

1-1-1969

Covenants: California's New Legislative Approach to Covenants Running with the Land

Juan E. Arrache Jr.

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Juan E. Arrache Jr., Comment, *Covenants: California's New Legislative Approach to Covenants Running with the Land*, 9 SANTA CLARA LAWYER 285 (1969).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol9/iss1/15>

This Comment is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

COVENANTS: CALIFORNIA'S NEW LEGISLATIVE APPROACH TO COVENANTS RUNNING WITH THE LAND

On July 18, 1968, California amended section 1468 of the Civil Code¹ and thereby modified to a considerable extent the law of covenants running with the land at law. Prior to that date California had been recognized as occupying a unique position in the law of covenants.² The purpose of this comment is to show how California has been drawn from its unique position toward the mainstream of common law covenants. Additionally, an attempt is made to put into perspective the effect of this statute on existing California law and to examine some inconsistencies resulting from the change.

PRIOR CALIFORNIA LAW

A real covenant, in contrast to a personal covenant, runs with the land;³ that is, when it is so related to the land, or so "touches and concerns the land" that its benefit or burden passes with the ownership irrespective of the consent of subsequent assignees.⁴ Commentators agree that to enable a covenant to run with the land four requirements must be met.⁵ First, the covenant must be proper as to form.⁶ Second, the parties must intend that the covenant run or bind their assignees.⁷ Third, "privity of estate" must exist between the grantor and grantee of the land conveyed.⁸ Fourth, the nature of the covenant must be such that it relates to the land or "touches

¹ CAL. CIV. CODE § 1468 (West Supp. 1968).

² See Burby, *Land Burdens in California-Covenants Running with the Land*, 4 S. CAL. L. REV. 343, 355 (1931); Clark, *The American Law Institute's Law of Real Covenants*, 52 YALE L.J. 699, 731 (1931).

³ BLACK'S LAW DICTIONARY 437 (rev. 4th ed. 1968).

⁴ 21 C.J.S. *Covenants* § 54 (1940). The land may be that property retained by the grantor or conveyed to a grantee, at least at common law.

⁵ C. CLARK, *COVENANTS AND INTERESTS RUNNING WITH LAND* 94 (2d ed. 1947); 3 H. TIFFANY, *REAL PROPERTY* 441-70 (3d ed. 1939); See also, W. BURBY, *REAL PROPERTY* 97-98 (3d ed. 1965).

⁶ *Id.*

⁷ *Id.*

⁸ At common law, privity of estate is considered the basic requirement for a replacement. C. CLARK, *COVENANTS AND INTERESTS RUNNING WITH LAND* 92 (2d ed. 1947); W. BURBY, *REAL PROPERTY* 98 (3d ed. 1965). The concept of privity of estate is a legal device which is used by common law courts to limit the parties who may be bound by covenants running with the land. The policy of a jurisdiction regarding the running of covenants is usually manifested in the meaning attributed to privity of estate.

There are basically two meanings of "privity of estate" frequently discussed. The first is referred to as mutual privity which had its roots in the feudal concept of the

and concerns" the land.⁹ Once the grantor satisfied the common law requirements of covenants running with the land, he or his assignees could enforce the covenant against the grantee and his assignees or vice versa.

Real covenants were distinguished from personal covenants by the "touch and concern" requirement, and the rights and duties of the parties under real covenants were known as benefits and burdens.¹⁰ At common law, both the benefit and the burden of the covenant were required to relate to the land or "touch and concern" the land before the covenant was considered real, and thus to run with the land. Whether the benefit or burden of a covenant "touches and concerns" was determined by the effect on the covenantor of the covenantee's interest in the land.¹¹ Correlative tests were applied to make such a determination. On the one hand, if the value of the covenantee's interest in the land increased by virtue of the covenant, then the *benefit* "touched and concerned" the land. On the other hand, if the value of the covenantor's interest in the land decreased, then the *burden* of the covenant "touched and concerned" the land. Furthermore, it was immaterial at common law whether the covenant imposed an affirmative or negative duty on the covenantor.¹²

Prior to 1968, covenants in California would run with the land at law only in three specific situations.¹³ The first situation is gov-

tenurial relationship between the grantor and grantee. The prerequisite to finding mutual privity is determining that there are two co-existing interests in the land. After *Quia Emptores*, 18 Edw. 1, cc. 1, 3 (1290), this was quite impossible in grants of fees because subfeudation was eliminated. California has adopted this view by judicial decision. *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 68 P. 308 (1902); *accord*, *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 117 P. 677 (1911). If *Quia Emptores* abolished the mutual interests in the land, this meaning of privity of estate is a nullity in grants of fees.

Perhaps the majority of American jurisdictions have adopted the second common meaning of privity of estate. These jurisdictions find that the relationship between the grantor and grantee is a sufficient basis for allowing covenants to run with the land. They have adopted the term "successive privity." In reality, "successive privity" is nothing more than a fiction which the courts use to support a covenant running at law. W. BURBY, *REAL PROPERTY* 98 (3d ed. 1965).

