that seemingly in the judge's mind, for allowing the covenant to run even under the Restatement restrictions. After all, this is a prohibition on carrying out the parties' wishes expressed in formal contracts; it must be supported by affirmative precedents, not by the absence of opposing authorities.⁵⁴ And it certainly seems unfair at the same time to reject out of hand all cases objecting to these restrictive rules which discuss the running of *benefit* or of *negative burdens* "in equity." A fairer way to play the game would seem to be to consider first as primary authorities those cases of actual decision as to the running or non-running of affirmative covenants, and thereafter as secondary authorities of some bearing such cases as contain rather precise and informed dicta pro or con. And, finally, the over-all result that on some ground or other the covenants almost always are permitted to run when the parties so desire should carry some weight.

In view, therefore, of the directly conflicting claims made as to the meaning of the cases, case analysis here is particularly tricky, as well as important because of the way the issue has been framed. It has been difficult to decide how to state this mass of precedent properly and still remain within the confines of an article. The cases really should be examined in the library and in detail; I have continuously urged that this

54. See discussion of general policy as to clogs on contracting power, notes 11, 17 *supra*. Rather curiously, however, there seems to be a tendency to put the burden upon those who would deny clogs upon contracting. Thus, the Reporter appears in substance to count as favorable to the Restatement those jurisdictions which have not passed upon the matter at all; and Mr. Sims, distinguished member of the Council and author of *Covenants Which Run with Land*, while generously granting the writer some ten states in his support, and this, too, without making reference to the important cases of covenants in gross referred to particularly in note 71 *infra* [a generosity which compares with the Reporter's concession of only *Horn v. Miller*, 136 Pa. 640, 20 Atl. 706 (1890), as supporting the writer's views], nevertheless holds that this is not enough and, upon citing a lesser number, many of which are at most dicta, eventually agrees that the weight of authority is with the Reporter. The writer does not understand such fixing of the burden of proof as to "the weight of authority."

be done by a committee of the Council or otherwise. But this is a time-consuming, thankless job and probably has not been done by over, at most, three or four parties to the present dispute. At any rate, the expedient here adopted is that of stating and commenting on each case only by way of an appendix to this article;⁵⁵ while only a summary and general statement as to the case authority is here attempted.

In the writer's judgment, the only jurisdictions to be counted definitely for parts of section 82 on the basis of actual and still not overruled decisions are Massachusetts for clause (a)⁵⁶ and Maine, Nevada, and Wyoming⁵⁷ (and perhaps Tennessee, though this is by no means clear⁵⁸) for clause (b). The decisions from Maine and Nevada are old, contain no clear-cut discussion, and, particularly in view of their harsh character, may stand as not overruled merely because no new case has arisen to call forth a re-examination of the problem. The Wyoming case, however, is fairly recent, with a considerable discussion; and because of its peculiar features and because it seems to be the Reporter's basic authority, the one case which in the last analysis probably led him to feel justified in the Restatement he has sponsored, it will be considered in more detail below.⁵⁹ Beyond this, the Reporter can properly cite for either one branch or the other of his section 82—but more doubtfully for both—a certain amount of dicta, not so very strong, in favor of one or the other rules, or at times an apparently indiscriminate conglomeration of both.⁶⁰ In this connection it should be pointed out that he cannot properly include jurisdictions, such as New York, where after various decisions, some on either side of the fence, the court eventually has come out flatly for what it conceives to

55. See App. I *infra*.

56. The Massachusetts cases are collected in App. I *infra*. See also notes 25, 26 *supra*.

57. *Smith v. Kelley*, 56 Me. 64 (1868); *Wheeler v. Schad*, 7 Nev. 204 (1871); *Lingle Water Users' Ass'n v. Occidental Bldg. & Loan Ass'n*, 43 Wyo. 41, 297 Pac. 385 (1931).

58. *Louisville & N. Ry. v. Webster*, 106 Tenn. 586, 61 S. W. 1018 (1901).

59. See pp. 720-21 *infra*.

60. It is perhaps with reference to cases claimed to support the Restatement by dicta, where the decisions themselves uphold the running of the covenants, that the Reporter's reliance on precedents seems particularly strained. Thus, he has claimed: Alabama, on the basis of an early weak dictum which at most should not stand against later cases; California, without reference to its peculiar statutes; Colorado, although there is no clear holding there of *interparty privity*; Indiana, by overlooking the effect of a case like *Conduitt v. Ross*, 102 Ind. 166, 26 N. E. 198 (1885), and misinterpreting the holding in *Indianapolis Water Co. v. Nulte*, 126 Ind. 373, 26 N. E. 72 (1890), that the *benefit* of a covenant to maintain a levee built by the promisor on his own land is personal; New York, by relying on cases now clearly superseded by later decisions; Texas, by citing only a late lower court dictum (which does not cite Texas cases) at variance with the general trend of Texas authorities; and so on. See note 73, and App. I *infra*. It is believed the only dicta properly to be cited for the Reporter's position are cases from Rhode Island for section 82(a) and from Missouri and Nebraska for section 82(b).

be the English rule of nontransferability of affirmative covenants.⁶¹ Certainly this state, and others assuming to follow a like rule,⁶² cannot be cited in favor of either or both branches of section 82. Also to be omitted are certain jurisdictions where the law has been made uncertain by statute;⁶³ thus, California has the unusual situation of just the converse of clause (b), namely, the rule that a covenant cannot run unless it is made separate and apart from a conveyance—a rule fully as sensible as clause (b).⁶⁴

Turning to the other side of the picture, we find a number of cases which uphold the running of covenants on grounds apart from the existence of either clause (a) or clause (b).⁶⁵ In addition, there is a considerable amount of dicta criticizing the privity doctrines⁶⁶ and of decisions determined without reference to these doctrines at all.⁶⁷ It is submitted that all this body of judicial authority is of substantial importance since the problem, looked at from this point of view, is in essence to prove a negative, that is, that many courts actually have not been worried about the supposed compulsion of the restrictions.⁶⁸ The Reporter, however,

61. *Miller v. Clary*, 210 N. Y. 127, 103 N. E. 1114 (1913), L. R. A. 1918E 222. See discussion of New York cases in App. I *infra*.

62. Various jurisdictions have been cited as not permitting the running of the burden of affirmative covenants. Cf. 3 *TIFFANY, REAL PROPERTY* (3d ed. 1939) § 850; *SIMS, op. cit. supra* note 28, at 166, 167. But it seems clear that included, in addition to New York, are at most England, New Jersey, and Virginia. Even in these jurisdictions the authority is not too persuasive. In England, where there are considerable dicta and the text writers have been very decided, the cases are more, as is stated in the leading case of *Austerberry v. Oldham*, 29 Ch. D. 750 (C. A. 1885), of the "semble" variety. See authorities cited *CLARK, op. cit. supra* note 6, at 113, 146, 158. The few American cases state the clearer alternative ground of invalidity of the noncompetition covenants as in restraint of trade. *Brewer v. Marshall*, 18 N. J. Eq. 337 (1867), 19 N. J. Eq. 537 (1868); *Costigan v. Pennsylvania R. R.*, 54 N. J. L. 233, 23 Atl. 810 (Sup. Ct. 1892); *Tardy v. Creasy*, 81 Va. 553 (1886); cf. note 35 *supra*.

63. In addition to California, note 64 *infra*, see *Farmers & Merchants Irrig. Co. v. Hill*, 90 Neb. 847, 134 N. W. 929 (1912).

64. The California rule is stated at length in App. I *infra*.

65. As pointed out in note 73 *infra*, it is believed that the decisions of 15 states cited in App. I *infra*, really support the running of covenants contrary to the views of the Restatement, and that the decisions of 10 other states are on the whole more consistent with such support than with the Restatement.

66. Among such cases in App. I *infra*, may be cited *Reidsville & S. E. R. R. v. Baxter*, 13 Ga. App. 357, 363, 79 S. E. 187, 190 (1913); *Burbank v. Pillsbury*, 48 N. H. 475 (1869); *Norfleet v. Cromwell*, 64 N. C. 1, 13, 14 (1870); *McCormick v. Stoneheart*, 195 S. W. 883 (Tex. Civ. App. 1917); 165 Broadway Bldg., Inc. v. City Investing Co., 120 F. (2d) 813 (C. C. A. 2d, 1941), *cert. denied*, 314 U. S. 682 (1941).

67. Examples from among the cases cited in App. I *infra*, might include *Sexauer v. Wilson*, 136 Iowa 357, 113 N. W. 941 (1907) (fencing covenant); *Rugg v. Lemley*, 78 Ark. 65, 93 S. W. 570 (1906) (party-wall covenant); and *Murphy v. Kerr*, 5 F. (2d) 908 (C. C. A. 8th, 1925).

68. As to the burden of proof here, see note 54 *supra*.

casts this body of authority aside on the ground that the dicta are unpersuasive and that the cases cited can all be distinguished away as actually complying with either one or the other of the two catch-all branches of section 82. This convenient way of getting rid of authorities naturally leaves not a great number remaining since not often (never where the lawyer is sophisticated enough at least to cause the exchange of cross-deeds) will a covenant be made where search will not discover at least some sort of slight interest, either already existing or created by the covenant agreement, to which the covenant may now by late rationalization be said to be attached. For example, if one enters into an agreement to pay for water rights, obviously he must have either had those rights before, thus satisfying clause (a) of 82, or received them as a part of the covenant, thus satisfying clause (b) of that section.⁶⁹ (Of course, even these covenants are still expected to run the more distressing hurdle of section 85.)

