# THE RUNNING OF COVENANTS WITH EASEMENTS AND OTHER INCORPOREAL INTERESTS.

It is not uncommon for the grantee of an easement to covenant for himself and his assigns to do something connected with the easement, e.g. in the case of a right of way, to maintain a fence, or keep the way in repair, or contribute to the cost of keeping it in repair. Books of precedents also include such covenants. Practical convenience requires that such a covenant should continue in force between subsequent dominant and servient tenants. If it does not, the servient land becomes more heavily burdened as soon as the covenant ceases to be enforceable, and a succeeding dominant tenant enjoys the benefit of the easement free of the burden originally attached to it. Furthermore, unless he qualifies his obligation by covenanting only for the period during which he holds the dominant tenement, the original dominant tenant continues to be liable on the covenant for any failure to repair etc. by subsequent dominant tenants, but without any right of indemnity (such as a lessee has against assignees) unless he specially covenants for this with an assignee.

Clearly there is much the same reason for allowing covenants to run with an easement and the land affected as there is for allowing it to run with the land and the reversion in the case of a lease. But on this question the law is not clearly settled and authority is strangely meagre. However the generally accepted opinion appears to be that the burden of a positive covenant can run with the land only in the case of landlord and tenant; and in the Encyclopaedia of Forms and Precedents, although the first precedent of a grant of a right of way[1] contains a covenant by the grantee that he and his successors will contribute to the cost of keeping in repair, the preliminary note[2] contains the statement that the burden of a covenant does not run with an easement. However, n this article it will be submitted that on principle a covenant may run with an easement and with the servient tenement, and that there is no insuperable authority to the contrary. The discussion will extend to other incorporeal interests as well as easements.

The question whether a covenant can run with an easement or other incorporeal interest must be considered in the light of the general law concerning the running of covenants, so far as it is

1. Vol. 6, p. 321 2. pp. 315, 316.

settled. Unfortunately, as the authorities stand, the law concerning the running of covenants with interests in land is a chaos that must surely be without parallel in the whole range of the common law. This is forcibly indicated by Romer L.J. in *Grant v. Edmondson*,[3] where the question was whether the assignee of a rentcharge could enforce against the grantor a covenant by the grantor to pay the rentcharge. He said: —

> ". . . Speaking for myself, I regard this question as being identical with the question whether there is any case that decides that it does. For in connection with the subject of covenants running with land, it is impossible to reason by analogy. The established rules concerning it are purely arbitrary, and the distinctions, for the most part, quite illogical. Why should the benefit of a vendor's covenant run with the land at common law, and the benefit of a lessee's covenant not so run with the reversion, if that be the law, as seems to be the better opinion and was certainly the opinion of the Legislature in the time of Henry the Eighth? Why, too, should it have been held that the burden of a lessee's covenant runs with the land at common law, but that the burden of a purchaser's covenant does not so run? Why, again, should a covenant have to be one touching the land in order that the benefit and the burden of it may run? Why, for instance, in a lease of land to be used solely for a particular trade should a covenant by the lessor not to build any other house to be used for the same trade, not enure for the benefit of the lessee's assigns? Why, again, should a covenant by a lessee in connection with something not *in esse* at the date of the lease but to be done on the land in the future bind his assigns if they are expressly mentioned and not otherwise? All these and other cognate questions have been argued and discussed for centuries by men learned in the law and, so far as I have been able to ascertain, without coming to any very satisfactory, still less to any unanimous, conclusion. Apart, therefore, from decisive authority one way or another, it seems to me that it is impossible to answer the question whether a covenant to pay runs with a rentcharge one way or the other. The question 'Why should it?' cannot be answered merely by reference to principles with any greater conviction than can the question 'Why should it not?' ".

In this case the Court of Appeal held that the benefit of a covenant affecting a rentcharge does not run with the rentcharge.

3. [1931] 1 Ch. 1.

The question that will be considered in this article is whether this decision is sound, and if so whether the position is the same in relation to other types of incorporeal hereditamen's such as easements and profits. If the only test is the one adopted by Romer L.J., that is, "whether there is any case that decides that it does", the answer is that a covenant may run with an easement, for there is at least one case in which it was so held, viz. *Holmes v. Buckley*.[4] But this, it is submitted, is a very unsatisfactory method of settling the question. On the one hand, the case, briefly reported as it is, and being a case in Chancery, is not of high authority, and indeed in *Austerberry v. Corporation of Oldham*[5] Lindley L.J. expressed a doubt as to what was in fact decided in the case. On the other hand it is submitted that the law is not in a state of such hopeless confusion that authority is the only guide and considerations of convenience and argument by analogy are entirely excluded. It may be that in some of its parts the law on this subject is settled, and that however defective it may be it cannot be repaired by judicial decision; but this does not mean that in other parts, where it has as yet escaped authoritative determination, it cannot be worked out on reasonable lines.

The submission that will be made is that in relation to incorporeal interests it is still possible to apply rules that have some reasonable correspondence with practical convenience. More specifically, it is submitted that the rules which apply to landlord and tenant can be applied to the owner of land and the owner of an incorporeal interest in the same land.

A covenant is said to run with land or an incorporeal interest in land (and is known as a real covenant) if it is enforceable not only as between the original parties, but also by or against a third party, who has succeeded to an interest in land held by an original party to the covenant. It is well settled that at common law a stipulation cannot run with land (for convenience the term land will, in what immediately follows, be used to cover an incorporeal interest in land) unless four conditions are fulfilled.