⁹ W. BURBY, *REAL PROPERTY* 98 (3d ed. 1965); C. CLARK, *COVENANTS AND INTERESTS RUNNING WITH LAND* 96 (2d ed. 1947); 3 H. TIFFANY, *REAL PROPERTY* 455 (3d ed. 1939).

¹⁰ C. CLARK, *COVENANTS AND INTERESTS RUNNING WITH LAND* 97 (2d ed. 1947).

¹¹ *Id.* A covenant which did not "touch and concern" the land was considered a personal covenant and, therefore, not binding on the heirs or the assigns of the contracting parties.

¹² Annot., 41 A.L.R. 1363, 1364 (1926). For example, a covenant to provide water to adjacent land by the grantor-covenantor was sustained as a real covenant even though it amounted to an affirmative duty. *Murphy v. Kerr*, 5 F.2d 908 (8th Cir. 1925).

¹³ CAL. CIV. CODE § 1461 (West 1954). "The only covenants which run with the land are those specified in this Title, and those which are incidental thereto."

erned by section 1462 of the Civil Code¹⁴ which provides that every covenant will run with the land, both as to the benefit and burden, if the covenant is for the direct benefit of the property conveyed.¹⁵ If, however, the covenant restricts rather than benefits the use of the land conveyed, then it will not run.¹⁶ Thus, the California rule held that the burden of a covenant will not run unless it is made for the direct benefit of the land. For example, in *Carlson v. Lindauer*,¹⁷ the owner of the surface rights of a parcel of property agreed to a covenant proposed by Union Oil, the owner of the oil rights under the same parcel. The agreement provided: that Union search for oil; that after five years, if no oil was found, Union would quit-claim the oil rights to the owner of the surface rights; and, that if oil was found, the owner would be entitled to royalties and surface damages.¹⁸ The court held that the royalties themselves were incorporeal property rights, within the meaning of the word "property" in section 1462, and that the covenant to quit-claim oil rights was a direct benefit to the royalty interest conveyed.¹⁹ Therefore, the covenant to quit-claim was a covenant running at law within the requirements of section 1462 of the Civil Code.²⁰

The second instance in which covenants were held to run at law was determined by applying the requirements of section 1468 of the Civil Code. Prior to 1968, section 1468²¹ allowed one landowner to covenant with another to do or refrain from doing some act which "is expressed to be for the benefit of the land of the covenantee." In the landmark case of *Marra v. Aetna Construction*

¹⁴ CAL. CIV. CODE § 1462 (West 1954). "Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land."

¹⁵ There was room for speculation as to whether the burden imposed upon the land retained by the grantor would bind his successors in interest even where the covenant confers a direct benefit on the property conveyed. This question, although never resolved by the California courts, has become moot with the amendment of section 1468 of the Civil Code. CAL. CIV. CODE § 1468 (West Supp. 1968).

¹⁶ *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 68 P. 308 (1902); *McCord, Long v. Cramer Meat & Packing Co.*, 155 Cal. 402, 101 P. 297 (1909); *Marra v. Aetna Constr. Co.*, 15 Cal. 2d 375, 101 P.2d 490 (1940).

¹⁷ 119 Cal. App. 2d 292, 259 P.2d 925 (1953).

¹⁸ *Id.* at 297-99, 259 P.2d at 927-28.

¹⁹ *Id.* at 304-05, 259 P.2d at 931-32.

²⁰ 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW 1042 (7th ed. 1960). Although there are few cases concerning beneficial real covenants in fees, other examples are covenants for title, to insure, and to release a mortgage. *Id.*

²¹ Ch. 450, § 1, p. 610, [1905] Cal. Stats., as amended, CAL. CIV. CODE § 1468 (West Supp. 1968): "A covenant by the owner of land to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, and which is made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with both of such parcels of land."

Company,²² plaintiff, the grantor's assignee, argued unsuccessfully that a burden, in the form of building restrictions, could run at law under section 1468 of the Civil Code. The California Supreme Court refused to obligate the defendant-grantee and held that section 1468 applies only to covenants between present landowners, thus excluding covenants contained in a deed from a grantor to a grantee.

The third case in which covenants will run is expressed in section 1464 of the Civil Code.²³ This section states that a covenant will run at law if it provides for the addition of some new thing to real property, or for the benefit of some part of the property not then in existence.²⁴ In addition, a covenant contained in a grant of an estate of property must be made expressly for the assignees of the parties. In *Marin County Hospital District v. Cicurel*,²⁵ the appellate court held that although a covenant for ingress and egress did confer something new on the land, the covenant failed because it did not expressly state that it was to bind the assignees of the parties.

This short summary of California law indicates that both the California Legislature and the state judiciary have been reluctant to allow covenants conferring a burden on property to run at law. The apparent motivation for the rule is that onerous covenants tend to restrain alienation and curtail the marketability of freeholds.²⁶

California courts have refused to uphold burdensome covenants at law not only on the authority of section 1462,²⁷ but also because the courts found no privity of estate existing between grantor and grantee.²⁸ California's restrictive view of privity, in accord with

²² 15 Cal. 2d 375, 101 P.2d 490 (1940). The case has been criticized as making an unwarranted technical distinction between covenants of owners and covenants in grants. 28 CALIF. L. REV. 769 (1940).