Even so, there is still left an irreducible minimum of judicial opinion which cannot be so rejected.⁷⁰ Perhaps hardest to distinguish away are the cases where the burden of a covenant has been allowed to run while the benefit is personal or in gross, such as the burden to pay a share of the construction expense of a party wall to the original builder, whenever the wall is used.⁷¹ These cases certainly cannot be brought under section 85; nor do they even fit properly under section 82 since the prom-

69. The cases of running covenants for the adjustment of water rights cited in App. I *infra*, seem almost as numerous as those of party-wall covenants or covenants to repair or fence. See, *e.g.*, *Bolles v. Pecos Irrig. Co.*, 23 N. M. 32, 167 Pac. 280 (1917); *Horn v. Miller*, 136 Pa. 640, 20 Atl. 706, 9 L. R. A. 810 (1890); *Adamson v. Black Rock Power & Irrig. Co.*, 297 Fed. 905 (C. C. A. 9th, 1924), *cert. denied*, 266 U. S. 630 (1925); *Ball v. Rio Grande Canal Co.*, 256 S. W. 678 (Tex. Civ. App. 1923); *Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 40 Colo. 467, 92 Pac. 290 (1907); and others in App. I *infra*. Against these simple and desirable results, the harsh conclusions of *Hurd v. Curtis*, 19 Pick. 459 (Mass. 1837), and *Lingle Water Users' Ass'n v. Occidental Bldg. & Loan Ass'n*, 43 Wyo. 41, 297 Pac. 385 (1931), stand out.

70. In addition to the cases cited in note 71 *infra*, the following are important cases which the Reporter overlooks: *Bald Eagle Valley R. R. v. Nittany Valley R. R.*, 171 Pa. 284, 33 Atl. 239 (1895); *Moseby v. Roche*, 233 Ala. 280, 171 So. 351 (1936); *Dick v. Sears-Roebuck & Co.*, 115 Conn. 122, 160 Atl. 432 (1932); *Mueller v. Bankers' Trust Co. of Muskegon*, 262 Mich. 53, 247 N. W. 103 (1933); *Missouri, K. & T. Ry. v. State*, 275 S. W. 673 (Tex. Civ. App. 1925); *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. 619 (C. C. A. 6th, 1897). Of course, the usual and freely running covenants for party walls or irrigation are really not distinguishable; the attempted rationalization that a single covenant is at once an easement and a running promise is an artificial and labored attempt to justify what the courts permit without hesitation. Indeed, it is argued in (1908) 8 Col. L. Rev. 121, that party-wall covenants must be held personal!

71. *Gibson v. Holden*, 115 Ill. 199, 3 N. E. 282 (1885); *Conduitt v. Ross*, 102 Ind. 166, 26 N. E. 198 (1885); *Pillsbury v. Morris*, 54 Minn. 492, 56 N. W. 170 (1893); *Hill v. City of Huron*, 33 S. D. 324, 145 N. W. 570 (1914). See also *Cook v. Paul*, 4 Neb. Unof. 93, 93 N. W. 430 (1903); *Adams v. Noble*, 120 Mich. 545, 79 N. W. 810 (1899);

isee's interest is personal. The Reporter has suggested as to these cases that they must be considered either as based on quasi-contractual principles or as erroneous. Obviously they are not in the quasi-contractual category because the courts frankly enforce the contracts according to their terms. And no reason is perceived why a simple contract to reimburse a man for his expenditures in this way as soon as the wall is later used should be considered improper. These and other cases, such as those involving water rights or other use of land, seem rather clearly in point, notwithstanding they have been ignored by the Reporter.⁷²

If, therefore, we are to be governed by a mere count of noses, rather than arguments of policy and social need, the count nonetheless goes against the Reporter on either branch of section 82 separately and clearly on both branches when joined together.⁷³ Here further consideration should be given the *Lingle* case from Wyoming, the case so important

Fowler v. Koehler, 43 App. D. C. 349 (1915); Gavit, *Covenants Running With the Land* (1930) 24 ILL. L. REV. 786, 799. While these cases are dialectically so important [as being so completely opposed to section 85 and at least to clause (a) of 82, and in real substance to clause (b)], yet they do not represent the usual type of party-wall agreement, for there the parties desire both benefit and burden to run and the courts freely permit this; see the many cases cited in App. I *infra*, and notes 5 and 6 *supra*. See also cases collected in Aigler, *The Running With the Land of Agreements to Pay for a Portion of the Cost of Party-Walls* (1912) 10 MICH. L. REV. 187. Several states now have statutes to this effect. See Isaacs, *Statutory Party Walls* (1923) 71 U. OF PA. L. REV. 229; Cor-dill v. Israel, 130 La. 138, 57 So. 778 (1912).

72. See note 69 and p. 719 *supra*.

73. A fair count of the showing made by the cases in App. I *infra*, is believed to result as follows: for section 82(a), one jurisdiction, Massachusetts, and dicta from another, Rhode Island (certain dicta in other cases, *e.g.*, Alabama, being overshadowed by later or more important cases from the same state); for section 82(b), three, and possibly four, states, Maine, Nevada, Wyoming, and Tennessee, and dicta from Missouri and Nebraska. None can be cited for section 85, unless the Massachusetts cases are again considered authority for clause (a) of 85. Against these, on the basis of present holdings, should be cited Alabama, Arkansas, Connecticut, Georgia, Illinois, Indiana, Maryland, Michigan, Minnesota, New Mexico, North Carolina, Pennsylvania, South Dakota, Texas, and Washington. Some of these are claimed by the Reporter, but it is not believed that his claims can be sustained. See note 60 *supra*. In the following jurisdictions the indications may be less strong, but there is nothing inconsistent in any one of them with the eventual adoption of a rule against interparty privity; all sustain covenants of this sort: Colorado, Iowa, Kansas, Kentucky, Montana, New Hampshire, Ohio, Oklahoma, Oregon, and Wisconsin. It is true that the Reporter claims these cases as generally supporting his view by small distinctions of the kind discussed above; thus, in the New Hampshire case, where Massachusetts privity was strongly criticized, there was acceptance of a deed poll, and so on. There are eight states where no cases have been found (these surely cannot be counted as favoring restraints); two, Delaware and South Carolina, where the only cases appear to hold the covenants personal on clear-cut grounds; one, California, with a special statutory rule; and three, New Jersey, New York, and Virginia, which more or less definitely follow the rule that no burden runs. It is submitted that there can be no doubt that the "weight of authority" is against the Reporter. And if *results* be looked at, they are literally overwhelming; omitting the special situations of California, Massachusetts, and New York, they show 88 cases where the cove-

to the Reporter's thesis.⁷⁴ This case involved a covenant, attached to a transfer of irrigation water rights, to pay certain annual operation and maintenance charges, together with annual assessments of the original cost over a ten-year period. The covenant was stated to run with the land. The annual charges were actually small; the court below gave judgment of about \$2,000 for five years of arrears. The appellate court quite properly reversed this judgment since the trial court, contrary to settled precedent, had assessed against the present landholder all deficiencies in payment, including accruals against former owners.⁷⁵ The court did not stop there, however, but in a rather lengthy opinion went on to hold that the obligation of the covenant as a whole could not be attached to the transfer.

Several questions arise as to the learned opinion. It purports to rely largely upon English legal history, but gives only general references to secondary sources which have not considered this subject in detail; it fails to note modern researches in and discussions of that legal history, as well as modern text comment on the rule; the authorities relied on are not recent; and the opinion fails to distinguish between Massachusetts privity and privity by way of deed. Perhaps it is for one or more of these reasons that the surprising result is reached of invalidating a comparatively simple and desirable arrangement of a kind which is quite regularly enforced and may be supported even under the stricter views of the Massachusetts decisions.⁷⁶ One wonders how irrigation can be developed in the arid parts of the West if a decision of this kind must obtain generally. Possibly the most interesting thing of all is to note that this covenant could easily have been rationalized as satisfying either branch of section 82; indeed, had the case gone the other way, the Reporter would certainly have distinguished it away as of no consequence. For the covenant itself definitely created and conveyed water rights, and the covenant was clearly an aid to the easement or profit thus created.⁷⁷

In concluding this survey of the authorities (for further details of which the reader must be referred to the first appendix), it is necessary

nants ran in such manner as the parties wished, 11 where the covenants were held personal either on clearly acceptable grounds or on the more debated, but arguable, ground, note 35 *supra*, that a covenant not to compete is in restraint of trade, but only 5 where running was refused. Even if the three special states be added, we find that many covenants actually do run in California and New York; it is only in Massachusetts where transfer is quite strictly limited, and even there the restriction is somewhat offset by development of the "affirmative easement."

74. *Lingle Water Users' Ass'n v. Occidental Bldg. & Loan Ass'n*, 43 Wyo. 41, 297 Pac. 385 (1931).

75. See CLARK, *loc. cit. supra* note 6; *Union Trust Co. of Md. v. Rosenberg*, 171 Md. 409, 189 Atl. 421 (1937); *Conti v. Duve*, 142 Pa. Super. 189, 15 A. (2d) 494 (1940), (1941) 89 U. OF PA. L. REV. 396.