1. The stipulation must be a covenant, *i.e.*, it must be made by deed: *Elliott v. Johnson*.[6]
2. The parties must have had the intention, expressly shown or reasonably to be inferred from the circumstances, that the covenant should bind or be enforceable by their successors in title to relevant land affected by the covenant:

4. (1691) Prec. C. 39; 1 Eq. Ca. Ab. 27, p. 4.
5. 29 Ch.D. 750 at p. 775.
6. L.R. 2 Q.B. 120.

*Shayler v. Woolf*[7]; *Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board.*[8]

3. The covenant must touch and concern land held by the covenantee: *Rogers v. Hosegood*[9]; *Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board.*[10]
4. There must be privity of estate (in one sense of that term) between an original party and any third party who is to be similarly affected by the covenant: *Westhoughton Urban Council v. Wigan Coal & Iron Co.*[11]; *Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board.*[12]

The privity of estate required under this fourth head is the relationship that exists between the former holder of an estate in land and a successor in title to him who holds the same estate. Thus if A covenants with X, who holds certain land in fee simple, and Y acquires the estate in fee simple originally held by X, there is privity of estate between Y and X; but if Y holds no more than a life estate or term of years in the land there is no such privity of estate. In the former case Y is privy in estate to X, but not in the latter. Where this privity exists the successor can, in proper cases, be treated as being in the same position as his predecessor in respect of rights and obligations. An heir or executor sustains the *persona* of his ancestor or testator, and can readily be regarded as succeeding to the rights and obligations of the ancestor or testator. Similarly, though to a more limited extent, a successor in title by some other mode can be regarded as representing his predecessor. "But", as Holmes J. says, "in order that an assignee should be so far identified in law with the original covenantee, he must have the same estate, that is, the same status or inheritance, and thus the same *persona, quoad* the contract": *Norcross v. James*,[13]

7. [1946] Ch. 320.
8. [1949] 2 K.B. 500. In this case, which will be several times referred to below, the defendant Board, a drainage authority, covenanted with various owners of land liable to flooding that in consideration of certain payments to be made by the landowners the Board would do certain work designed to prevent flooding. The Board failed to carry out properly the work it covenanted to do, and damage resulted to the land concerned. Before the damage occurred, one of the landowners, Mrs. E. Smith, had conveyed her land to J. B. Smith, the first plaintiff, and J. B. Smith had let the land on a yearly tenancy to Snipes Hall Farm Ltd., the second plaintiff. There was no land held by the defendant Board which was affected by the covenant. On general common law principles, as well as by s. 78 of the Law of Property Act, 1925, the first plaintiff was held entitled to recover damages for breach of contract from the Board; and the second plaintiff was held to be similarly entitled to damages by virtue of s. 78, which provides that "a covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and *the persons deriving title under him or them*".
9. [1900] 2 Ch. 388.
10. [1949] 2 K.B. 500.
11. [1919] 1 Ch. 159.
12. [1949] 2 K.B. 500.
13. 140 Mass. 188; 2 N.E. 946.

quoted in Clark: Real Covenants.[14] *Cf.* Holmes: The Common Law.[15] Thus in the example used above Y can be identified with X if he completely takes X's place in relation to the land; but if he holds only a lesser estate, X's connection with the land continues, and Y does not displace him as the beneficiary of the covenant.

But although the four requirements indicated above must be satisfied, it is very far from being true that in all cases where they are satisfied the covenant runs with the land. The fullest running of covenants is allowed in the case of covenants in a lease. At common law, on the assignment of a lease, the assignee of the lease is bound by the lessee's covenants and he can enforce the lessor's covenants: *Spencer's Case.*[16] On the other hand it seems that on an assignment of the reversion covenants in the lease were not enforceable at common law between the assignee of the reversion and the lessee or his assigns; but at an early date this rule was altered by a statute, the Grantees of Reversions Act of 1540.[17] Thus in the case of leases, by the combined operation of common law and statute, both the burden and the benefit of covenants run so as to bind or benefit successors in title to the original parties.

Where, on the other hand, an original party to a covenant has an estate in land but is not lessor or lessee in relation to the other party, the benefit of a covenant can run with land, but not the burden. Thus where A the owner of land covenants with X the owner of neighbouring land to supply X's land with water, and X assigns his land to Y, Y can enforce the covenant against A: *Sharp v. Waterhouse.*[18] It is not even necessary that the covenantor should own any land which will be affected by the covenant: *Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board.*[19] But if A the covenantor assigns his land to B, B is not liable to X or Y on A's covenant: *Austerberry v. Corporation of Oldham.*[20] The reason for this difference as to benefit and burden appears to be that there is no good reason why an assignment by the covenantee should release the covenantor from his obligation (for as Denning L.J. pointed out in the *River Douglas Catchment Board* case,[21] the original covenantee could after parting with the land recover no more than nominal damages), but that, as to the running of the burden, it would be contrary to public policy that land should be

14. p. 114. Continuing, Holmes J. says: "The privity of estate which is thus required 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". *Cf.* Holmes: The Common Law, p. 404.
15. p. 405.
16. 5 Co. Rep. 16a.
17. 32 H. VIII, c. 34.
18. 7 E. & B. 816.
19. [1949] 2 K.B. 500.
20. 29 Ch.D. 750.
21. [1949] 2 K.B. 500.

burdened with covenants of which a purchaser might be unaware when he acquired the land.