²³ CAL. CIV. CODE § 1464 (West 1954): "A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with land so far only as assigns thus mentioned are concerned."

²⁴ This is nothing more than a codification of the common law rule of *Spencer's Case*. 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW 1040 (7th ed. 1960). If that which the covenant concerns is not in existence in the estate then the covenant must expressly bind the assignees.

²⁵ 154 Cal. App. 2d 294, 301, 316 P.2d 32, 37 (1957).

²⁶ 28 CALIF. L. REV. 769 (1940).

²⁷ *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 68 P. 308 (1902); accord, *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 117 P. 677 (1911). See discussion note 8 *supra*.

²⁸ *Id.*

England and a few American jurisdictions, is based on the reasoning that since the statute *Quia Emptores*²⁹ eliminated subinfeudation, privity of estate no longer exists between a grantor and grantee of a fee.³⁰ Elimination of privity precluded the running of burdens in all situations except for those specifically provided for in the California statutes.

When a covenant imposing a burden on the land conveyed cannot be upheld at law, the California courts will often uphold it on equitable principles.³¹ Such covenants are often referred to as equitable servitudes or restrictive covenants. The doctrine originated in an English case, *Tulk v. Moxhay*,³² where the grantee took the land with notice of certain burdensome covenants imposed upon the land. The court reasoned that since the grantee may have received the land at a reduced price, his breach of the covenant amounted to an unjust enrichment. Since there was no adequate remedy at law, equity stepped in to enforce the covenant. Today, equitable servitudes or restrictive covenants have a tremendous practical utility and are widely used in California.³³

CIVIL CODE SECTION 1468

Prior to 1968, section 1468 provided that burdensome covenants could run at law only if created by existing owners of property.³⁴ In *Marra v. Aetna Construction Company*,³⁵ the Supreme Court of California refused to allow an onerous covenant to run with the land in the grantor-grantee situation. In interpreting section 1468 the court stated:

But it is apparent that this section of the code applies only to covenants entered into between owners of property. Covenants, like the present one, contained in a grant in fee of real property, are governed solely by section 1462 of the Civil Code. . . .³⁶

The statute and the California courts have further required that covenants between owners of property should expressly state that

²⁹ 18 Edw. I, cc. 1, 3 (1290).

³⁰ See discussion note 8 *supra*.

³¹ *Werner v. Graham*, 181 Cal. 174, 183 P. 945 (1919); see *Robertson v. Nichols*, 92 Cal. App. 2d 201, 206 P.2d 898 (1949); *Miles v. Clark*, 44 Cal. App. 539, 187 P. 167 (1919).

³² 2 Phillips 774, 41 Eng. Rep. 1143 (1848).

³³ Equitable servitudes are a valuable tool in regulation of tract developments. MacElven, *Land Use Control Through Covenants*, 13 HASTINGS L.J. 310 (1962).

³⁴ Ch. 450, § 1, p. 610, [1905] Cal. Stats., as amended, CAL. CIV. CODE § 1468 (West Supp. 1968).

³⁵ 15 Cal. 2d 375, 101 P.2d 490 (1940).

³⁶ *Id.* at 377, 101 P.2d at 492.

they exist for the benefit of the land of the covenantee.³⁷ Additionally, the statute required that the covenant be expressly for the assignees of the covenantee and covenantor.³⁸ The effect of the *Marra* case was to make it impossible for the burden of a covenant contained in a grant of a fee to run with the land at law.³⁹

Some twenty-eight years after *Marra* the legislature responded. Encouraged by land and title associations,⁴⁰ it adopted Assembly Bill 1054,⁴¹ proposed by Assemblyman Harvey Johnson, as an amendment to section 1468 of the Civil Code. The interest of the land and title associations was similar to the concern generated prior to the passage of the original Civil Code sections 1469 and 1470.⁴² Prior to 1953 there was some confusion as to whether a burden would run in a lease situation where a developer of a commercial shopping center had covenanted to do or refrain from doing some act on property other than the leased premises.⁴³ Covenants posing problems were those in which the owner of the shopping center would promise not to lease to a competitor of the lessee, to pay taxes on the common parking lot, or undertake other affirmative or negative duties.⁴⁴ To clarify this uncertainty sections 1469 and 1470 were passed.

Section 1469 binds the lessor and his assignees to any *affirmative* covenants which the lessor may provide for in the lease.⁴⁵ Section 1470 binds a lessor to his *negative* covenants.⁴⁶ Note that under

³⁷ *Moe v. Gier*, 116 Cal. App. 403, 410-11, 2 P.2d 852, 855 (1931); *accord*, *Barbieri v. Ongaro*, 208 Cal. App. 2d 753, 756, 25 Cal. Rptr. 471, 473 (1962).

³⁸ Ch. 450, § 1, p. 610, [1905] Cal. Stats., *as amended*, CAL. CIV. CODE § 1468 (West Supp. 1968).

³⁹ Letter from David E. MacEllven, Vice President and Counsel of Western Title Insurance Company to Carl E. Weidman, Executive Vice President of the California Land Title Co., March 8, 1968, copy on file in the office of the *Santa Clara Lawyer*.

⁴⁰ *Id.*

⁴¹ A.B. 1054, 1968 Cal. Stats. Reg. Sess. 1 (1968).