76. Compare, *e.g.*, *Morse v. Aldrich*, 19 Pick. 449 (Mass. 1837).

77. Compare notes 69, 70 *supra*, based on these cases.

to touch upon two matters often referred to in this discussion, namely, ancient legal history and the views of commentators. With respect to the former, there is little doubt that here much pseudolegal history has masqueraded as real with hampering effect.⁷⁸ When one goes back to the Year Book sources, one finds the enforcement of covenants of the general type here considered, especially with the use of the writ *de fine facto*, without any question of validity; and there seems no doubt but that these interests were considered land interests and transferable as such.⁷⁹ It is amusing therefore to note all the excitement which the famous *Pakenham's Case*⁸⁰ has aroused. Here was a case where a covenant by a prior to sing in a chapel was held to pass without any question being raised by counsel or by the court; and since this result has not fitted in with later concepts of what should have been the history, it has been necessary to find all sorts of reasons for condemning the authority of that case as inconsiderable or as dicta or otherwise.⁸¹ Actually this history dates only from the chance and unsubstantiated remark of the reactionary Lord Kenyon in 1789 in the case cited,⁸² and from this a whole history has developed. For his part the writer would not urge conclusions from the Year Book cases too strongly in support of the theory he holds proper since it really should be doubtful how far we can judge our course by what was done in feudal England seven or eight centuries ago. But he feels that it is highly improper to misstate history and to use the misstated history as a claimed basis for tying the hands of modern courts and judges.⁸³

78. Compare Bordwell, *English Property Reform and its American Aspects* (1927) 37 YALE L. J. 1, 18, 20; Bordwell, Book Review (1929) 38 YALE L. J. 838, 839; Holdsworth, Book Review (1930) 46 L. Q. REV. 364; Walsh, Book Review (1929) 7 N. Y. U. L. Q. REV. 220; Chafee, Book Review (1929) 43 HARV. L. REV. 334; Roberts, Book Review (1929) 18 KY. L. J. 96.

79. See the several important cases, particularly those in the 1200's, showing the enforcement of the running of the burden of covenants through the writ to enforce a fine, in CLARK, *op. cit. supra* note 6, at 103-07.

80. Y. B. 42 Edw. III, 3, pl. 14 (1368); cf. Woodbine, *Pakenham's Case* (1929) 38 YALE L. J. 775. For some of the discussions, see CLARK, *op. cit. supra* note 6, at 102, 103; cf. authorities cited in note 85 *infra*.

81. The case, so far as it goes (no judgment was entered), shows that the court was prepared to enforce a running covenant in an action of *covenant* without a grant or deed and without an easement between the original parties.

82. *Webb v. Russell*, 3 T. R. 393, 100 Eng. Rep. 639 (K. B. 1789).

83. Before *Webb v. Russell*, in 1789, the objectors have not been able to find a case enforcing such a requirement; and, as noted above, there are definite Year Book cases the other way. Some attempt has been made to rest upon the preamble to the Statute of Leases, 32 Hen. VIII, c. 34 (1540), stating that statutory reform was needed to provide for the enforcement of covenants in leases made by the monasteries lately seized by the king; but this rationalization of the king's needs is clearly unreliable. 7 HOLDSWORTH, HISTORY OF ENGLISH LAW (2d ed. 1937) 288. A statutory preamble with a definite purpose is hardly a place in which to find an accurate legal and historical survey of three or four centuries.

As to the commentators whose views have been suggested as sufficiently considerable to constitute a ground for the Restatement apart from the decisions,⁸⁴ it is true that some authors, such as encyclopedias and general property text writers, have made confused references to the decisions referred to earlier.⁸⁵ It is not surprising that a confusion which has crept into the cases should be repeated in texts which have not been prepared from a highly analytical or careful point of view. That there were other views at the same time has already appeared from the references to Holmes.⁸⁶ It is surprising, however, that apparently no consideration is here given to the large and informed amount of modern comment, practically all highly critical of this doctrine and practically all following the approach for which this writer has contended.⁸⁷ It is a truism that these most careful and analytical comments of modern times are usually to be found in the law reviews. During the last twenty years the law reviews have considered this subject quite extensively, and yet these writings appear to have been totally ignored in this discussion.

One further reference should be made to section 85. Since, as indicated, no authority has been cited for it and since none has been found fairly or reasonably supporting it, its history here in connection with the precedents must necessarily be brief. But it should be made quite clear to the reader that it is but parading under the ancient and well authenticated doctrine of "touching and concerning." That doctrine was settled in 1583 by the famous *Spencer's Case*,⁸⁸ which held that a covenant to run must

84. By an Adviser, App. II *infra*.

85. Hare & Wallace's Notes to *Spencer's Case*, 5 Co. 16a, 77 Eng. Rep. 72 (Q. B. 1583), 1 SMITH'S LEADING CASES (5th Am. ed.) 115, 139, 140; 19 AM. & ENG. ENC. OF LAW 973, 998-1004; 21 C. J. S. § 84; THOMPSON ON REAL PROPERTY (Perm. ed.) § 3629; cf. 3 TIFFANY, REAL PROPERTY (3d ed. 1939) § 851, where the conclusions are more hesitantly stated than in earlier editions.

86. See note 2 *supra*. See also 4 KENT, COMM. (12th ed. 1873, Holmes ed.) 480, n. 1; RAWLE, COVENANTS FOR TITLE (5th ed. 1887) 294, n. 2; Darling, *Is a Sublease for the Residue of a Lessee's Term in Effect an Assignment?* (1882) 16 AM. L. REV. 16, 39-42; POLLOCK, PRINCIPLES OF CONTRACT (11th ed. 1942) 192, n. 76. McFee, *Privity of Estate* (1886) 20 AM. L. REV. 389, 411, after struggling with the concept, concludes that the intricacy, contradiction, and confusion in the application of the term were the result of expressing totally different ideas of policy by the one phrase "privity of estate."

87. These are too numerous to cite exhaustively. The following are typical: (1938) 47 YALE L. J. 821, collecting modern authorities; (1927) 36 YALE L. J. 1187; (1927) 37 YALE L. J. 125; (1930) 39 YALE L. J. 911; (1941) 50 YALE L. J. 1056, 1064; (1938) 18 B. U. L. REV. 764; (1940) 28 CALIF. L. REV. 769; (1933) 11 CHI-KENT REV. 122; (1938) 38 COL. L. REV. 1299; (1927) 12 CORN. L. Q. 404; (1933) 19 CORN. L. Q. 145; (1938) 24 CORN. L. Q. 133; (1938) 7 FORDHAM L. REV. 462; (1923) 21 MICH. L. REV. 593; (1923) 7 MINN. L. REV. 489; (1938) 16 N. Y. U. L. Q. REV. 164; (1927) 5 TEX. L. REV. 197; (1928) 14 VA. L. REV. 646. But compare (1926) 39 HARV. L. REV. 507; (1927) 4 WIS. L. REV. 125, questioning certain cases approved in this article. See discussion by Gavit, *Covenants Running With the Land* (1930) 24 ILL. L. REV. 786, 798, and in *Restrictive Covenants in New York* (1938) 13 ST. JOHN'S L. REV. 93.

88. 5 Co. 16a, 16b, 77 Eng. Rep. 72, 74 (Q. B. 1583).

"touch or concern the thing demised," and not be merely collateral to the land, as where a lessee covenanted to build a house upon other than the leased land of the lessor or to pay a collateral sum to the lessor or to a stranger.

Following this case, the general view has been that the problem concerns the nature of the promise, and the intimate connection of the promise with the land itself has been consistently emphasized ever since.⁸⁹ In a famous article⁹⁰ Dean Bigelow analyzed the cases and pointed out that the test is in effect the measuring of the legal relations of each party with reference to the land itself. If the promisor's legal privileges and other relations in the land are restricted or lessened by the promise, it touches and concerns the land as to him. And if the promisor's legal relations are increased or made more valuable in the land, the benefit of the covenant touches or concerns that land as to him.⁹¹ The rule, of course, expresses the rational concept that a promise passing with land must be one which concerns the land and that merely some purely personal adjustment between the parties will not be assumed by a new purchaser of the land.⁹² The question, therefore, is entirely as to the *kind* of promise and not the *relationship* of the two parties to each other or a balancing off of one against the other, as required by section 85. That section concerns an entirely different thing, a kind of jural nexus which binds *A* and *B* together with respect to land and provides that *A*'s interest shall not outweigh *B*'s and vice versa. It is superimposed upon, and not a part of,

89. The cases are, of course, numerous: of those cited in App. I *infra*, perhaps the case of *Epting v. Lexington Water Power Co.*, 177 S. C. 308, 181 S. E. 66, 102 A. L. R. 773 (1935), illustrates the point as well as any; there a covenant to move a mill elsewhere and furnish power was held intended to be personal. That circumstances may properly alter results is shown by comparing a case such as *Fort Smith Gas Co. v. Gean*, 186 Ark. 573, 55 S. W. (2d) 63 (1932) (where a covenant to furnish domestic gas, with no premises mentioned, was held personal), with cases upholding the running of similar covenants to supply particular premises. *Johnson v. American Gas Co.*, 8 Ohio App. 124 (1917); *Parks v. Hines*, 68 S. W. (2d) 364 (Tex. Civ. App. 1934), *aff'd*, *Hines v. Parks*, 128 Tex. 289, 96 S. W. (2d) 970 (1936).

90. See Bigelow, *The Content of Covenants in Leases* (1914) 12 MICH. L. REV. 639, (1914) 30 L. Q. REV. 319.

91. This test has often been approved, as by the court in *Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank*, 278 N. Y. 248, 15 N. E. (2d) 793 (1938), and in *165 Broadway Bldg., Inc. v. City Investing Co.*, 120 F. (2d) 813 (C. C. A. 2d, 1941), *cert. denied*, 314 U. S. 682 (1941), and by Aigler, Comment, *The Content of Covenants in Leases* (1919) 17 MICH. L. REV. 93. It is rejected *sub silentio* by this Restatement.