Equity, it may be briefly noted, has modified the strict common law rules (1) by allowing the burden of a negative or restrictive covenant to run with land in certain defined circumstances, under the doctrine of *Tulk v. Moxhay*;[22] (2) by allowing the benefit of a restrictive covenant to be taken by and the burden to be enforced against not only a successor to the whole estate of the original party, but also a person who takes a lesser estate from him (*Taite v. Gosling*,[23] treated in *Westhoughton Urban Council v. Wigan Coal & Iron Co.*[24] as laying down a rule in equity to this effect), or who in effect (*e.g.* as mortgagor in possession) although not technically at law, has the same interest in the land (*Rogers v. Hosegood*).[25] A third modification of the common law has recently been made by the Court of Appeal under the influence of the very broad conceptions of the relation of law and equity that are entertained by Denning L.J. (as he then was). In *Boyer v. Warbey*[26] it was held that stipulations in leases run with the land even though the lease is under hand only and not under seal. The decision does not rest on a bold overruling of the previously accepted view that at common law it is only covenants that run with land, or on an equally bold introduction of a new and independent rule of equity extending the common law principle to stipulations not under seal; but, as Megarry and Wade put it,[27] "this very reasonable change is strangely attributed to 'the fusion of law and equity' made by the Judicature Act". In Australia, if not in England, this decision must remain open to question; and as it stands it could not apply in New South Wales, where there is as yet no fusion of law and equity.

The law as surveyed above deals only with covenants made by parties in respect of corporeal interests in land held by one or both of them (whether in possession or in futurity) as distinguished from purely incorporeal interests such as rentcharges, easements, and profits. In a few cases the courts have ruled on the running of covenants relating to incorporeal interests; and these will now be considered.

First, there are several decisions concerned with covenants relating to rentcharges.

In *Brewster v. Kidgill*[28] Langford granted to Ellen Brewster, of whom the plaintiff was son and heir, a rentcharge of £40 a

22. 2 Ph. 774.
23. 11 Ch.D. 273.
24. [1919] 1 Ch. 159, 170-171.
25. [1900] 2 Ch. 388, 404.
26. [1953] 1 Q.B. 234.
27. Real Property, p. 658.
28. 12 Mod. 166.

year, and a memorandum on the back of the deed stated that the true intent and meaning of the deed was "that the grantee and her heirs shall for ever hereafter be paid the said rentcharge, without any deduction or abatement of taxes. . . ." The main question was whether the defendant, who was now the owner of the land, was entitled to deduct taxes imposed by Parliament subsequently to the grant. Holt C.J. and the other members of the Court agreed that the provision in question extended to future parliamentary taxes, which might therefore be deducted. But Holt C.J. raised a further question. It did not appear how the defendant came to the land; and, assuming him to be an assignee and not an heir of the grantor, and treating the provision in question as a covenant, Holt C.J. held that he was not liable, on the ground that the covenant did not run with the land. His view was that the *benefit* of the covenant might run with the land so as to be enforceable by an assignee of the rent, but that the *burden* could not run with the land so as to make an assignee of the land liable. "I make no doubt", he said, "but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted; but that covenant should run with the rent against the assignee of the land, I see no reason". Accordingly he considered that judgment should be given for the defendant. "But", the report continues, "the other three Judges thought that this covenant might charge the land, being in nature of a grant, or at least a declaration going along with the grant, shewing in what manner the thing granted should be taken, and reckoned the indorsement as part of the deed". Judgment was therefore given for the plaintiff. Despite the first impression created by the words just quoted, it would appear that the majority did not consider that there was here a covenant the burden of which ran with the land (contrary to the view of Holt C.J.), but rather that the indorsement was not a covenant but part of the grant, defining the rentcharge as one free of deductions for taxes. See the very thorough discussion of this case in *Smith's Leading Cases*.[29] Another case that may be noted is *Cook v. Arundel*,[30] which was cited by Holt C.J.. Part of certain land subject to a rentcharge was conveyed with a covenant that the part transferred should be discharged from the rent, and it was held that the covenant was personal.

In *Milnes v. Branch*[31] the facts (somewhat simplified as to the parties) were that Barnsley and Robinson conveyed land to Branch and his heirs to the use that Barnsley and his heirs might have a yearly rentcharge, and subject thereto to the use of Branch and his heirs; and Branch, for himself and his heirs etc. covenanted

29. 13th ed., vol. 1, p. 78. 30. Hardres 87.
31. 5 M. & S. 411.

with Barnsley and his heirs that he his heirs or assigns would pay the yearly rent and would within a year erect buildings on the land of the yearly value double the yearly rentcharge reserved. Within a year Barnsley granted the rentcharge to the plaintiff Milnes for 1,000 years. Some years later Milnes brought an action of covenant against Branch, assigning for breach a year's rent in arrear and failure to erect the buildings in accordance with the covenant. It will be seen that here a lessee from the covenantee claimed the benefit of the covenant from the original covenantor.

On a demurrer counsel for the defendant argued that the case was not covered by the Grantees of Reversions Act, and that the covenant was personal. Counsel for the plaintiff relied on the dictum of Lord Holt in *Brewster v. Kidgill*[32] that the assignee of a rent might have covenant against the grantor. The Court of King's Bench held that the action was not maintainable. The full report of the judgments is as follows:—

> *Lord Ellenborough C.J.* I am inclined to think that the language of Lord Holt, as to the right of the assignee of the rent to have covenant, was extra judicial; and putting aside that dictum, I do not find any authority to warrant the position that this covenant runs with the rent. I do not see how the analogy, as it regards covenants which run with the land, is to be applied, unless it be shewn that this is land; it might as well be applied to any covenant respecting a matter merely personal. The Stat. H. 8 recites that, at common law, such only as are parties or privies to any covenant can take advantage of it; here is neither privity of contract, nor privity of estate; the rent is reserved out of the original estate.
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> *Bayley J.* I am entirely of the same opinion. The argument for the plaintiffs loses sight of the coveyance by which this rent is created. It is incorrect to state it as a rent charge granted by the owner of the fee; it being a conveyance in fee by Barnsley and Robinson to the defendant to certain uses, one of which is, that they shall receive the rent; so that the rent arises out of the estate of the feoffors. It is therefore not a grant by the owner of the fee, and the covenant is a covenant in gross.
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> *Abbott J.* concurred.

