VERMONT'S LAW OF PROMISES RUNNING WITH THE LAND: FORMAL RESTRAINTS ON A PRACTICAL DOCTRINE

INTRODUCTION

Courts have long recognized promises running with the land as a means for landowners to structure their rights and obligations involving parcels of land.[1] The original promise between landowners is generally framed in the language of contract. For example, *X* sells *Y* a parcel of land adjacent to land that *X* retains. In the deed of the transfer, *X* includes a restriction that *Y* may not build a house taller than one story on his land.[2] Landowner *Y* is bound personally by this restriction, but for landowner *X* to have full benefit of the promise, the obligation (or burden) of the promise must be more than merely personal to *Y*. The land *Y* now owns must carry the obligation with it. Otherwise, the day following his acquisition, *Y* could sell his land free of the restriction, depriving *X* of the premium he would have realized by selling the land without the restriction and of the benefit *X* sought—low houses around his retained land. Likewise, when *X* sells his retained land, he can receive full value for it only if he can pass the benefit of the promise along with the land. The judicial doctrine of promises running with the land ensures that the benefits and burdens of promises regarding land use do pass with the transfer of land.[3]

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1. Spencer's Case, 5 Co. Rep. 16a, 77 Eng. Rep. 72 (Q.B. 1583). This note will restrict itself to the phrase "promises running with the land," except where context demands more precise terms. The phrase "promises running with the land" and its variants are meant to include both promises running at law (real covenants) and promises running in equity (equitable servitudes).

2. This hypothetical is based loosely on McDonough v. W.W. Snow Constr. Co., 131 Vt. 436, 306 A.2d 119 (1973). Landowner *X* receives the benefit of this promise and owns the benefited estate; landowner *Y* carries the burden of this promise and his is the burdened estate.

3. The ability to structure relationships among landowners and their land can serve many useful social goals. These goals have been explored in depth by Cross, *Interplay Between Property Law Change and Constitutional Barriers to Property Law Reform*, 35 N.Y.U. L. REV. 1317 (1960); Newman & Losey, *Covenants Running with the Land, and Equitable Servitudes; Two Concepts, or One?* 21 HASTINGS L.J. 1319 (1970); Note, *Covenants Running with the Land: Their Desirability and Utility*, 32 NOTRE DAME LAW. 502 (1957). Some promises may be unclear in their purpose or serve ends that are socially undesirable and, therefore, may be judged void. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (a racially restrictive covenant in a residential development is void as against public policy); Ross v. Newman, 206 Neb. 42, 291 N.W.2d 228 (1980) (a restrictive covenant that fails to provide clear standards for approval of proper use of land is unenforceable).

The Vermont Supreme Court recently restated its requirements for a promise to run with the land at law[4] and in equity.[5] For a promise to run with the land at law, the promise must meet four requirements: the promise must be in writing, the parties must intend the promise to run with the land, the promise must touch and concern the land, and the parties to the promise must be in privity of estate.[6] The requirements for a promise to run in equity are similar. Instead of the requirement of privity, however, the parties must meet a notice requirement,[7] and the standard for meeting the requirement of touching and concerning the land is less demanding for promises running in equity.[8] The significance of the two separate categories of promises is that parties seeking money damages for breach must fulfill the conditions for promises running at law,[9] while parties who seek specific performance of their promises may meet the less demanding requirements for promises running in equity.[10]

By splitting cases of promises running with the land into two types, the Vermont court has followed well-recognized tradition.[11] The historical difference between "real covenants" (promises running at law) and "equitable servitudes" (promises running in equity) has, however, engendered considerable controversy and confusion. The controversy centers upon the proper theoretical justification for promises which run with the land.[12] Recent schol-

4. Albright v. Fish, 136 Vt. 387, 394 A.2d 1117 (1978).

5. Chimney Hill Owners' Ass'n v. Antignani, 136 Vt. 446, 392 A.2d 432 (1978). The distinction between running at law and running in equity is perhaps confusing, given the merger of courts of law and equity in Vermont. VT. R. CIV. P. 2 (1971). The distinction will be maintained in the note to approximate the language of the Vermont court. The *Albright* court uses the term running "at law" for cases in which plaintiff seeks money damages. Albright v. Fish, 136 Vt. at 393, 394 A.2d at 1120. The term "running in equity" applies to those cases in which plaintiff seeks injunctive relief. *Id.* at 393 n.1, 394 A.2d at 1120 n.1.