92. Some question has occasionally been raised as to whether money payments can be considered as other than personal; but the numerous cases herein cited, and the reason of the situation, make it clear that payments for the direct benefit of land held are as closely connected therewith as any other contractual duties. See discussion, CLARK, *op. cit. supra* note 6, at 76-79; (1927) 12 CORN. L. Q. 404, 405.

the rule that the covenant must touch and concern the land and be not merely collateral to it.⁹³

WHY THE RESTATEMENT IS AS IT IS

If, as is believed to be clear, the authorities do not justify the complicated setup of the Restatement, how does it happen that it has so persisted, in spite of all criticisms, as the law behind which the Institute is determined to stand? The answer to that question, the most interesting and instructive part of this whole history, is not at all in doubt. Indeed, to any one familiar with the cardinal principle of the Institute, that a determined and expert Reporter shall lead the congregation into unanimity of belief, the answer is surely known before this case history is studied. Either the Reporter gets his way or there is no restatement, only a deadlock. And the whole business at hand is to produce a restatement. The only unusual element in this particular case history is that we find all the ordinary elements here in heightened form.

Hence we must say—and it is, indeed, a compliment to a teacher of courage and fortitude to say—that this Restatement is a monument to the enduring persistence of the Reporter. Had he not had a well-nigh obsessive belief that a certain kind, and a certain kind only, of covenants was so bad a thing, so harsh to poverty-stricken landowners, that it must be struck down, no matter what the cost, and had he not followed the path pointed out by that belief without permitting the slightest deviation, the course of this history would have been different. The fact that he was gifted with an attractive and agreeable personality which cloaked an unusual strength of character and that he deservedly had a wide circle of warm personal friends necessarily made his declarations as to the case law carry unusual strength, even beyond the well-nigh impregnable position which the Institute customarily accords its Reporters. The writer does not criticize the Reporter; why should he not take advantage of a heaven-sent opportunity to put over his views, just as other Reporters have done before him? But had he countenanced any departure from the rule of practical inalienability which he had in mind, it is obvious that it would have been quickly accepted, in view of the general dubiety of the Institute members as to these restrictions and the modern view of free alienability of property interests.

93. The binding of land to land seems to be quite clear from the express words of section 85, see discussion p. 711 *supra*, and was so understood by the Advisers in voting upon it. See App. II *infra*. Consider, for example, the important series of party-wall cases for the payment of part of the cost of a party wall when used (which, it is well settled, "touches and concerns" land) which may still run when the benefit is personal, see note 71 *supra*. These obviously cannot satisfy the requirements of either clause (a) or clause (b) of 85.

The commanding position of the Reporter to any Restatement has been well-recognized. Professor Max Radin puts it with his usual facility when he speaks of a doctrine as "enshrined in the summary of Williston on Contracts which is called the Restatement."⁹⁴ Professor Beale's dominance of the Restatement of the Conflict of Laws has produced a whole legal literature.⁹⁵ So, one might call the roll of the great names which carry their respective formulations of the law. That this must be the result should be rather obvious. Unless the Reporter himself will yield his views to others (a tolerance not characteristic of the scholarly mind), the central administration of the Institute must get behind his views in order that a restatement be forthcoming, and thereafter the administration party is naturally strong enough to carry the matter through to a conclusion. The writer has served as Adviser on Property in one branch or another of the subject practically since the formation of the Institute; and while he has seen many sharp differences of opinion, he knows of no instance where the views of the Reporter, persisted in, did not prevail. An Adviser, if he is shrewd, soon realizes that it is arrant foolishness for him to look up, or get convictions about, the authorities; it is the wiser course to confine his attention to improvements of form, while he is meanwhile absorbing desirable instruction and information in his chosen field under pleasant vacation auspices.⁹⁶

Hence the only aspect in which this Restatement can be considered novel is that the trends apparent in the other Restatements appear here in so accentuated a form. For here we have a subject more caviar than usual to the general, a result which is more bold in extending doubtful and overlapping lines of cases into a completely novel structure of prohibition than any other Institute product, and an unusually uncompromising adherence to a policy of outlawing parties' bargainings contrary to the trend of modern legal thinking. There is, however, perhaps one difference, which, if it does exist, is of much importance. It is hard to avoid the conclusion that the result here was more a creature of chance than in the other cases. Of course, the views of Williston, Beale, Bohlen, and the others were well-known through their writings; and it could naturally be expected that their Restatements would follow their views. But Professor

94. See Radin, *Contract Obligation and the Human Will* (1943) 43 COL. L. REV. 575.

95. Cook, *loc. cit. supra* note 51, is, of course, only the latest of well-nigh a multitude of articles and even books which have resulted.

96. Since, therefore, the conferences in general are so limited to details of form, they are necessarily both dull and time-consuming. And the resulting draftsmanship not merely is not worth the great expense involved, but tends to become crabbed to meet the formal—if not the substantive—suggestions of several minds. It justifies the comment of Pollock to Holmes: "I have not seen the later versions of the re-stated law of Contract, but doubt whether the promoters have an adequate draftsman among them. Crabbed and obscure definitions are of no use beyond a narrow circle of students, of whom probably every one has a pet one of his own." 2 HOLMES-POLLOCK LETTERS (Howe ed. 1941) 233.

Rundell, the Reporter for Servitudes, though a well-recognized property teacher, had not written on the subject; and certainly it was a distinct surprise to the writer, and doubtless to others, to find as the work proceeded just what his convictions were and how strong they were. Of course, it is possible that the Director did know of these views and that they facilitated the choice, although, as far as is known, the Director himself took no position in the dispute until after the lines had been formed last spring. The indications are that when the work in the property field was expanded and distributed among several groups to hasten its completion, the actual distribution of parts among several Reporters was more or less by chance (or perhaps by agreement among the gentlemen involved) and not by very deliberate choice. The result with which we are thus faced is presumably, therefore, unusually adventitious.

This case history will not be complete and, indeed, some of its more important teachings will be lost if some more detailed account of the treatment accorded minority views is not outlined. Here the writer finds himself in somewhat of a dilemma, for he knows too much about this history to be the best of historians. "All of this I saw; some of it I was." He took an active part in that minority, which constantly threatened to be, if it was not actually, a majority; and there is danger that documentation will seem to the reader as overmuch personal history, rather than the chronicle of ordinary Institute procedure which is intended. Once again, therefore, the expedient has been hit upon of stating the matter only summarily at this point, leaving the supporting data to the less obtrusive position of a second appendix to this article.⁹⁷

For present purposes it may be emphasized that the question of inter-party privity was the one big issue which divided the Reporter and his Advisers from the beginning. Indeed, after several conferences, all the Advisers present at a conference in September, 1941, agreed to the elimination of the provision. But the Reporter maintained his position in his next draft, and it was then agreed that the issue should go to the Council for settlement. When, however, it came before the Council in February, 1943, because of haste of printing or other mischance, the dissent was not stated, and it was orally reported that the Advisers were in agreement as to the then section 5, present section 82, except for one who wanted to *change* the existing law! So the Council voted approval of section 82, though it returned section 85 as unintelligible, being presumably misprinted. Reconsideration being asked, the Advisers then voted by a majority of one to sustain section 82, and by a considerable majority to eliminate section 85.⁹⁸ Thereafter, the Executive Committee, after hearing the Reporter and the writer, voted unanimously for the elimination of section 85

97. App. II, pp. 737-38 *infra*.

98. The reasons given by the various Advisers are summarized in App. II *infra*.

and took no formal action as to section 82 (thus allowing it to stand), although just half of those present, outside of the officers, expressed grave doubt about it. Unfortunately, this was reported to the Council as unanimous support of the Committee for section 82.⁹⁹ Thereafter the Council, with the Reporter, but no representative of the minority view, present, voted to sustain both sections 82 and 85; though it is understood that the majority for clause (b) of 85 was "slight."¹⁰⁰ And the Annual Meeting, after a brief debate which showed many of the members rather disturbed about the situation, but impressed by "the weight of authority," voted favorably upon section 82 and clause (a) of 85; and after a series of parliamentary maneuvers, it voted down motions both for the approval and disapproval of clause (b) and finally referred the whole matter back to the Reporter for another year and without recommendation as to that clause. This action has since been described as "approval" of the Reporter's position.¹⁰¹ There seems little doubt that the officers consider the Reporter's position to have been sustained or that they contemplate the reference as more for the purpose of polishing the form of statement than for making any change of substance.

Even so summary a statement shows the continuing doubt of many scholars and distinguished men as to the result; but it cannot show fully how decisive in resolving votes, if not doubts, was the Reporter's continued insistence that the cases compelled the result.¹⁰² Moreover, it points to a curious and really quite disturbing reaction towards minority views, which is not so much a willful desire to suppress such views as a complete failure to appreciate that they may exist, at least after the Reporter has finally spoken. Thus, as to the *contretemps* of the original presentation of the material to the Council in February, 1943, the officers have repeatedly said that they thought in good faith the Advisers were in accord as stated; and all other circumstances point to the truth of that conviction, even in the face of the importance of the problem and the long history of division as to it.¹⁰³ Such a conviction as to their work is dangerous (even more so when honestly, and therefore firmly, held) both to the fluid growth of our law and to the encouragement of clear and straight and independent thinking upon the part of the various constituent members of our profession.

99. See App. II *infra*.

100. See Report of Annual Meeting, not yet published, but referred to in App. II *infra*.

101. By Judge Goodrich, *cf.* note 53 *supra*; also by the Director in correspondence.

102. It was clearly decisive as to the vote of the Advisers and the Executive Committee on section 82; it was probably decisive at the Council and the Annual Meeting in May, 1943.

103. Compare, also, the report that the members of the Executive Committee were unanimous as to section 82, or that the Annual Meeting approved clause (b) of 85. It would seem that the fact of division is unconsciously or subconsciously rejected.