Lord Ellenborough appears to have rested his decision on two separate grounds, though in his judgment, as reported, these are not clearly indicated as being separate. The first is that the covenant was personal; and his reason for regarding it as personal appears to be that covenants are personal unless they affect land,

32. 12 Mod. 166.

and a rentcharge is not land. His second ground was the one more fully stated by Bayley J., who relied on it alone. This ground depends, as Lawrence L.J. points out in *Grant v. Edmondson*,[33] on a view once held, but now regarded as erroneous, that for the benefit of a covenant to run with land the covenantee must derive his estate from the covenantor and thus be privy in estate to him—a view which apparently is still strongly supported in the United States; see Clark: Real Covenants, p. 116. There was indeed in this case a sounder reason for holding that the covenant was unenforceable by Milnes for lack of privity of estate, viz. that Milnes did not succeed to the whole estate of the covenantee; but this of course is privity of estate in another sense.

In several later cases this decision (which Strachan[34] regrets "did not find its way into that historic reporter's drawer which held some of 'Lord Ellenborough's bad law' ") has since been followed as authority for the rule that a covenant to pay a rentcharge is personal and cannot run with the rentcharge. These cases are reviewed by Lawrence L.J. in *Grant v. Edmondson*.[35] The case of highest authority before *Grant v. Edmondson* is *Haywood v. Brunswick Building Society*.[36]

In this case Charles Jackson conveyed land to Edward Jackson to the use that Edward should pay Charles an annual rentcharge; and Edward for himself his heirs executors administrators and assigns covenanted with Charles his executors and assigns that he Edward his heirs and assigns would pay Charles his heirs and assigns the rent half-yearly and would erect and keep in repair buildings on the land of the value of double the rent. Charles conveyed the rent to Haywood and his heirs, together with the benefit of the covenant. Edward conveyed the land to McAndrew, who mortgaged it in fee to the Society subject to the rentcharge and covenant. Buildings were erected on the land in accordance with the covenant, but they were not kept in repair. Haywood brought an action against the Society for breach of the covenant.

In the Court of Appeal Brett L.J. dealt very briefly with the question whether the covenant ran at law, holding that *Milnes v. Branch*[37] was authority for the rule that "a covenant to build does not run with the rent in the hands of an assignee". This was a decision that the *benefit* of the covenant did not run. He did not advert to the fact that whereas in *Milnes v. Branch*[37] the covenantee was not an assignee of the whole estate in the rentcharge, in this case he was. Cotton L.J., after expressing

33. [1931] 1 Ch. 1, 19.
34. 47 L.Q.R. 385.
35. [1931] 1 Ch. 1.
36. 8 Q.B.D. 403.
37. 5 M. & S. 411.

agreement, merely said: "I think that a mere covenant that land shall be improved does not run with the land within the rule in *Spencer's Case* so as to give the plaintiff a right to sue at law." Whether he was thinking of the running of the benefit with the rentcharge, or the running of the burden with the land, is not clear. Lindley L.J. considered that *Milnes v. Branch*[37] did not apply very closely and pointed out that in that case the plaintiff was not assignee in fee of the rent, having only a leasehold interest in it. He held that the burden of the covenant did not run with the land, and added: "This is not a case of landlord and tenant: we must never lose sight of that distinction".

In *Grant v. Edmondson*[38] the Earl of Wilton, tenant for life of the Wilton settled estates, in the exercise of statutory powers granted certain land included in the settled estates to J. B. Edmondson in fee simple, and by the same deed J. B. Edmondson granted a rentcharge to the Earl and the person or persons who would for the time being have been entitled to the land if the conveyance had not been made, and covenanted for himself and his heirs and assigns etc. with the Earl his heirs and assigns and other persons who would from time to time have been entitled as aforesaid to pay the rent to the persons entitled. Subsequently the plaintiffs became entitled in fee simple to the rentcharge, and they sued the defendant, as executor of J. B. Edmondson, for arrears of the rent payable. The Court of Appeal held that the benefit of the covenant to pay the rentcharge did not run with the rentcharge so as to enable the plaintiffs to sue on it. In this case all three members of the Court of Appeal discussed the authorities very fully; but in effect each based his decision on the authority of *Milnes v. Branch*[39] and its acceptance in later cases and text-books.

In none of the cases dealing with rentcharges has the question of the running of covenants been dealt with on the basis of convenience or even established legal principles; and what is now a fairly substantial body of authority rests on the short and somewhat obscure judgment of one judge (Lord Ellenborough) in *Milnes v. Branch*.[39] It is perhaps now too late for this line of authority to be overruled; but it still, it is submitted, remains possible to deal with questions concerning other types of incorporeal interests on the basis of principle, not merely because there are no adverse decisions, but because there is some, if not very much, authority supporting the view that covenants may run with such interests, the unsettled question being to what extent they can run.