⁴² Ch. 652, § 1, p. 1903, [1953] Cal. Stats., *as amended*, CAL. CIV. CODE § 1469 (West Supp. 1968); Ch. 652, § 2, p. 1904 [1953] Cal. Stats., *as amended*, CAL. CIV. CODE § 1470 (West Supp. 1968).

⁴³ CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA LAND SECURITY AND DEVELOPMENT, 871 (1960). *See also* 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW 1042 (7th ed. 1960). "Although privity is present in an estate for years . . . the California cases generally treat *leases* 'as grants of an estate,' thus making CC. 1462 and 1463 applicable to covenants in leases."

⁴⁴ *Cf.* Bialkin and Bohannon, *Covenants Not to Establish a Competing Business—Does the Benefit Pass?*, 41 VA. L. REV. 675 (1955). The authors discuss the issue whether courts will enforce the benefit of a covenant not to compete in an action by the assignee of the covenantee. The authors point out that there is little consistency in this area of the law.

⁴⁵ CAL. CIV. CODE § 1469 (West Supp. 1968). "Each covenant made by the lessor in a lease of real property to do any act or acts on other real property which is owned by the lessor . . ."

⁴⁶ CAL. CIV. CODE § 1470 (West Supp. 1968). "Each covenant made by the lessor

both sections the lessor is bound to covenants pertaining to his contiguous land not demised under a lease. Practically, this meant that a lessee could now rely on the courts to enforce a covenant not to lease contiguous property to a competitor no matter how many times ownership of the fee changed hands.

Many current shopping center land transactions are effectuated by conveyances of a fee rather than leases. Consequently, purchasers desired the same statutory protection available to lessees. With this in mind, the land title associations pressed for legislative action to obtain the benefits of sections 1469 and 1470 for grantees.⁴⁷ As a result, section 1468 was amended to provide for the running of covenants of the grantor; specifically, covenants to do or refrain from doing some act on the grantor's land. The amended language of section 1468 was adopted almost entirely from sections 1469 and 1470 and explicitly states that each covenant of the grantor with the grantee of the land conveyed runs with the land.⁴⁸ Further, the amended section now provides that such covenant binds the grantor and his assignees to both the affirmative and negative burdens stipulated in the covenant. Because a grantor's covenant will now run

in a lease of real property not to use or permit to be used contrary to the terms of such lease any other real property which is owned by the lessor"

⁴⁷ CALIFORNIA CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1968 CODE LEGISLATION 34 (1968).

⁴⁸ CAL. CIV. CODE § 1468 (West Supp. 1968) now provides: "Each covenant, made by an owner of land with the owner of other land or made by a grantor of land with the grantee of land conveyed, to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, runs with both the land owned by the covenantor and the land owned by or granted to the covenantee and shall, except as provided by section 1466, or as specifically provided in the instrument creating such covenant, and notwithstanding the provisions of section 1465, benefit or be binding upon each successive owner, during his ownership, of any portion of such land affected thereby and upon each person having any interest therein derived through any owner thereof where all of the following requirements are met:

(a) The land of the covenantor which is to be affected by such covenants, and the land of covenantee to be benefited, are particularly described in the instrument containing such covenants;

(b) Such successive owners of the land are in instrument expressed to be bound thereby for the benefit of the land owned by or granted to the covenantee;

(c) Each such act relates to the use, repair, maintenance or improvement of, or payment of taxes and assessments on, such land or some part thereof;

(d) The instrument containing such covenants is recorded in the office of the recorder of each county in which such land or some part thereof is situate.

Where several persons are subject to the burden of any such covenant, it shall be apportioned among them pursuant to Section 1467, except that where only a portion of such land is so affected thereby, such apportionment shall be only among the several owners of such portions. This section shall apply to the mortgagee, trustee, or beneficiary of a mortgage or deed of trust upon such land or any part thereof while but only while he, in such capacity, is in possession thereof.

with the land, the ruling in the *Marra* case is at least *partially* nullified.⁴⁹

Along with the above major provisions, section 1468 has numerous specific requirements which must be met before a covenant will be enforced. The covenant must be made explicitly for the benefit of the land of the covenantee.⁵⁰ Both the property of the covenantor and that of the covenantee must be specifically described in the instrument.⁵¹ Successive owners of the land burdened must be expressly bound by the covenant.⁵² Duties prescribed in the covenant must relate to the land or some part of it.⁵³ The instrument, a deed in the grantor-grantee situation, or memorandum in the owner-to-owner transaction, must be recorded in the county in which the land is located.⁵⁴ Also, section 1468 is expressly limited by sections 1466⁵⁵ and 1467⁵⁶ of the Civil Code. The former provides that a subsequent purchaser is not liable for a previous owner's breach of covenant. The amended statute also makes specific reference to section 1467 of the Civil Code which provides that where several persons are subject to the burden or entitled to the benefit of a covenant it must be apportioned among them according to the value of the property or the quantum of their interest.