PERORATION AND PROGNOSIS

Does this tale have any moral? And what is the future of real covenants likely to be after the dynamiting they are about to suffer at the hands of America's leading sciolists in law? Legal prophecy is always dangerous, but it is fascinating and occasionally helpful. Let us try to look ahead.

Those of us who have had occasion to make use of the Restatements somewhat extensively realize that the complete product finds its greatest usefulness as a jumping-off point for the beginning of discussion. The Restatements are easy and graceful citations upon settled points;¹⁰⁴ but rarely, if ever, do they point the way out of a dispute or through a morass. American lawyers and judges like to be shown and convinced; and since the supporting grounds are carefully eliminated from the Restatements, they do not contain the material to persuade.¹⁰⁵ One must resort to the detailed writings of scholars, and, of course, especially of the various Reporters where they are available, for the arguments and supporting data which will point to eventual decision.¹⁰⁶

One may, therefore, doubt whether the Institute will be more successful here in confining the law within the narrow channels proposed than in other instances. True, an opportunity for clarification and exposition of a troubled corner of the law has unfortunately been lost, but nevertheless that law will probably still keep on its way much as before, even though it remains muddy, ill-defined, and confused. Probably, therefore, very few more covenants will be actually held invalid as a result of this Restatement than had been held so before. Of course, where a court is already in doubt, this may operate to swing the balance against the covenant, but more often it will at most help to some rationalization of an already achieved result.

This may not be quite the case, however, as to one branch of the subject, where the Restatement may have effects more decisive. That is in the business of searching and guaranteeing titles. The gentlemen working in this field must naturally be fearful of any matters which suggest doubts about existing titles. The Restatement gives free play to all their possible doubts. One might expect them to regard it favorably as a stimulating factor for their business, except that, as the writer knows them, they are likely to be more upset by the fact of uncertainty than pleased by the

104. Clark, *The Restatement of the Law of Contracts* (1933) 42 YALE L. J. 643.

105. This has been so often stated in critical articles that there is no need to retrace this ground again.

106. Thus, Judge Goodrich, in his *Annual Report of Adviser on Professional Relations* (1940) 17 A. L. I. REP. 50, 59, referred appreciatively to the fact that the writer had cited the Restatement of Torts in *Pease v. Sinclair Refining Co.*, 104 F. (2d) 183 (C. C. A. 2d, 1939). Of course, the writer has cited the Restatements several times; he is glad to do so where possible. But the case referred to well illustrates the point. The Restatement offered a graceful point of take-off—but when it came to a consideration of the really decisive issues, resort to law review articles was necessary for enlightenment.

possibility of finding their business enlarged. At any rate, on the basis of the Restatement a title searcher will be quite justified in refusing to pass as sound any titles wherein these horrible encumbrances of affirmative covenants are suggested.¹⁰⁷

But on the whole, one need regret less the possible turn of development which may be given to a particular legal subject than the attitude towards both the science and the art of law which is reflected in the Institute's work as here set forth. After all, what impresses one most about this whole affair is what, with the utmost deference, can be viewed only as the intellectual shoddiness of the whole affair. The writer can accept with comparative equanimity a statement that either this or that clear-cut rule is the desirable policy and the most supported by the authorities. But it is a different matter to accept a complicated jerry-built structure whose very complications can be justified only as an attempt to catch differing and mutually conflicting precedents to a result which certainly as a whole, if not in various of its parts, does not exist anywhere, though it may tend indirectly to support preconceived notions of policy. That seems to this writer at least a deviousness unworthy of our profession. Lawyers are jealous of both their prerogatives and their capacities to lead. How can they be expected to preserve the respect of the general populace if they take such indirect methods to a goal, no matter how desirable that goal may be?

Of course, the problem presented by such a restatement to the individual members of the Institute is not an easy one, and one must sympathize with their predicament. What are they to do with a document thus offered for their approval preparatory to issuance as representing their best collective judgment? Particularly must one sympathize with those members who are earnestly desiring more light. It is obvious, however, that the administration program must go through and that doubts and qualms of individual members may in the long run be permitted no actual effect in changing the course of events. The real question is how far a legal document which does not and cannot represent the considered expert and informed view of other than a few named individuals can properly stand as the authentic voice of the profession.

107. Of course, there is always the disturbing thought, stated so trenchantly by McDougal, that we are dealing only with the backwater of vital modern property in these Restatements anyhow. See McDougal, Book Reviews (1940) 49 YALE L. J. 1502, (1941) 54 HARV. L. REV. 526; and McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform* (1942) 55 HARV. L. REV. 1077. See also Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest* (1943) 52 YALE L. J. 203, and his views on the proper teaching of Property, 1941 HANDBK. ASS'N AM. L. SCHOOLS 268.

APPENDIX I. AMERICAN PRIVITY CASES *

Alabama. Moseby v. Roche, 233 Ala. 280, 171 So. 351 (1936) (bn. of c. by beach owner not to use his own property for bathing parties or any commercial use runs; need not be in a deed); Cummings v. Alexander, 233 Ala. 10, 169 So. 310 (1936) (bt. of c. to pay mortgage—in a separate instrument from a deed of conveyance—runs); Gilmer v. Mobile & M. Ry., 79 Ala. 569, 574 (1885) (bn. of c. in deed of right of way to railroad to stop trains near promisee's house runs; the court said that while well-considered cases hold "the common ligament, the estate charged," enough, there was certainly sufficient privity here in view of the easement); cf. Mobile & M. Ry. v. Gilmer, 85 Ala. 422, 5 So. 138 (1888); Leek v. Meeks, 199 Ala. 89, 74 So. 31 (1916) (bn. and bt. of party-wall c. run).

Arkansas. Fort Smith Gas Co. v. Gean, 186 Ark. 573, 55 S. W. (2d) 63 (1932) (c. that "all gas used by grantors for domestic use" be free of charge was personal; no premises mentioned or reference to "assigns"); Rugg v. Lemley, 78 Ark. 65, 93 S. W. 570 (1906) (bt. and bn. of party-wall c. run); Bank of Hoxie v. Meriwether, 166 Ark. 39, 265 S. W. 642 (1924) (same); St. Louis, I. M. & S. Ry. v. Sanders, 91 Ark. 153, 121 S. W. 337 (1909) (bt. of c. to construct levee—apart from a deed—runs).

California. The California cases, which are numerous and are usually cited indiscriminately, are governed by the Civil Code. CAL. CIV. CODE (Deering, 1941) § 1461 prohibits the running of any c. except as contained in that title, while section 1462 by express terms provides as to cs. contained in conveyances only for the running of *bts.* Section 1468—only passed in 1905, after decision of many of the cases usually cited—provides for somewhat wider running as to cs. made between adjoining landowners. Hence, following a close reading of these statutes, the California court holds that the *bn.* may not run when the c. is contained in a conveyance, but may in other cases not contained in a conveyance. See Marra v. Aetna Construction Co., 15 Cal. (2d) 375, 101 P. (2d) 490 (1940), and the careful explanation in (1940) 28 CALIF. L. REV. 769, 771: "The general American rule has been criticized as arbitrary and as bearing no relation to the general policy involved. Its converse in California seems no less arbitrary." Many cases may be cited, therefore, which would undoubtedly be upheld on almost any other rule of privity except this statutory one, *e.g.*, Pedro v. Humboldt County, 217 Cal. 493, 19 P. (2d) 776 (1933); Berryman v. Hotel Savoy Co., 160 Cal. 559, 117 P. 677 (1911); Heimburge v. State Guaranty Corp., 116 Cal. App. 380, 2 P. (2d) 998 (1931) (c. to leave a light well between property conveyed and grantor's remaining property not upheld); whereas other cases, such as those involving water rights, have been upheld on various grounds, as in equity or by way of lien, etc., *e.g.*, Miller & Lux, Inc. v. San Joaquin Agricultural Co., 58 Cal. App. 753, 209 Pac. 592 (1922); Fresno Canal & Irrig. Co. v. Rowell, 89 Cal. 114, 22 Pac. 53 (1889); Fresno Canal & Irrig. Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275 (1889); Chrisman v. Southern California Edison Co., 83 Cal. App. 249, 256 Pac. 618 (1927). See also Burby, *Land Burdens in California* (1931) 4 So. CALIF. L. REV. 343, 354, and (1937) 10 So. CALIF. L. REV. 281, 292.

Colorado. Hottell v. Farmers' Protective Ass'n, 25 Colo. 67, 53 Pac. 327 (1898) (c. in deed conveying elevator, agreeing to furnish power, runs; the court said that there was privity of estate—without defining the type of privity involved); Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co., 40 Colo. 467, 92 Pac. 290 (1907) [bt. and bn. of c. to furnish water for irrigation through a ditch run with the "easement" of water thus created; references to privity may well mean by succession only, RESTATEMENT, PROPERTY (2) (Proposed Final Draft, 1943) § 83].

* The following abbreviations have been used in this appendix: "c." for "covenant or enforceable agreement"; "bn." for "burden"; "bt." for "benefit."

Connecticut. Dick v. Sears-Roebuck & Co., 115 Conn. 122, 160 Atl. 432 (1932) (bn. of c. not to conduct business runs and may be enforced by *original promisee*).

Delaware. Merchants' Union Trust Co. v. New Philadelphia Graphite Co., 10 Del. Ch. 18, 83 Atl. 520 (1912) [bn. of c. in a lease of land by a mortgagor that the lessee pay part of the rent to the mortgagee does not run, because there is neither privity of estate, by succession, RESTATEMENT, PROPERTY (2) (Proposed Final Draft, 1943) § 83, or by contract, nor any agency or trust shown].