An important case is *Bally v. Wells*.[40] Bally, the rector of a parish, demised to Whitmarsh all the tithes of the parish for a

37. 5 M. & S. 411.
38. [1931] 1 Ch. 1.
39. 5 M. & S. 411.
40. Wilm. 341.

term of six years, and Whitmarsh for himself his executors administrators and assigns covenanted not to let any farmers have any part of the tithes without the consent in writing of Bally. Whitmarsh assigned to Wells, and Wells allowed some farmers to have part of the tithes without the consent of Bally. Bally brought an action for breach of covenant against Wells. On a verdict for the plaintiff there was a motion in arrest of judgment on the grounds, firstly, that an action did not lie against the assignee because the covenant was merely personal, and secondly, that a covenant could not run with an incorporeal interest. The Court of Common Pleas overruled the objections and gave judgment for the plaintiff.

Wilmot C.J., delivering the opinion of the Court, first pointed out the practical advantages of being able to enforce such a covenant as this, and then said: "To see whether the equity of the case can be got at in a Court of Law, I will consider how the law stands, in respect of covenants following the thing demised into the hands of assignees; and if there is any difference between land and tithes." After referring to *Spencer's Case*,[41] he said that "to carry the lien of a personal obligation over to an assignee, and to make him the object of an action at the suit of a person with whom he did not originally contract, he must in all cases, where something is to be done *de novo*, be expressly named; and there must also be a privity between the assignee and the person to whom he becomes engaged; and the covenant must respect 'the thing leased', which I consider as the medium creating the privity between them". And after referring to other cases he said: "All these cases clearly prove, that 'inherent' covenants, and such as tend to the support and maintenance, of the thing demised, where assigns are expressly mentioned, follow the reversion and the lease, let them go where they will".

Then, having asked the question, "Is there any difference between lands and tithes as to the annexation of covenants ?", he decides that "a covenant may be annexed with and pass with an incorporeal inheritance as well as with a corporeal one". It may be observed that some of his arguments to show that there is no difference relate particularly to tithes, and can be treated as inapplicable where some other type of incorporeal interest is in question; and this was done in *Grant v. Edmondson*.[42] But the general principle was clearly laid down that a covenant can run with an incorporeal interest as well as with a corporeal interest, and he referred to an "incorporeal inheritance" and not merely to an estate for years. Here it was the burden that was held to run, as it can run with a term of years in land (a corporeal interest).

41. 5 Co. Rep. 16a. 42. [1931] 1 Ch. 1.

The burden cannot run at law with an estate in fee simple in land, and this case, despite the reference to an "incorporeal inheritance", leaves it open whether the burden of a covenant can run with an estate in fee simple in an incorporeal interest.

In a few other cases a covenant has been held to run with an estate for years in an incorporeal interest, but in these cases the decision has rested on the Grantees of Reversions Act, which expressly extends to incorporeal interests. In *Martyn v. Williams*[43] there was a grant of a profit (to get china clay) for a term of twenty-one years, with a covenant by the grantee that he or his assignees would on the determination of the term deliver up the works in repair. The grantor assigned the land in fee simple to the plaintiff, who on the determination of the term sued the defendant (the original lessee of the profit) for breach of the covenant. The question here was whether the benefit of the covenant would run with the land of the grantor. Martin B., delivering the judgment of the Court of Exchequer, said that if the profit had originally been granted in fee simple to A, and A had granted a term of years in the profit to X, with a covenant by X to deliver up the works in repair to A, and A had then assigned the reversion in the profit to B, B could have enforced the covenant against X. He cited *Bally v. Wells*[44] as authority for this proposition, and also relied on the Irish case of *Earl of Egremont v. Keene*,[45] in which a lessor of tolls was held entitled to maintain an action of covenant against an assignee of the lessee for nonpayment of rent. These were cases of assignment of the lease, whereas *Martyn v. Williams*[46] was a case of assignment by the lessor, but Martin B. said that "it has always been considered that if the lessor could maintain covenant against the assignee of the lessee, the assignee of the lessor could maintain covenant against the lessee". This statement is surprising if it is meant to state a rule of common law, for it is generally accepted that although covenants run on an assignment of a lease a statute (the Grantees of Reversions Act) was needed to make them run on an assignment of the reversion. Perhaps what he meant was that if at common law a covenant was such that it could run at common law on an assignment of the lease (as touching land or an incorporeal interest in land) then equally it would run with the reversion under the statute. However, he went on to say, "But in truth it seems only necessary to refer to the statute itself", and pointed out that the statute expressly applied to incorporeal interests. Then coming to the actual facts of the case itself, in which there was not a grant of a profit in fee and a lease of the pre-existing profit, but merely

43. 1 H. & N. 817.
44. Wilm. 341.
45. 2 Jones Ir. Ex. 307.
46. 1 H. & N. 817.

an original creation of a profit for a term of years, he held that for the purposes of the statute the owner in fee of the land was a reversioner in respect of the profit. "There is in reality the relation of reversioner and ownership of particular estates between them; there is exactly the same privity of estate as exists between reversioner and tenant properly so called, and upon the determination of the term the entire interest in the land reverted to the plaintiff, as upon the expiration of an ordinary lease".

A similar view of the relation between a grantor who is owner of land in fee and a grantee of an easement for a term of years was taken in *Hastings v. North Eastern Railway Co.*[47] See also *Hooper v. Clark*,[48] where in effect the facts and decision were the same as in *Martyn v. Williams.*[49]

These decisions go only so far as to establish that covenants may run at common law with an estate for a term in four types of incorporeal interest, viz. tithes, tolls, easements, and profits; they do not establish a rule that covenants may run with an estate in fee simple in an incorporeal interest. Nevertheless their general effect is to cast doubt on the correctness of the *dicta* in *Austerberry v. Corporation of Oldham*[50] and *Haywood v. Brunswick Building Society*[51] suggesting that the burden of a covenant runs only in cases of landlord and tenant. It is not really arguable that the judges who uttered these *dicta* were contemplating leases of incorporeal interests as well as cases of landlord and tenant in the usual and proper sense of that term. Furthermore, the principle on which these cases were decided is different from that established by cases on rentcharges, where the covenants in question were treated as being personal, or in gross, whereas in these cases they were recognised as touching and concerning the thing demised.