However, section 1465 of the Civil Code,⁵⁷ which provides that an assignee of the covenantor cannot be bound by a covenant unless he acquires the covenantor's entire interest in the property, is expressly made inapplicable to section 1468.⁵⁸ Thus, it appears that an assignee of a covenantor may be bound by a covenant which meets

⁴⁹ *Marra v. Aetna Constr. Co.*, 15 Cal. 2d 375, 101 P.2d 490 (1940) is only partially nullified in that the court interpreted section 1468 as not applying to the running of covenants in grants. The present amendment allows only covenants of grantors to run whether they are burdensome or beneficial. The amendment makes no mention of the onerous covenants of the grantee. *Marra* dealt with a burdensome covenant of the grantee.

⁵⁰ CAL. CIV. CODE § 1468 (West Supp. 1968).

⁵¹ *Id.* § 1468(a).

⁵² *Id.* § 1468(b).

⁵³ *Id.* § 1468(c).

⁵⁴ *Id.* § 1468(d).

⁵⁵ CAL. CIV. CODE § 1466 (West 1954). "No one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for a breach of the covenant before he acquired the estate, or after he has parted with it or ceased to enjoy its benefits."

⁵⁶ CAL. CIV. CODE § 1467 (West 1954). "Where several persons, holding by several titles, are subject to the burden or entitled to the benefit of a covenant running with the land, it must be apportioned among them according to the value of the property subject to it held by them respectively, if such value can be ascertained, and if not, then according to their respective interests in point of quantity."

⁵⁷ CAL. CIV. CODE § 1465 (West 1954). "A covenant running with the land binds those only who acquire the whole estate of the covenantor in some part of the property."

⁵⁸ CAL. CIV. CODE § 1468 (West Supp. 1968).

the requirements of section 1468 even though he has not acquired the covenantor's entire interest. This is particularly significant in the shopping center situation. Suppose, for example, a developer conveys in fee a building and lot to a purchaser who wishes to establish a restaurant in a recently constructed shopping center. The purchaser, fearing competition, requires from the grantor a covenant that he will not use the land retained to compete with the purchaser. Since 1465 is now inapplicable, a lessee of land, acquiring less than a fee from the grantor would be bound by the covenant not to compete. The lessee could not establish a restaurant in competition with the previous purchaser without breaching the covenant.

Finally, section 1468 binds mortgagees, trustees, and beneficiaries of mortgages, but only while acting in their respective capacities, and only while in possession of the land. They must take actual possession of the land to become personally liable for the breach of a covenant.⁵⁹

THE LAW AFTER THE AMENDMENT TO SECTION 1468

As previously mentioned, several commentators have clearly defined the common law requirements for a covenant running with the land.⁶⁰ The first requirement is that the covenant be proper as to form.⁶¹ Although the rule in early common law jurisdictions required the covenant to be in a sealed instrument, modern practice in most jurisdictions merely requires satisfaction of the statute of frauds, although some jurisdictions require covenants to be contained in the grant. But California, through section 1468 of the Civil Code, requires that the written instrument must be recorded. It appears that a mere memorandum will satisfy the requirements of 1468 if it is recorded in the county in which the property is located.⁶²

At common law, the second requirement is that the parties must intend that the covenant run with the land.⁶³ Section 1468 prior to the 1968 amendment, required an express manifestation of intent by the provision "expressly for his assigns or to the assigns of the

⁵⁹ *Id.*

⁶⁰ W. BURBY, REAL PROPERTY 97-98 (3d ed. 1965); C. CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 94 (2d ed. 1947); 3 H. TIFFANY, REAL PROPERTY 441-70 (3d ed. 1939).

⁶¹ C. CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 94 (2d ed. 1947).

⁶² CAL. CIV. CODE § 1468 (West Supp. 1968). A memorandum of the covenant would suffice since there is no express requirement in section 1468 for a sealed instrument. The section merely requires that the covenant be recorded in the county in which the land is located.

⁶³ C. CLARK, COVENANTS AND INTEREST RUNNING WITH LAND 94 (2d ed. 1947). Clark maintains that manifestation of intent need not be expressed in any precise form.

covenantee.”⁶⁴ The 1968 amendment deleted this clause but retained the requirement by incorporating it in other terms. Sub-section (b) requires that “successive owners of the land are in such instrument expressed to be bound.”⁶⁵ When the covenantor says that his successors shall be bound, he is, therefore, manifesting his intention to create a real covenant and not merely a personal covenant. The third pre-requisite in common law jurisdictions is “privity of estate” between grantor and grantee.⁶⁶ “Privity” is a policy restriction on the perpetuation of obligations in that it limits the enforcement of burdensome covenants to persons who have a “successive” interest in the land or to persons who have a “mutual” interest in the land.⁶⁷ California took the latter restricted view of privity but concluded that because of the elimination of subinfeudation, the mutual or tenurial interest of the grantor and grantee in the land has been abolished and only those covenants provided for by statute can run with the land.⁶⁸ The vagueness and confusion that has developed over the terms “privity,” “successive,” and “mutual” in other jurisdictions does not exist in California since the legislature has declared which covenants will bind the assignees of the covenanting parties. The statutes have thus set the policy limits of covenants running with the land. By virtue of the 1968 amendment to section 1468, the legislature has advanced beyond pre-existing policy limits by allowing the burdensome real covenants of the grantor to bind his successors in interest.⁶⁹

Finally, the common law required that the covenant must “touch and concern” the land.⁷⁰ If the covenant can be considered as intimately bound up in the land then it is said to “touch and concern.”⁷¹ Section 1468 embodies the common law requirements by specifically stating that a covenant must relate “to the use, repair, maintenance or improvement of” the land.⁷²

The new Amendment coincides with the common law in other respects. At common law, both negative and affirmative covenants would run with the land at law.⁷³ Section 1468 states that a grantor

⁶⁴ Ch. 450, § 1, p. 610, [1905] Cal. Stats., *as amended*, CAL. CIV. CODE § 1468 (West Supp. 1968).