Florida. Armstrong v. Seaboard Air Line Ry., 85 Fla. 126, 95 So. 506 (1922) (grantee's c. to maintain station held personal, three judges dissenting).

Georgia. Reidsville & Southeastern R. R. v. Baxter, 13 Ga. App. 357, 363, 79 S. E. 187, 190 (1913) [bn. of c. in a deed conveying railroad right of way to construct warehouse and siding runs; privity unnecessary, citing Tucker v. McArthur, 103 Ga. 409, 30 S. E. 283 (1898), a warranty case]; Smith v. Gulf Refining Co., 162 Ga. 191, 134 S. E. 446 (1926) (bn. of c. to sell only S. O. gas passed on conveyance of a term); Georgia S. R. R. v. Reeves, 64 Ga. 492 (1880) (bn. of c. to build a depot enforced; deed poll); Atlanta, K. & N. Ry. v. McKinney, 124 Ga. 929, 53 S. E. 701 (1906) (bt. and bn. of c. by purchaser of water rights to furnish water to covenantee run; no reference to privity in this and preceding case, only to rule of touching and concerning); Horne v. Macon Tel. Pub. Co., 142 Ga. 489, 83 S. E. 204 (1914) (party-wall c. runs); Proctor v. Redfern, 182 Ga. 175, 185 S. E. 255 (1936) (bn. of c. to make monthly payments runs).

Illinois. Gibson v. Holden, 115 Ill. 199, 3 N. E. 282 (1885) [bt. of party-wall c. is personal while bn. runs; cf. Roche v. Ullman, 104 Ill. 11 (1882)]; Natural Products Co. v. Dolese & Shepard Co., 309 Ill. 230, 140 N. E. 840 (1923) (c. in deed not to quarry stone runs); Van Sant v. Rose, 260 Ill. 401, 103 N. E. 194 (1913) (bt. of a negative restriction may be personal).

Indiana. Conduitt v. Ross, 102 Ind. 166, 26 N. E. 198 (1885) (bn. of a party-wall c. runs while bt. is personal); Fair Bldg. Co. v. Wineman Realty Co., 87 Ind. App. 520, 156 N. E. 433 (1927) (both bn. and bt. of party-wall c. run); Hazlett v. Sinclair, 76 Ind. 488 (1881) (bn. of grantor's c. to fence passed with the adjoining land); cf. Midland Ry. v. Fisher, 125 Ind. 19, 24 N. E. 756 (1890), Lake Erie & W. R. R. v. Priest, 131 Ind. 413, 31 N. E. 77 (1892), and Stover v. Harlan, 87 Ind. App. 347, 154 N. E. 882 (1927) (that grantee's c. to fence runs); Indianapolis Water Co. v. Nulte, 126 Ind. 373, 376, 26 N. E. 72, 73 (1890) (bt. of c. to maintain a levee built by the promisor on his own land is personal).

Iowa. Sexauer v. Wilson, 136 Iowa 357, 113 N. W. 941 (1907) (fencing c. in grant of land runs; "assigns" not necessary).

Kansas. Southworth v. Perring, 71 Kan. 755, 81 Pac. 481, 82 Pac. 785 (1905) (party-wall c. runs).

Kentucky. Louisville, A. & P. V. Elect. Ry. v. Whipps, 118 Ky. 121, 80 S. W. 507 (1904), and Louisville, H. & St. L. Ry. v. Baskett, 121 S. W. 957 (Ky. 1909) (c. by grantee of right of way to maintain station runs); Swiss Oil Corp. v. Dials, 232 Ky. 298, 22 S. W. (2d) 912 (1929) (royalty c. in oil lease runs; formal dictum that privity is necessary); Ferguson v. Worrall, 125 Ky. 618, 101 S. W. 966 (1907) (party-wall c. runs).

Maine. Smith v. Kelley, 56 Me. 64 (1868) (unclear, but apparently c. does not run because made *one* day after conveyance); Lyon v. Parker, 45 Me. 474 (1858) (bt. of c. to repair does not run).

Maryland. Union Trust Co. v. Rosenberg, 171 Md. 409, 189 Atl. 421 (1937) (bn. of c. in a mortgage to pay taxes and assessments runs until privity of estate, *i.e.*, by succession, ends, the assignee not being liable for breaches before he acquires, or after he has been divested of, title).

Massachusetts. Under the peculiar rule of this state of privity by "substituted tenure," discussed in the article above, a c. in aid of an easement, granted fifteen years before, to draw off water from a mill pond, will run, *Morse v. Aldrich*, 19 Pick. 449 (Mass. 1837); but there must be at least an easement, or else the c. does not run, *Hurd v. Curtis*, 19 Pick. 459 (Mass. 1837); *Wheelock v. Thayer*, 16 Pick. 68 (Mass. 1834), even if contained in a deed, *Shade v. M. O'Keefe, Inc.*, 260 Mass. 180, 156 N. E. 867 (1927); *Orenberg v. Johnston*, 269 Mass. 312, 168 N. E. 794 (1929). A party-wall c. runs, *Savage v. Mason*, 3 Cush. 500 (Mass. 1849), but not a c. to refrain from a certain type of business, *Norcross v. James*, 140 Mass. 188, 2 N. E. 946 (1885) (quarrying); *Shade v. M. O'Keefe, Inc.*, *supra* (grocery business). There can be no running of cs. in gross, as where the bt. is personal, *Lincoln v. Burrage*, 177 Mass. 378, 59 N. E. 67 (1901) (c. to pay for party wall); *Orenberg v. Johnston*, *supra* (c. to maintain tower clock in Harvard Church); *Consolidated Arizona Smelting Co. v. Hinchman*, 212 Fed. 813 (C. C. A. 1st, 1914), one judge dissenting, *cert. denied*, 239 U. S. 640 (1915), *rev'g* 193 Fed. 907 (D. Me. 1912) (c. by a purchaser of mining property to pay for it out of future earnings); or where the bn. is personal, *Walsh v. Packard*, 165 Mass. 189, 42 N. E. 577 (1896) (guaranty of rent). Such needlessly strict disregard of parties' intentions has been somewhat offset by an unusual recognition of *affirmative easements*, as prescriptive duties to repair a bridge, *Middlefield v. Church Mills Knitting Co.*, 160 Mass. 267, 35 N. E. 780 (1894), or to pay annual damages for flowage repairs and drawing of water, *Whittenton Mfg. Co. v. Staples*, 164 Mass. 319, 41 N. E. 441 (1895), or the "quasi easement to have fences maintained," as *Holmes, J.*, in *Norcross v. James*, *supra*, describes *Bronson v. Coffin*, 108 Mass. 175 (1871). See *CLARK, op. cit. supra* note 6, at 104. On this theory the bn. of a c. to pay one-third the expenses of maintaining a side track and taxes has been allowed to run. *Everett Factories & Terminal Corp. v. Oldetyme Distillers Corp.*, 300 Mass. 499, 15 N. E. (2d) 829 (1938).

Michigan. *Mueller v. Bankers' Trust Co. of Muskegon*, 262 Mich. 53, 247 N. W. 103 (1933) (c. not in a deed to build a bridge runs—no mention of privity); *Adams v. Noble*, 120 Mich. 545, 79 N. W. 810 (1899) (bt. and bn. of a party-wall c. run—though parties may make the bt. personal if they so wish).

Minnesota. *Shaber v. St. Paul Water Co.*, 30 Minn. 179, 14 N. W. 874 (1883) (bt. of c. to keep up water level runs); *Pillsbury v. Morris*, 54 Minn. 492, 56 N. W. 170 (1893) [bn. of party-wall c. runs though bt. is personal; see clear explanation of this case in *Kimm v. Griffin*, 67 Minn. 25, 69 N. W. 634 (1896), both bt. and bn. of party-wall c. may run]; *Kettle River R. R. v. Eastern Ry.*, 41 Minn. 461, 43 N. W. 469 (1889) (c. to use a certain railroad is personal); *Pelser v. Gingold*, 8 N. W. (2d) 36 (Minn. 1943) (c. to pay a personal debt incurred for improvements does not run).

Missouri. *Sharp v. Cheatham*, 88 Mo. 498, 502 (1885) (party-wall c. created equitable easement and runs; dictum that an action at law would fail); *Robins v. Wright*, 331 Mo. 377, 53 S. W. (2d) 1046 (1932) (party-wall c. runs); *Iowa Loan & Trust Co. v. Fullen*, 114 Mo. App. 633, 91 S. W. 58 (1905) (c. for title runs with mere possession).

Montana. *Herigstad v. Hardrock Oil Co.*, 101 Mont. 22, 52 P. (2d) 171 (1935) (bn. of c. by assignee of oil prospecting permit to pay contingently on oil production runs).

Nebraska. *Farmers & Merchants Irrig. Co. v. Hill*, 90 Neb. 847, 134 N. W. 929 (1912) (statute grants a lien for enforcement of irrigation charges and liability on c. is not personal; dictum that privity of estate necessary); *Loyal Mystic Legion v. Jones*, 73 Neb. 342, 102 N. W. 621 (1905) (bt. and bn. of party-wall c. run); *Cook v. Paul*, 4 Neb. Unof. 93, 93 N. W. 430 (1903) (bt. of party-wall c. is personal).

Nevada. *Wheeler v. Schad*, 7 Nev. 204 (1871) (c. made 6 days after conveyance cannot run).

New Hampshire. Burbank v. Pillsbury, 48 N. H. 475 (1869) (c. to fence runs with acceptance of deed poll; strong criticism of Massachusetts privity).