The question remains whether a covenant which touches and concerns an estate in fee simple in an incorporeal interest can run with that interest and with the land out of which the incorporeal interest arises. There is some slight authority that it can. In *Holmes v. Buckley*[52] a husband and wife in 1622 granted a watercourse through the wife's land, and covenanted for themselves their heirs and assigns from time to time to cleanse the same. By mesne assignments the land came to the defendant and the watercourse to the plaintiff. For forty years the plaintiff and his predecessors had cleansed the watercourse, despite the covenant by the grantees to do so; but when the defendant built over the watercourse, making cleansing more difficult, the plaintiff brought a bill in equity for

47. [1898] 2 Ch. 674; [1899] 1 Ch. 656; [1900] A.C. 260.
48. L.R. 2 Q.B. 200.
49. 1 H. & N. 817.
50. 29 Ch.D. 750.
51. 8 Q.B.D. 403.
52. Pre. C. 39; 1 Eq. Ca. Ab. 27, p. 4.

establishing enjoyment of the watercourse and that the defendant and all claiming under him might from time to time cleanse it. It was objected that the covenant was personal, but the Court held that it ran with the land and that the defendant ought to do the cleansing, and decreed accordingly.

This appears to be a clear decision that the covenant ran with the land at law, and not a too wide (because the covenant was positive) anticipation of the doctrine of *Tulk v. Moxhay*[53]: see per Cotton L.J. in *Austerberry v. Corporation of Oldham*,[54] but see also his remarks at p. 777. On the other hand in the same case Lindley L.J. failed to understand the ground of the decision and put it aside on the basis of the brevity of the report. It may be remarked that he failed to understand the ground of the decision only because of his preconception that the burden of a covenant could run only in the case of landlord and tenant—a view which he might not have asserted so positively if he had considered the inconsistent cases discussed above. However, as was conceded at the beginning of this article, the case is not a strong authority. Apart from this case there seems to be no direct authority, though two other cases may be mentioned.

In *Duncan v. Louch*,[55] counsel in course of argument having said in reference to one of the terms of the grant of an easement in fee simple that there was no covenant that would run with the land, Wightman J. said: "Why should it not run with the land and the easement ?" But the point did not have to be decided.

In *In re Ellenborough Park*[56] land was subdivided, and purchasers of plots were given a right to use an inner area retained by the vendors, as a pleasure ground, subject to payment by each of a fair proportion of the cost of keeping it in order. The vendors covenanted for themselves and their successors to keep the inner area, known as Ellenborough Park, as a pleasure ground, and each purchaser covenanted to pay a fair proportion of the expenses of keeping the pleasure ground in good order. Thus the obligation of the purchasers to contribute to the upkeep of the park was imposed both by a condition attached to the grant and, in more detailed terms, by a separate covenant. From 1941 to 1946, by which time all relevant holdings had changed hands, the park was requisitioned by the War Office. During its period of occupation the War Office paid the owners of the park a compensation rental, and subsequently paid them a substantial sum for dilapidations. The owners of the park took out a summons asking (1) whether the owners of property fronting the park had an enforceable right to

53. 2 Ph. 774.
54. 29 Ch. D. at p. 775.
55. 6 Q.B. 904.
56. [1956] 1 Ch. 131.

the use of the park on payment of contribution to its upkeep, (2) whether any part of the compensation rental paid by the War Office should be credited in the park owners' accounts to the sum contributed by neighbouring owners to the expense of upkeep, (3) whether any part of the compensation for dilapidations should be so credited.

The answer to the third question depended on whether the owners of the park were under an obligation to keep the park in repair. Danckwerts J. held that they were. However he did not base this on the covenant of their predecessors "to keep as an ornamental pleasure ground the plot of ground" etc.; this perhaps was because the covenant did not clearly bind them to any positive acts. He based it on an implication from the covenant of the purchasers to contribute to upkeep, quoting that covenant. In so doing he was necessarily giving effect to this covenant of the original purchasers, and also to an implied covenant by the original vendors. That is to say, he treated the covenants as running with the land and the easement so as to bind subsequent holders. He seems to have been unaware that there might have been some objection to such a running of covenants. In the Court of Appeal the question did not arise, for the only question before the Court was whether the right to use the park was an easement. The Court of Appeal did indeed refer incidentally[57] to the obligation to contribute, but, without referring to the covenant, treated it as depending on the condition attached to the grant, which was made "subject to the payment of a fair and just proportion of the costs" etc.

This case also is not a clear authority on the question under consideration. Danckwerts J. obviously treated the covenant as running, but he may have done so *per incuriam*. The Court of Appeal, on the other hand, may have regarded the covenant as no longer applying; but if so it is surprising that in a judgment of twenty-nine pages a few words were not spared to say so.

The few authorities just considered being inconclusive, the question depends on general legal principle. And since the practical convenience of enforcing covenants annexed to easements and profits seems to be obvious, the question is, to use the words of Wilmot C.J. in *Bally v. Wells* (*supra*), "whether the equity of this case can be got at in a Court of Law". Approached in a technical legal way, the question involves a consideration of the doctrine of privity of estate. Although the common law has readily allowed the *benefit* of a covenant to run with land, it has from an early date based the running of the *burden* on a privity of estate between

57. p. 169.

obligor and obligee. This is the ground on which in case after case the running of covenants in leases has been rested. Between the original lessor and lessee, both of whom have estates in the same piece of land, there is a privity of estate, and the same privity of estate exists between the lessor and an assignee of the lessee. This, it is to be observed, is a different sort of privity of estate from that first mentioned in this article. It is not the privity between an original party to a covenant and a third person who later succeeds to the whole estate of the original party, but a privity between covenantor and covenantee.