⁶⁵ CAL. CIV. CODE § 1468(b) (West Supp. 1968).

⁶⁶ C. CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 111, 119 (2d ed. 1947).

⁶⁷ See note 8 *supra*.

⁶⁸ *Id.* This of course does not eliminate the mutuality of interest between landlord and tenant, or between the owner of a fee and an easement holder.

⁶⁹ CAL. CIV. CODE § 1468 (West Supp. 1968).

⁷⁰ C. CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 96 (2d ed. 1947).

⁷¹ *Id.* at 99.

⁷² CAL. CIV. CODE § 1468(c) (West Supp. 1968).

⁷³ Annot., 41 A.L.R. 1363, 1364 (1926). California courts would reach the same

may covenant "to do or refrain from doing" some act on his land.⁷⁴ Thus, California is in line with common law states providing that a covenant imposing both affirmative as well as negative burdens on the covenantor will run with the land. Another important parallel to the law in other jurisdictions found in section 1468 is that the covenantor will be liable only when the breach of his covenant occurs during his ownership.⁷⁵ Similarly, the case law in other jurisdictions provides that a covenantor is not liable for breaches of the covenant after he has parted with title to the property.⁷⁶

Common law jurisdictions distinguish between the burdensome covenants of the grantor and the grantee.⁷⁷ In either case, if the covenants meet the traditional requirements they will run at law. The California Legislature, however, for no apparent reason, has restricted the running of covenants to those of the grantor. Section 1468 provides: "Each covenant made by . . . a grantor . . . expressed to be for the benefit of the land of the covenantee runs with the land owned by the covenantor and the land owned by or granted to the covenantee."⁷⁸

Where a stranger to the land, one not in privity of estate, covenants to impose a benefit on the covenantee's land, the common law authorities are divided as to whether such a covenant will run with the land benefited.⁷⁹ Minnesota has taken the view that the assignees of the covenant can enforce the benefit against the covenantor.⁸⁰ Other jurisdictions, however, refuse to allow the benefit to run because they find no privity of estate between the covenantor and covenantee.⁸¹ But in no case will the burden run with the land of the covenantor.⁸² California, by virtue of section 1468, has taken a unique position, allowing both burdens and benefits of covenants between owners of land to run at law. But at the same time the legislature has retained an anomaly by allowing covenants of both

results as the federal court did in *Murphy v. Kerr*, 5 F.2d 908 (8th Cir. 1925), wherein the grantor of tract A covenanted to pump water from tract B to tract A. In a suit to quiet title by a subsequent grantee of tract B the federal court held that a covenant imposing an affirmative duty on the covenantor runs with the land as long as all the requirements of a real covenant are met.

⁷⁴ CAL. CIV. CODE § 1468 (West Supp. 1968).

⁷⁵ *Id.*

⁷⁶ *Goldberg v. Nicola*, 319 Pa. 183, 178 A. 809 (1935).

⁷⁷ 3 H. TIFFANY, REAL PROPERTY 443-44, 449-50 (3d ed. 1939).

⁷⁸ CAL. CIV. CODE § 1468 (West Supp. 1968).

⁷⁹ 3 H. TIFFANY, REAL PROPERTY 444 (3d ed. 1939).

⁸⁰ *Shaber v. St. Paul Water Co.*, 30 Minn. 179, 14 N.W. 874 (1883); see *Lingle Water Users Ass'n v. Occidental Building & Loan Ass'n*, 43 Wyo. 41, 297 P. 385 (1931) (by implication).

⁸¹ *Lyon v. Parker*, 45 Me. 474 (1858); *Mygatt v. Coe*, 124 N.Y. 212, 26 N.E. 611 (1891); *Tudor v. Jaca*, 178 Ore. 126, 165 P.2d 770 (1946).

⁸² 3 H. TIFFANY, REAL PROPERTY 448 (3d ed. 1939).

grantors and owners to run while saving the grantee from the same obligation.

SOME UNRESOLVED PROBLEMS

Though a strict interpretation would seemingly preclude burdens from running to grantees, the statute might be subject to liberal construction, thereby permitting such a result. For example, assume that A conveys Blackacre in fee simple absolute to B. B covenants to provide water for Whiteacre, land retained by A. B then conveys to C. C discontinues water services to Whiteacre. Can A recover damages for breach of covenant against C at law? The applicable California statutory scheme provides: That only those covenants which are specifically provided for by statute will run;⁸³ that only those covenants which are beneficial to the land conveyed run at law;⁸⁴ and, that section 1468, as amended, allows each covenant of the grantor and owner of the land to run.⁸⁵ In addition, case law precedents have said that there is no privity of estate in the grant of a fee.⁸⁶ In the hypothetical, C's covenant is neither beneficial to the property conveyed, nor is it a covenant of a grantor or owner of land. Furthermore, there is no privity of estate between A and C. The authority against allowing the grantee's obligation to run seems insurmountable.