New Jersey. Costigan v. Pennsylvania R. R., 54 N. J. L. 233, 23 Atl. 810 (Sup. Ct. 1892) [c. not to claim damages for building railroad construed as personal; also semble that the bn. of no affirmative c. runs at law, citing English cases and Brewer v. Marshall, 18 N. J. Eq. 337 (1867), 19 N. J. Eq. 537 (1868), c. not to sell marl from other land, i.e., not to compete, is illegal and in general restraint of trade; moreover, no affirmative bn. should run]; National Union Bank at Dover v. Segur, 39 N. J. L. 173 (1877) (bt. of c. not to conduct a banking business runs).

New Mexico. Bolles v. Pecos Irrig. Co., 23 N. M. 32, 167 Pac. 280 (1917) (c. to furnish irrigation runs to and against successors); Murphy v. Kerr, 5 F. (2d) 908 (C. C. A. 8th, 1925) (c. in deed to pump water to reservoir on land conveyed runs).

New York. After almost hopeless confusion in the cases, the Court of Appeals in Miller v. Clary, 210 N. Y. 127, 103 N. E. 1114 (1913), at length adopted the English rule (note 62 *supra*) that with certain exceptions there stated—to repair fences and ways relating to party walls, to provide railway crossings, and in leases—the bn. of no affirmative c. runs. The c. not enforced—to furnish water power for a flour mill—satisfied the twin requirements of section 82, since it was in aid of an easement granted by the deed containing the c. This is the present New York law, Neponsit Property Owners' Ass'n, Inc. v. Emigrant Industrial Savings Bank, 278 N. Y. 248, 15 N. E. (2d) 793 (1938) (upholding a c. to pay yearly assessments for maintenance of roads, parks, sewers, etc.; action to foreclose a lien), though the exceptions appear substantial. Thus, a c. to repair sewer and right of way runs, Greenfarb v. R. S. K. Realty Corp., 256 N. Y. 130, 175 N. E. 649 (1931), as does a c. to pay damages from sparks, ashes, etc. Morgan Lake Co. v. New York, N. H. & H. R. R., 262 N. Y. 234, 186 N. E. 685 (1933). See discussion of New York law in 165 Broadway Bldg., Inc. v. City Investing Co., 120 F. (2d) 813 (C. C. A. 2d, 1941), *cert. denied*, 314 U. S. 682 (1941) (upholding the running of the bt. of a c. to repay a deposit).

The earlier New York law, therefore, is superseded, though the confusion of those cases, and the misunderstanding of history shown, is probably the chief reason (at least together with the original tangent taken by the Massachusetts cases) for such confusion as has developed elsewhere. The early and often cited case of Van Rensselaer v. Hays, 19 N. Y. 68 (1859), stated the correct doctrine of privity by succession only; but the court later became troubled by legal history, Harsha v. Reid, 45 N. Y. 415 (1871), and in Cole v. Hughes, 54 N. Y. 444 (1873), made the surprising holding that a party-wall c. must be considered only personal. [For the confusion this case has caused, reference is made to the able criticism found in McCormick v. Stoneheart, 195 S. W. 883 (Tex. Civ. App. 1917).] Later cases naturally tried to limit this unworkably harsh rule. Hence in Mott v. Oppenheimer, 135 N. Y. 312, 31 N. E. 1097 (1892), a party-wall c. was allowed to run; and still later cases, therefore, asserted a curious distinction that, while a c. for the immediate building of a party wall could not run, yet one for building in the remote future would. Cf. Crawford v. Krollpfeiffer, 195 N. Y. 185, 88 N. E. 29 (1909); Sebald v. Mulholland, 155 N. Y. 455, 50 N. E. 260 (1898); CLARK, *op. cit. supra* note 6, at 140, 141; Clark, *supra* note 5, 37 HARV. L. REV. 301. Meanwhile other cases created confusion, and the court adopted even that devastating rule as to cs. of warranty that they could not run except where the grantor had title or possession, which, as Rawle says, makes the warranty useless when it is most needed. See RAWLE, COVENANTS FOR TITLE (5th ed. 1887) 341; CLARK, *op. cit. supra* note 6, at 100. This rule as to warranties was adopted in New York in Mygatt v. Coe, 124 N. Y. 212, 26 N. E. 611 (1891), 142 N. Y. 78, 36 N. E. 870 (1894), 147 N. Y. 456, 42 N. E. 17 (1895), 152 N. Y. 457, 46 N. E. 949 (1897), against powerful dissent in each case except the second, where the unanimous

opinion ordering a new trial was favorable to a recovery. (This unfortunate warranty rule, repudiated by the better authorities, has, quite occasionally, been resorted to as justifying the privity rule, but obviously that cannot be so; for this rule applied only to the running of *bts.*, and comes from another background, namely, that a stranger to a title cannot give a good deed of warranty as to it.) Other cases which have been cited supported the running of various *cs.*, *Denman v. Prince*, 40 Barb. Ch. 213 (N. Y. 1862) (*c. to share in maintenance of dam*); *Waterbury v. Head*, 12 N. Y. St. Rep. 361 (1837) (*same*); and *Nye v. Hoyle*, 120 N. Y. 195, 24 N. E. 1 (1890) (*same*), with varying dicta. All add color to the former New York picture, which, it is submitted, is a powerful argument against the complications of the present Restatement.

North Carolina. *Norfleet v. Cromwell*, 64 N. C. 1, 14 (1870) [*c. for contribution to repair an existing canal runs*; court limits its decision to a case where "easement is apparent," but condemns the distinction drawn between lease and fee *c.* based upon "privity of estate" as "arbitrary, and not a rule of reason, and may be dismissed as insufficient"; see also *Norfleet v. Cromwell*, 70 N. C. 634 (1874)]; *Herring v. Wallace Lumber Co.*, 163 N. C. 481, 79 S. E. 876 (1913) (*c. on sale of timber by the purchaser to build a railroad to the timber upheld*); *Raby v. Reeves*, 112 N. C. 688, 16 S. E. 769 (1893) (*c. to make monthly payments for an easement runs*); *Barringer v. Virginia Trust Co.*, 132 N. C. 409, 43 S. E. 910 (1903) (*c. on grant of water rights to maintain a dam on other premises held personal*); *Parrott v. Atlantic & N. C. R. R.*, 165 N. C. 295, 81 S. E. 348 (1914) (*grantee's c. to maintain flag station runs*); *Ring v. Mayberry*, 168 N. C. 563, 84 S. E. 846 (1915) (*c. by grantee to maintain stairway runs*).

Ohio. *Maher v. Cleveland Union Stockyards Co.*, 55 Ohio App. 412, 9 N. E. (2d) 995 (1936) (*c. in deed to pay assessment for opening street runs*); *Johnson v. American Gas Co.*, 8 Ohio App. 124 (1917) (*bn. of c. to furnish free gas to residence of promisee upheld*); *Railway v. Bosworth*, 46 Ohio St. 81, 18 N. E. 533 (1888) (*grantor's c. to fence on grant of right of way runs*); *Huston v. Cincinnati & Zanesville R. R.*, 21 Ohio St. 235 (1871) (*grantee's c. runs*). These cases do not rely on privity. In *Easter v. Little Miami R. R.*, 14 Ohio St. 48 (1862), upholding the running of a grantor's *c. to fence adjoining lands*, there are dicta that the Massachusetts requirements are met. In *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. 619 (C. C. A. 6th, 1897) (*per Lurton, J., Harlan and Taft, JJ., concurring—the bn. of a c. not to manufacture a certain kind of product was held to run*).

Oklahoma. *Empire Natural Gas Co. v. Southwest Pipe Line Co.*, 25 F. (2d) 742 (N. D. Okla. 1928), *aff'd*, *Southwest Pipe Line Co. v. Empire Natural Gas Co.*, 33 F. (2d) 248 (C. C. A. 8th, 1929) (*bn. of c. to purchase natural gas produced on leasehold estate enforced, at least in equity, against the assignee of the leasehold*).

Oregon. *Beck v. Lane County*, 141 Ore. 580, 18 P. (2d) 594 (1933) (*c. by grantee to maintain railroad crossing runs*); *Guild v. Wallis*, 130 Ore. 148, 279 Pac. 546 (1929) (*c. by grantee to maintain and keep open drainage ditch runs*); *Ford v. Oregon Elect. Ry.*, 60 Ore. 278, 117 Pac. 809 (1911) (*grantee's c. to maintain station runs*); *Brown v. Southern Pac. Co.*, 36 Ore. 128, 58 Pac. 1104 (1899) (*c. in a deed whereby grantors agreed to fence other land or not hold railroad for injury to stock was intended to be personal*); *Houston v. Zahm*, 44 Ore. 610, 76 Pac. 641 (1904) (*c. by purchaser to open and maintain public highway is personal, citing Massachusetts cases*); *Norby v. Section Line Drainage Dist.*, 159 Ore. 80, 76 P. (2d) 966 (1938) (*grantee's c. to maintain ditch runs*).

Pennsylvania. *Horn v. Miller*, 136 Pa. 640, 20 Atl. 706 (1890) (*bt. and bn. of agreement adjusting water rights and extent thereof run*); *Bald Eagle Valley R. R. v. Nittany Valley R. R.*, 171 Pa. 284, 33 Atl. 239 (1895) (*bn. of c. made in consideration of aid in development of an iron company that the latter give all its traffic to a certain railroad runs*);

injunction granted because damages are inadequate); *Kelly v. Nypano R. R.*, 200 Pa. 229, 49 Atl. 779 (1901) (bn. of c. in grant of right of way to railroad that latter maintain fence runs, so long as privity of estate or period of enjoyment exists).

Rhode Island. *Middletown v. Newport Hospital*, 16 R. I. 319, 15 Atl. 800 (1888) (c. for beach privileges upheld "in equity"; dictum that privity or tenure necessary "at law").