Modern writers sometimes explain this privity as depending on tenure: see Megarry and Wade, Real Property, p. 651. There is, however, in the authorities ground for treating privity of estate as extending beyond cases of tenure. In Viner's Abridgment[58] it is said that "privies in estate are as joint tenants, baron and feme, donor and donee,[59] lessor and lessee, etc." The writer has not found in the older authorities any definition of privity of estate other than by way of examples. In the cases concerning the running of covenants the examples given involve tenure, e.g. in *Walker's Case*[60] assignee of reversion or lord by escheat and lessee, and, by way of analogy, tenant in dower or by curtesy and the heir, in respect of a right to sue for waste. This is not surprising, since covenants are not likely to be made between parties both holding estates in one piece of land unless one is grantor and the other is grantee of a particular estate. But privity of estate is also required for a release of an estate to one who has a lesser estate in the same land, and in this connection a remainderman is privy in estate to one who has the next preceding estate. On this subject see Preston: Conveyancing,[61] and the authorities cited by him. It is possible that the term "privity of estate" means one thing in one connection, and something different in another connection, but the older authorities do not say so, nor, as indicated above, do they give any restrictive or comprehensive definition of privity of estate.

The purport of the above brief discussion has been to suggest that there is no narrowly fixed definition of privity of estate. However, for privity of estate to exist between two persons, it must be that both hold an estate in the same land or the same incorporeal interest. The authorities requiring privity of estate which are cases where the parties hold estates in land (as distinct from incorporeal interests) all concern lessor and lessee. It does not follow, however, that if a case should arise where there is, for

58. "Privity" A.

59. *i.e.* of an estate tail.

60. 3 Co. Rep. 22a.

61. II, 327.

example, a grant of an estate for life with a remainder in fee, and life tenant and remainderman are parties to the deed and enter into mutual covenants concerning the land, the covenants cannot run with the land. That is to say, so it is submitted, privity of estate does not necessarily involve tenure between the parties.

Nor, also, does it necessarily follow from the authorities that the requirement of privity of estate where the parties hold estates in the land means that covenants cannot run where the parties hold, not different estates in the same interest (corporeal or incorporeal) but different interests in the same land (e.g. one an estate in fee simple in the land and the other an estate in fee simple in an easement or profit in the same land). The authorities in which privity of estate was declared to be necessary are cases where, on the one hand, the parties were privy in estate, or, on the other hand, were only indirectly connected in estate, or had no relationship at all that the common law could recognise. Thus in *Webb v. Russell*,[62] commonly cited for the requirement of privity of estate, the covenantee had no legal interest at all in the land, but was a mortgagor with an interest in equity only. For covenants to run (or rather for the burden of covenants to run) the land must provide an immediate link between the parties. In those cases where the only link that each party has with the land is by holding an estate in it, the estate must be a legal estate, and the two estates must, as it were, be adjacent estates, so that there is privity of estate, and not the more remote relationship that exists between, for example, A and Y, where A leases to X and X subleases to Y. But decisions requiring privity of estate where the only possible connection through the land is by holding estates in it are not authorities for cases where the connection is otherwise, by interests in the land recognised at common law, but not by estates in the land. In the decisions where the running of covenants has been allowed on the basis of privity of estate there has been no consideration of cases where the covenant concerns an easement or profit held in fee simple; and the fact that privity of estate has been required where the covenant has been made in respect of estates in land is no ground for saying that covenants can run only in such a case, and not where they are made in respect of some other interest in land.

It is therefore submitted that authority does not stand in the way of the running of covenants with easements and profits, and further, that general legal principle also is not opposed to it. In the case of lessor and lessee, the existence of privity of estate between the parties does not in itself explain why covenants run

62. 3 T.R. 393.

with the estate of the lessee. This is a mere technical conception, and some ground of utility must be the real explanation. One practical ground is mentioned in *Spencer's Case*,[63] that the covenant "extends to the support of the thing demised". The idea of burden being taken with benefit is also present, and was used in *Hyde v. Dean and Canons of Windsor*[64] to justify the running of the burden although assigns were not named: see also *Brett v. Cumberland*.[65] In *Cockson v. Cock*[66] it was held that a covenant by a lessee to leave fifteen acres every year for pasture bound an assignee "because it is for the benefit of the estate, according to the nature of the soil". It will be noticed that this reason for the running of a covenant also provides the test for the sort of covenant that will run: the covenant it was said in *Spencer's Case*[67] must "touch or concern the thing demised", and the requirement has been explained as meaning that it must "affect the nature, quality, or value of the thing demised" or "the mode of enjoying it" (*Mayor of Congleton v. Pattison*[68]); though this test is now regarded as being too restrictive.

The requirement of privity of estate is thus not so much an indication of a positive reason why covenants should run as a restrictive rule limiting the cases in which they may do so. Where a covenant runs it does so because the parties are mutually affected by it in relation to their respective interests in the land, so that if it ceased to bind or be enforceable by an assignee, the interest of the latter in the land would be more valuable or less valuable as the case might be, and the interest of the other party correspondingly affected. But a direct link between one party or his assignee and the other party or his assignee was necessary to justify the enforcement of a contract between persons not both parties to the contract, as a substitute for the usual requirement of privity of contract; and in the case of lessor and lessee privity of estate provided this justification and set limits to what must otherwise have been regarded as contrary to ordinary principles of contract and possibly dangerous in its consequences.