6. Albright v. Fish, 136 Vt. at 393, 394 A.2d at 1120.

7. Chimney Hill Owners' Ass'n v. Antignani, 136 Vt. at 454-55, 392 A.2d at 428.

8. Albright v. Fish, 136 Vt. at 393 n.1, 394 A.2d at 1120 n.1.

9. *Id.* at 393, 394 A.2d at 1120.

10. *Id.* at 393 n.1, 394 A.2d at 1120 n.1.

11. *See, e.g.*, Choisser v. Eyman, 22 Ariz. App. 587, 529 P.2d 741 (1974); Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938); Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143 (Ch. 1848).

12. For the argument that such promises are essentially creatures of contract law, see Ames, *Specific Performance for and against Strangers to a Contract*, 17 HARV. L. REV. 174 (1905); Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 18 COLUM. L. REV. 291 (1918). An opposing camp describes these promises as children of property law: *see*, C. CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND (1929); Bordwell, *The Running of Covenants—No Anomaly* (pts. 1 & 2), 36 IOWA L. REV. 1, 484 (1950-51); Pound,

arship has adopted an approach that is less concerned with theoretical justification than with clarifying the means for letting these promises run with the land.[13] The conclusion these scholars have reached is that promises regarding the use of land are actually of one kind and should be treated alike regardless of whether the enforcement sought is legal or equitable. As Justice Cardozo predicted half a century ago, the equitable and legal doctrines of promises running with the land are too similar to withstand merger: "In the end we may find that [methods of justifying promises that run with the land] have come together so often and in so many ways that there is no longer any space between the paths, no longer choice to make between them."[14]

This note will briefly rehearse the traditional common law and equitable approaches to promises running with the land, summarize the development of promises running with the land in Vermont, and evaluate the doctrine's current formulation by the Vermont Supreme Court. The evaluation will show that, whatever historical reasons exist for distinguishing between equitable promises and legal promises, maintining the distinctions is no longer useful or necessary. The formal distinctions can, through the confusion that the requirements generate, dilute the utility of these promises by hindering the ability of landowners to structure their relationships and plan mutually beneficial land uses.

The Progress of the Law, 1918-1919, 33 HARV. L. REV. 813 (1920); Reno, *The Enforcement of Equitable Servitudes in Land* (pts. 1 & 2) 28 VA. L. REV. 951, 1067 (1942). The confusion spawned by the controversy stimulated Justice Cardozo to comment: "Difficulties there are in either view if the underlying concept is pressed to the limit of its logic." Bristol v. Woodward, 251 N.Y. 275, 288, 167 N.E. 441, 446 (1929).

13. *See, e.g.,* 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 670 [2] (rev. ed. 1981); Browder, *Running Covenants and Public Policy,* 77 MICH. L. REV. 12 (1978); Cross, *supra* note 3; Newman & Losey, *supra* note 3; Stoebuck, *Running Covenants: An Analytical Primer,* 52 WASH. L. REV. 861 (1977); Note, *Affirmative Duties Running with the Land,* 35 N.Y.U. L. REV. 1344 (1960).

Attempting to merge the doctrines of promises running with the land is not an exclusively recent trend. *See, e.g.,* Newman, *A Legal Approach to Equitable Servitudes,* 42 MICH. L. REV. 293 (1943). The more common approach taken by courts, however, was to try to maintain the separate indentities of the two concepts. *See, e.g.,* Goldberg v. Nicola, 319 Pa. 183, 178 A. 809 (1935) (question of damages for breach of covenant restricting building height to be decided on property theory, not contract theory, making current holder of land liable for breach).

14. Bristol v. Woodward, 251 N.Y. 275, 289, 167 N.E. 441, 446 (1929).

I. Promises Running with the Land at Common Law and in Equity

That two persons could make a promise regarding the use of land and bind subsequent holders of the land who had not joined in the orginal promise was definitively recognized in sixteenth century England in *Spencer's Case.*[15] Plaintiff was a landlord who had covenanted with his tenant for the tenant to construct a wall on the leased land. The tenant bound himself, his executors and his administrators, to fulfill the covenant. Defendant was the assignee of the original tenant's assignee, and he refused to fulfill the obligation. When the landlord sued, the court held for the defendant. The court stated three requirements for covenants to run with the land:[16] 1) the covenant must concern a thing in being (in esse) at the time of the covenant, or, if the thing is not in being, the covenantor must specifically announce his intent that the promise will bind his assignees;[17] 2) the covenant must "touch or concern" the land;[18] 3) the parties to the suit must be in "privity of estate" with

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15. 5 Co. Rep. 16a, 77 Eng. Rep. 72 (Q.B. 1583). Although *Spencer's Case* is generally credited with first allowing covenants to run with the land, the exact meaning of the case is much discussed and not completely clear. In ruling for tenant/defendant, the court announced eight broad principles in dicta. How one principle relates to the others is sometimes perplexing. *See generally,* Berger, *A Policy Analysis of Promises Respecting the Use of Land,* 55 Minn. L. Rev. 167, 172-73 (1970); Williams, *Restrictions on the Use of Land: Covenants Running with the Land at Law,* 27 Tex. L. Rev. 419, 422-23 (1949).