South Carolina. *Epting v. Lexington Water Power Co.*, 177 S. C. 308, 181 S. E. 66 (1935) (c. to move a mill elsewhere and furnish power was intended to be personal).

South Dakota. *Hill v. City of Huron*, 33 S. D. 324, 331, 145 N. W. 570, 572 (1914) [bt. of party-wall c. is personal, though bn. runs. Compare later case between the parties after personal assignment, 39 S. D. 530, 165 N. W. 534 (1917)].

Tennessee. *Louisville & N. R. R. v. Webster*, 106 Tenn. 586, 61 S. W. 1018 (1901) (bn. of c. to maintain a fence does not run, because it was entirely on promisor's land and promisee railroad company had no easement); *Carnegie Realty Co. v. Carolina C. & O. Ry.*, 136 Tenn. 300, 189 S. W. 371 (1916) (c. on grant of land to maintain depot runs); *Doty v. Chattanooga Union Ry.*, 103 Tenn. 564, 53 S. W. 944 (1899) (similar).

Texas. *McCormick v. Stoneheart*, 195 S. W. 883 (Tex. Civ. App. 1917) [party-wall c. runs, criticizing the privity-of-estate rule; the case was criticized by *Jones v. Monroe*, 262 S. W. 541 (Tex. Civ. App. 1924), which, however, was reversed, 285 S. W. 1055 (Tex. Com. App. 1926), *aff'd*, 288 S. W. 802 (Tex. Com. App. 1926), upholding running]; *Ball v. Rio Grande Canal Co.*, 256 S. W. 678 (Tex. Civ. App. 1923) (water-rights c. runs); *Parks v. Hines*, 68 S. W. (2d) 364 (Tex. Civ. App. 1934), *aff'd*, *Hines v. Parks*, 128 Tex. 289, 96 S. W. (2d) 970 (1936) (grantee's c. to extend electric and water lines to other lands of grantor runs). In *Panhandle & S. F. Ry. v. Wiggins*, 161 S. W. (2d) 501, 505 (Tex. Civ. App. 1942), upholding a party-wall c., there is a dictum, citing no Texas cases, that privity is necessary. In *Missouri, K. & T. Ry. v. State*, 275 S. W. 673 (Tex. Civ. App. 1925), the bn. of a c. to maintain railroad shops runs even though the benefit does not.

Virginia. *Dickinson v. Hoomes's Adm'r*, 8 Gratt. 353, 403, 404 (Va. 1852) (c. of warranty runs; extensive criticism of the requirement of privity); *Tardy v. Creasy*, 81 Va. 553 (1886) (c. to abstain from business is personal, also void as in restraint of trade, two judges dissenting).

Washington. *Adamson v. Black Rock Power & Irrig. Co.*, 297 Fed. 905 (C. C. A. 9th, 1924), *cert. denied*, 266 U. S. 630 (1925) (irrigation c. runs); *Ellensburg Lodge No. 20, I. O. O. F. v. Collins*, 68 Wash. 94, 122 Pac. 602 (1912) (party-wall c. runs).

West Virginia. *Lydick v. B. & O. R. R.*, 17 W. Va. 427, 436, 437 (1880) (c. by grantee railroad to maintain a switch runs; query by the court whether privity of estate is necessary); *Hurxthal v. St. Lawrence Boom & Mfg. Co.*, 53 W. Va. 87, 44 S. E. 520 (1903) (c. to pay for maintenance of dam runs as an "equitable mortgage"); *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600 (1883) (c. not to transport oil is void as in restraint of trade); *Harbert v. Hope Natural Gas Co.*, 76 W. Va. 207, 84 S. E. 770 (1915) (bn. of c. in a lease to supply domestic gas runs, though gas may be used away from the premises leased).

Wisconsin. *Wooliscroft v. Norton*, 15 Wis. 217 (1862) (c. on grant of land and water to repair dam and water pump runs; privity exists in any event, though some authorities state "the proposition much more broadly" in favor of running); *Crawford v. Witherbee*, 77 Wis. 419, 46 N. W. 545 (1890) (c. to render one-eighth of mineral and to mine runs).

Wyoming. *Lingle Water Users' Ass'n v. Occidental Bldg. & Loan Ass'n*, 43 Wyo. 41, 297 Pac. 385 (1931) (irrigation c. does not run; discussed in text p. 721 *supra*).

APPENDIX II. INSTITUTE HISTORY IN RE PRIVITY

The question of a requirement of interparty privity of estate for the running of the burden of a covenant had been debated at at least two earlier conferences of the Reporter and his Advisers before the Reporter's material came up for a vote at the conference in September, 1941. The minutes of that conference show that at the end of the discussion on what is now section 82 an Adviser, after giving reasons for the omission of this requirement, concluded, "and so I don't think this illogical doctrine is necessary or very useful. All present agree." To which the Reporter said, "If I am unconvinced I shall write a brief to show what the cases seem to require and the reasons of policy which I think accord with that." MINUTES, CONFERENCE ON PROPERTY (2) (Sept. 1-6, 1941) 47, 48. With respect to the material which is now section 85, the Reporter stated that he was not satisfied with the then form and that he would prepare another draft and asked for suggestions; whereupon several were made looking for closer identification of the material with the rule of "touching and concerning." *Id.* at 56-60.

After this conference the Reporter did not file a brief, nor did he modify his position in later drafts; and it was then definitely agreed that the matter should go before the Council—an understanding which was confirmed by correspondence, wherein the issues were extensively explored, in January, 1942. The material did not come before the Council until February, 1943, when Property (2) Council Draft No. 1, containing Chapter 2, sections 5 and 8, corresponding to present sections 82 and 85 respectively, but without notation of dissent, was considered before it was distributed to the Advisers. Section 5 was presented to the Council with the statement on behalf of the Reporter, who was ill: "As Section 5 stands, in the opinion of all the Advisers except one, it states the law as it is. Judge Clark does not like the law as it is and would like to go beyond it. We all felt we could not go to the limit which Judge Clark wanted to go." The Council, therefore, accepted it as "satisfactory" without record vote. TRANSCRIPT, COUNCIL MEETING ON PROPERTY (2) (Feb. 23-26, 1943) 7, 8. As to section 8, that did not then contain the words "in the physical use or enjoyment of land possessed by him" now appearing in the first clause of (a) of section 85; and a long discussion was had as to its meaning, culminating in its re-reference back to the group for clarification on the Acting Reporter's statement that "something is not in order" in the black letter. *Id.* at 17.

Reconsideration having been sought on the ground that the position of the Advisers had not been correctly stated, the matter came again before the Advisers in April, 1943; and they then voted 4 to 3 in support of section 5, and 5 to 2 for the elimination of section 8. Their stated reasons show that as to section 5, one supported it because he favored a policy of keeping "the running as restricted as possible," one felt bound by the weight of authority, another felt that a "slight preponderance" of cases favoring the Reporter was supported by the prevailing opinion in the legal profession, as shown by text writers, while the fourth approved on grounds of policy, since it cut down the running of covenants and added a requirement bringing home to the promisor realization of the importance of his act. The dissenters took essentially the position stated in this article. MINUTES, CONFERENCE ON PROPERTY (2) (April 8-10, 1943) 14-28. As to section 8, all of the four who had favored section 5 voted against this section except the first, who, though expressing "a great deal of doubt about the matter," still favored the section as a matter of policy. He was joined by one of those who had opposed section 5, but who frankly said that this section was misnamed "Touching and Concerning" and that there was a good deal of authority contrary; but on policy he thought land should not be burdened by covenants where the benefit was in gross. The majority criticized the provision, inter alia, as a trouble-maker and not a correct statement of the "touching and concerning" doctrine. *Id.* at 31-46.

The matter then came before the Executive Committee, which heard the Reporter and the writer and then took no action with respect to section 5, thus allowing it to stand, but voted unanimously to strike section 8. But as to section 5, the only comment made by committee members (outside of the officers) was unfavorable; of the four members then present, one said he favored the views expressed by the writer and another expressed preference for the simplicity and clarity of statement of this position, but accepted the weight of authority as viewed by the majority of the Advisers and the Reporter. The other two said nothing. MINUTES, EXECUTIVE COMMITTEE ON PROPERTY (2) (April 17, 1943) 9, 10. Of two members who had left earlier one had stated that he was for, the other that he was against, the position taken. This was reported to the Council as follows: "Your Executive Committee voted unanimously to recommend that you retain the section." SPECIAL REPORT OF DIRECTOR TO THE COUNCIL, PROPERTY (2) (April 27, 1943) 5.

At the Council Meeting, May 10, 1943, at which only the Reporter was present in addition to the Council members, the minutes show approval of both sections. MINUTES, COUNCIL MEETING ON PROPERTY (2) (May 10, 1943) 5, 6. But in the debate at the Annual Meeting (not yet printed, but made available to the writer through courtesy of the Director) a member of the Council stated that clause (b) of 85 was approved only by a slight majority. The Annual Meeting after interesting debate voted approval of section 82 and clause (a) of 85; then as a motion for disapproval of clause (b) was being put, a motion for its approval was substituted and voted down; a motion of disapproval was voted down; and finally it was voted merely to re-refer the whole section to the group "for further consideration and report next year." The debate showed a considerable doubt as to these requirements upon the part of several members, and that they were worried by the supposed weight of authority; and there was considerable confusion and some well-taken criticism of the use made of the doctrine of "touching and concerning," although other members relied on this line of cases as supporting the privacy requirements. With respect to the action taken by the meeting, the officers of the Institute have reported that the meeting *approved* the Reporter's statement. See Goodrich, *loc. cit. supra* note 53.