As already pointed out, it appears illogical that real covenants should be enforced in every circumstance except cases in which a grantee is the covenantor. However, section 1468 may provide an escape from the apparent inconsistency. Both the former and amended versions of 1468 provide that the covenants of "owners" would run. In the *Marra* decision the supreme court construed this language as excluding burdensome covenants between grantor and grantee.⁸⁷ This construction has been criticized as being too restricted and too technical.⁸⁸ What significant difference is there between a grantee who imposes a burden on his land and an owner who imposes a burden on his land? The only difference is academic; an instantaneous moment in time when the grantee accepts the grantor's deed and becomes legal owner of the estate. Perhaps a more liberal construction of section 1468 would solve this incongruity in the law;

⁸³ CAL. CIV. CODE § 1461 (West 1954).

⁸⁴ CAL. CIV. CODE § 1462 (West 1954); *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 41, 68 P. 308, 309 (1902). This case determined that the property benefited had to be the property conveyed. See also 28 CALIF. L. REV. 769 (1940).

⁸⁵ CAL. CIV. CODE § 1468 (West Supp. 1968).

⁸⁶ *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 68 P. 308 (1902). See also discussion note 8 *supra*.

⁸⁷ *Marra v. Aetna Constr. Co.*, 15 Cal. 2d 375, 101 P.2d 490 (1940).

⁸⁸ 28 CALIF. L. REV. 769 (1940).

on the other hand, the legislature may see fit to again amend section 1468 to include the covenants of grantees. Besides the incongruity apparent in the grantee's freedom from obligation under the present statutory scheme, the new version of 1468 may result in misinterpretation.

A noted California authority exemplifies the conflict that may occur in the interpretation of the new amendment to section 1468.⁸⁹ The comment states that although the 1968 amendment to section 1468 does not expressly repeal section 1462, the distinction between burdens and benefits has been left without legal significance, and that section 1468 does not distinguish between covenants between owners of land and covenants contained in grants. Although such a result is desirable, it appears to be an improper analysis of the amendment.

Section 1468, as amended, expressly provides for the running of covenants made by an owner or a grantor. Since it expressly determines which parties' covenants will run, a strict construction of the statute will preclude the running of a grantee's burdensome covenants. Additionally, section 1468 requires that the covenant of the grantor or owner be *expressly beneficial to the land of the covenantee*.⁹⁰ Clearly, the legislature had section 1462 in mind in using this language, since 1462 also requires the covenant to be a direct benefit on the land conveyed.⁹¹ The burden in such a case will be personal to the original grantee and could not be enforced against his subsequent assignees. Furthermore, the distinction between owners' covenants and deed covenants seems clear. Under section 1468 only grantors or owners of land may covenant to do or refrain from doing some act on their own land. As a result, covenants in grants will run with the land and be binding on the subsequent assignees of the parties to the conveyance only if they are the covenants of the grantor. Section 1468, therefore, only partially removes the distinction between covenants by owners and those contained in grants of property.

Further difficulty in applying 1468 may arise when it is considered together with the Civil Code provisions governing restraints and limitations. The broadened scope of section 1468 will probably lend itself to more frequent use, creating problems in these areas. Assume, for example, that a covenant, which is beneficial to the land conveyed, absolutely limited the grantor's power to sell his entire estate or conditioned his power to sell by requiring him to seek the

⁸⁹ CALIFORNIA CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1968 CODE LEGISLATION 33-35 (1968).

⁹⁰ CAL. CIV. CODE § 1468 (West Supp. 1968).

⁹¹ CAL. CIV. CODE § 1462 (West 1954).

permission of the covenantee before selling.⁹² Section 711 of the Civil Code⁹³ provides: "*Conditions* restraining alienation, if repugnant to the interest created are void." The California Supreme Court has determined that this section applies equally to *covenants* running with the land.⁹⁴ The court viewed attempts to unreasonably restrain alienation in any form, whether by condition, covenant, or servitude, as producing the same result. The result in any case amounts to restricting marketability which is clearly contrary to social policy.⁹⁵

Finally, the temporal durability of onerous covenants should be considered in light of the fact that other jurisdictions have statutes which either limit to a period of time covenants and conditions, in themselves unlimited as to time;⁹⁶ or which terminate all covenants and conditions unlimited as to time, or those longer than the statutory period.⁹⁷ California, however, has no such provision. There are arguments grounded on equitable principles which may be utilized to render ineffective a covenant which has outlived the purpose for which it was originally intended. These principles may be found in California cases dealing with equitable servitudes, where a distant assignee of an original party to a covenant restricting the use of certain property seeks to enjoin an assignee of the other party from violating the restrictive covenant.⁹⁸ These courts reason that the physical circumstances surrounding the restricted property have changed substantially so that the restriction reduces the marketability of the property, rendering enforcement of the covenant inequitable. Where such conditions exist, the courts in equity refuse to enforce the restrictions. Whether such an assertion can successfully be sustained where the court is faced with a covenant clearly within the purview of section 1468 has not yet been determined.