Much of the confusion surrounding *Spencer's Case* stems from the court's murky statement of facts. The court said that if the covenanting party promised for himself and his assigns that "they would make a new wall" then the promise should bind the assignee. 5 Co. Rep. at 16b, 77 Eng. Rep. at 74. The court also said that promises regarding things collateral, or not touching and concerning the land, do not bind assignees even if they are specifically named in the covenant. *Id.* Yet, when stating the case, the court had said that when the original tenant had promised to build the wall, the tenant "covenanted for him, his executors and administrators . . . that he, his executors, administrators or assigns" would build the brick wall that was the subject of the covenant. *Id.* at 16a, 77 Eng. Rep. at 72.

Either the court felt that the object of the preposition "for" held stronger magic than the subject of the next clause, or the court garbled its report of the covenant. Regardless of what Spencer and his tenant actually covenanted, the received meaning of the case is that a promisor must specifically name his assignees to bind them to a promise that touches and concerns the land.

16. Using three as the number of requirements is somewhat arbitrary. The number has been chosen for symmetry with the discussion of Kellogg v. Robinson, 6 Vt. 276 (1834). See *infra* text accompanying notes 68-80. Commentators have broken the requirements into a various number of components: *e.g.,* C. Clark, *supra* note 12, at 74 (three requirements); Newman, *supra* note 13 at 294 (seven requirements); Williams, *supra* note 15, at 440-42 (five requirements); Note, *supra* note 13, at 1345 n.6 (four requirements).

17. 5 Co. Rep. 16a-b, 77 Eng. Rep. at 74. Some commentators separate the intent and *in esse* requirements into two different elements. *E.g.,* Berger, *supra* note 15, at 172.

18. 5 Co. Rep. 16b, 77 Eng. Rep. at 74.

the original parties to the promise.[19]

The first requirement of *Spencer's Case* is that the promising parties must make the promise concerning a thing already in being or, if not in being, specifically state that they intend the promise to run. Early on, American courts ignored the first of these alternative requirements.[20] Courts continue, however, to require that the original parties to the promise intend the promise to run before enforcing it.[21] Although *Spencer's Case* required a specific statement of intent,[22] modern courts have been content to construe the entire instrument that creates the promise to determine whether the parties intended the promise to run with the land.[23]

There is no precise definition of "touching and concerning" the land,[24] the second requirement of *Spencer's Case*. Yet the element is conceded to be necessary.[25] Among many formulations of the requirement,[26] the one first stated by Professor Bigelow,[27] and later refined by Judge Clark,[28] has been generally accepted.[29]

> If the promisor's legal privileges and other relations in the land are restricted or lessened by the promise, [the burden] touches and concerns the land as to him. And if the promisor's legal relations are increased or made more valuable in

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19. 5 Co. Rep. 16b-17a, 77 Eng. Rep. at 74.

20. *See, e.g.*, 165 Broadway Building, Inc. v. City Investing Co., 120 F.2d 813, 816 (2d Cir. 1941); Masury v. Southworth, 9 Ohio St. 340 (1859); Bald Eagle Valley R.R. v. Nittany Valley R.R., 171 Pa. 284, 33 A. 239 (1895); Kellogg v. Robinson, 6 Vt. 276 (1834) (see *infra* note 83); Ecke v. Fetzer, 65 Wis. 55, 26 N.W. 266 (1866).

21. *See, e.g.*, Brendonwood Common v. Franklin, _ Ind. _, 403 N.E.2d 1136 (1980); Orange and Rockland Utilities, Inc. v. Philwood Estates, Inc., 70 A.D.2d 338, 421 N.Y.S.2d 640 (1979); Hudspeth v. Eastern Ore. Land Co., 247 Ore. 372, 430 P.2d 353 (1967); Rodruck v. Sand Point Maintenance Comm., 48 Wash. 2d 565, 295 P.2d 714 (1956).

22. 5 Co. Rep. at 16b, 77 Eng. Rep. at 74.