Applying these observations to the case where an owner of land grants an easement or profit in fee, and the parties enter into covenants for the benefit of the servient land or the incorporeal interest granted, the same reason exists, it is submitted, for maintaining the covenants in force after an assignment by either of the parties as in the case of lessor and lessee. The essential ground for allowing the covenant to run is that it touches or concerns the interest in land held by the covenantee and is annexed to the

63. 5 Co. Rep. at 16a.
64. Cro. Eliz. 552.
65. 1 Rolle 359.
66. Cro. Jac. 125.
67. 5 Co. Rep. at 16b.
68. 10 East 130.

interest held by the covenantor. There is also an immediate link between the dominant and servient owners, as there is between lessor and lessee. Equally the enforceability of the covenant may be restricted to dominant and servient owners who are in immediate privity of interest, but denied where a successor to either party does not take the whole estate of his predecessor.

These arguments of course would apply as well to rentcharges as to easements and profits; and the fact that there is substantial authority against the running of covenants with rentcharges would at first sight suggest that they cannot be held to run with easements and profits. But the authorities on rentcharges are like an inverted pyramid built up on a point, and they have been erected one upon the other without any regard to principle, as Romer L.J. recognised in *Grant v. Edmondson.*[69] Indeed Lord Ellenborough's decision in *Milnes v. Branch,*[70] which the later authorities follow, not only is unsound as to its second ground, as is now recognised, but on its first ground is contrary to the earlier decision of *Bally v. Wells.*[71] *Bally v. Wells* decided that a covenant may be annexed to an incorporeal inheritance, whereas Lord Ellenborough apparently acted on the view that the covenant was personal "unless it be shewn that this is land." A sounder view, it is submitted, is that advanced by Lord St. Leonards, a great property lawyer, before the uncritical acceptance of Lord Ellenborough's judgment in *Milnes v. Branch*[72] by the Court of Appeal in *Haywood v. Brunswick Building Society.*[73] In his work on Vendor and Purchaser,[74] after a full discussion of the earlier authorities, he said: "Upon the whole it is submitted that covenants like those in *Brewster v. Kidgell*[75] ought to be held to run in both directions; with the rent or interest carved out of or charged upon it in the hands of the assignee, so as to enable him to sue upon them; with the land itself in the hands of the assignee, so as to render him liable to be sued upon it". Even if it is too late for this view to be adopted in respect of rentcharges, it should, it is submitted, be adopted in relation to easements and profits, where authority does not stand in the way.

In conclusion, the American view of this matter may be noted. The Restatement of Property,[76] dealing with the running of burdens, states[77] that "the successors to land respecting the use of which the owner has made a promise become bound upon the promise as promisors", subject to the following rules:—

69. [1931] 1 Ch. 1.
70. 5 M. & S. 411.
71. Wilm. 341.
72. 5 M. & S. 411.
73. 8 Q.B.D. 403.
74. Sugden: Vendor and Purchaser 13th ed., p. 484.
75. 12 Mod. 166.
76. Vol. V: Servitudes.
77. Sec. 530.

(i) Successors are not bound unless it was intended by the parties to the promise that they should be bound;[78]

(ii) Successors are not bound unless the promise was made in such form as to be binding upon the promisor and is in writing under seal;[79]

(iii) Successors are not bound unless either (*a*) the transaction of which the promise is a part includes a transfer of an interest either in the land benefited or in land burdened, or (*b*) the promise is made in the adjustment of the mutual relationships arising out of the existence of an easement (which is defined to include a profit) held by one of the parties in the land of the other. This is a requirement of privity between promisor and promisee[80];

(iv) Successors are not bound unless by succession they hold (*a*) the estate or interest of the promisor, or (*b*) an estate or interest corresponding in duration to the estate or interest of the promisor. This is a requirement of privity between promisor and successor[81];

(v) Successors can be bound only if performance of the promise will benefit the promisee or other beneficiary of the promise in the physical use or enjoyment of the land possessed by him, or (*b*) the consummation of the transaction of which the promise is a part will operate to benefit and is for the benefit of the promisor in the physical use or enjoyment of land possessed by him, and if the burden on the land of the promisor bears a reasonable relation to the benefit received by the person benefited.[82]

It will be noticed that not only is the burden of covenants held to run with easements and profits, but that a general running of the burden is recognised beyond that allowed in law or equity under English law. The burden of even a positive covenant may run, but only if the transaction as a whole gives a reasonable compensating advantage to the promisor.

As to the running of the benefit, the rules stated are much the same as in English law, except that a deed is not required, nor is succession to the whole estate of the original promisee.

These rules are not universally accepted in the United States. Clark[83] forcibly attacks the requirement for the running of the burden that there must be succession between the contracting parties, in accordance with rule iiia above; and the decisions in

78. Sec. 531.

79. Sec. 532.

80. Sec. 534.

81. Sec. 535.

82. Sec. 537.

83. Real Covenants, pp. 116, 206.

the various States are not uniform. But numerous decisions support the running of covenants with easements. Thus New York is one of the few States that follow the English rule against the running of the burden of affirmative covenants with land; but even in that State it is recognised that the burden of a covenant will run, with land or easement, when it is made in relation to an easement. See *Neponsit Property Owners Association v. Emigrant Industrial Savings Bank.*[84]

W. N. Harrison.*

84. N.Y. 248; 15 N.E. 793. This case is reprinted in Casner & Leach: Cases and Text on Property, p. 1105.

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