An early California appellate court made a distinction between equitable relief and the contractual obligation under a condition, and refused to allow affirmative relief quieting title free from the restrictive conditions even though there had been changes in the neighbor-

⁹² Cf. *Murray v. Green*, 64 Cal. 363, 28 P. 118 (1883). This case held that provisions requiring consent of the grantor to convey in a grant of a fee was void as a restraint of alienation. See also *Prey v. Stanley*, 110 Cal. 423, 42 P. 908 (1895).

⁹³ CAL. CIV. CODE § 711 (West 1954).

⁹⁴ *Bonnell v. McLaughlin*, 173 Cal. 213, 159 P. 590 (1916).

⁹⁵ See *Title Guar. & Trust Co. v. Garrott*, 42 Cal. App. 152, 165, 183 P. 470, 475 (1919), for a stronger statement of this view.

⁹⁶ See, e.g., MASS. ANN. LAWS ch. 184, § 23 (1887). This section limits conditions or restrictions, unlimited as to time, to thirty years.

⁹⁷ MINN. STATS. ANN. § 500.20 (1937). This section voids all nominal conditions and limits restrictions to 30 years.

⁹⁸ *Downs v. Kroeger*, 200 Cal. 743, 254 P. 1101 (1927); *Marra v. Aetna Constr. Co.*, 15 Cal. 2d 375, 101 P.2d 490 (1940).

hood.⁹⁹ In a subsequent case before the Supreme Court of California, the decision sustained the judgment quieting plaintiff's title to certain restrictions phrased as conditions providing for forfeiture of the estate upon breach of said restrictions.¹⁰⁰ In *Letteau v. Ellis*,¹⁰¹ the court sustained a judgment by the trial court for the defendant disallowing a forfeiture of an estate due to a breach of condition prohibiting sale, rental, or use of the premises by persons of Negro descent. Defendant argued that circumstances had changed in that the tract was generally inhabited by persons of Negro descent and therefore it would be inequitable to allow a forfeiture. The court refused to adopt any of the technical niceties in view of the force of public policy in the case.¹⁰²

In view of the above authority, it is clear that affirmative equitable relief could be granted or injunctive relief denied where there has been a substantial change in circumstances in the use of the surrounding property so as to render enforcement of a covenant under section 1468 inequitable. But a covenant under section 1468 is one running with the land *at law* so that damages are an appropriate remedy unless they are inadequate. Can the same defense of a changed condition be successfully asserted to avoid a judgment in damages? There is authority to the effect that a changed condition is not a defense to an action in damages for past breaches of a covenant running with the land.¹⁰³ In *Weiss v. Cord Helmer Realty Corporation*,¹⁰⁴ a New York court, citing a long line of precedent, stated that an action for damages for breach of covenant may be denied because of change of conditions in the neighborhood.¹⁰⁵ The question has not yet been presented in California courts, possibly due to the limited use of real covenants prior to 1968. Even if California elects to follow the restricted New York rule, it seems that change in the character or conditions of surrounding property would still have immense evidentiary effect on the actual amount of damages sustained by the covenantee suing for breach of covenant.

⁹⁹ *Strong v. Shatto*, 45 Cal. App. 29, 187 P. 159 (1919).

¹⁰⁰ *Hess v. County Club Park*, 213 Cal. 613, 2 P.2d 782 (1931).

¹⁰¹ 122 Cal. App. 584, 10 P.2d 496 (1932).

¹⁰² "We find it needless to follow appellants' arguments on the technical rules and distinctions made between conditions, covenants, and more restrictions. In many, if not all, of the cases dealing with changed conditions, the terms have been used with apparent disregard of the niceties of differentiation, and the reasons advanced would have application to a resulting situation, regardless of the means of its creation." *Id.* at 588, 10 P.2d at 497.

¹⁰³ Annot., 4 A.L.R.2d 1111, 1113 (1949).

¹⁰⁴ 140 N.Y.S.2d 95 (1955).

¹⁰⁵ *Id.* at 99.

CONCLUSION

Section 1468 of the Civil Code, as amended in 1968, is an unprecedented attempt to codify the essential elements of the common law of covenants. The essential difference between section 1468 and the common law is that at common law burdens would generally run with the land as to the assignees and successors of both grantor and grantee, while section 1468 expressly limits their efficacy to the assignees and successors of the grantor and an owner contracting independently. This exclusion of grantees from such obligations appears to be an arbitrary rule. If the legislature intended this limitation to avoid restraining the marketability of property, it is difficult to understand how the marketability of a grantee's property would be any less affected than the property of the grantor which can now be subjected to burdensome covenants. The legislature should further amend section 1468 to allow the running of onerous covenants of the grantee. In addition, a statute should be enacted to limit covenants, equitable restrictions, and conditions to some reasonable period of time. Although courts of equity can nullify the effect of equitable servitudes or allow or deny equitable relief for covenants and conditions, there is now no method in California by which a court can avoid a useless covenant running with the land at law.

Juan E. Arrache, Jr.