23. *See, e.g.*, Peters v. Stone, 193 Mass. 179, 79 N.E. 336 (1906); LaValle v. Kulkay, 277 N.W.2d 400 (Minn. 1979); Silverstein v. Shell Oil Co., 40 A.D.2d 34, 337 N.Y.S.2d 442 (1972); Ball v. Milliken, 31 R.I. 36, 76 A. 789 (1910). *But see* Werner v. Graham, 181 Cal. 174, 183 P. 945 (1919) (deed is the exclusive statement of the parties' intent and cannot be construed at a later date with the aid of parole evidence).

24. C. CLARK, *supra* note 12, at 76; Reno, *supra* note 12, at 961.

25. *See* Browder, *supra* note 13, at 41.

26. See Note, *Covenants Running with the Land*, 18 B.U. L. REV. 764 (1938) for a compilation of the various tests for the touch and concern requirement.

27. Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639 (1914).

28. C. CLARK, *supra* note 12, at 75-7.

29. *See, e.g.*, Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938); Raintree Corp. v. Rowe, 38 N.C. App. 664, 248 S.E.2d 904 (1978); Rodruck v. Sand Point Maintenance Comm., 48 Wash. 2d 565, 295 P.2d 714 (1956); 5 R. POWELL, *supra* note 13 ¶ 673[2][a]; Reno, *supra* note 12, at 962.

> the land, the benefit of the covenant touches or concerns that land as to him.[30]

The Clark-Bigelow test recognizes that a court applying the "touch and concern" requirement makes an evaluation of the promise before it.[31] The test stresses the economic relationship that exists between parcels of land linked by a promise that does "touch and concern" the land.[32] A promise that runs with the land should affect the interests that subsequent holders of the land receive.

The third requirement of *Spencer's Case* necessitates that there be "privity of estate" for a promise to run with the land.[33] The privity element has posed numerous problems of interpretation.[34] The court in *Spencer's Case* probably used the term only to define the relation between the parties to the covenant and their respective sucessors—a "vertical" privity.[35] Vertical privity of estate is a common requirement among modern courts.[36] The concept requires that a party claiming the benefit of a promise running with the land or a party shouldering the burden of such a promise must have received his estate in direct descent from an

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30. Clark, *The American Law Institute's Law of Real Covenants*, 52 YALE L.J. 699, 724 (1943). Professor Reno quotes two earlier judicial formulations of the touch and concern requirement which show the historical continuity of the Clark-Bigelow test.

> The covenant "must affect the nature, quality, or value of the thing demised or the mode of occupying it." Lord Ellenborough in Congleton v. Pattison, 10 East. 130 (K.B. 1823). "If it be beneficial without regard to his continuing owner of the estate, it is a mere collateral covenant upon which the assignee cannot sue." Best, J., in Vyvyan v. Arthur, 1 B. & C. 410 (K.B. 1823).

Reno, *supra* note 12, at 961 n.35.

31. C. CLARK, *supra* note 12, at 76.

32. *See, e.g.*, Neponsit Property Owners' Assn v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793, 796 (1938); Rodruck v. Sand Point Maintenance Comm., 48 Wash. 2d 565, 295 P.2d 714, 721 (1956).

33. 5 Co. Rep. at 16b-17a, 77 Eng. Rep. at 74.

34. The pedigree of "privity of estate" remains obscure. Although the 1980 version of POWELL ON PROPERTY discussed privity as arising obscurely from *Spencer's Case*, 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 674, at 172 (rev. ed. 1980), the 1981 revision denies that the concept can be found in *Spencer's Case*. 5 R. POWELL, *supra* note 13 ¶ 673[2][c], at 60-58 to 60-59. The new POWELL concurs that the concept began with Webb v. Russell, 3 T.R. 393, 100 Eng. Rep. 639 (K.B. 1789). *See infra* notes 38-39 and accompanying text. Historically, the requirement of privity of estate was seen in *Spencer's Case* because the promisor and promisee were in a tenant/landlord relationship, although the significance of this relationship was unclear. 5 R. POWELL, *supra* note 13 ¶ 673[2][c] at 60-59 to 60-60. *See also* C. CLARK, *supra* note 12, at 98.

35. C. CLARK, *supra* note 12, at 110-11; Bordwell, *supra* note 12, at 488.

36. *See, e.g.*, Brendonwood Common v. Franklin, _ Ind. _, 403 N.E.2d 1136 (1980); Leighton v. Leonard, 22 Wash. App. 136, 589 P.2d 279 (1979).

original party to the promise.[37] Successive owners of the same estate would then receive the burdens and benefits attached to that estate.

Two hundred years after *Spencer's Case,* Lord Kenyon stated in dicta in *Webb v. Russell*[38] that the original parties to the covenant must also be in privity of estate (a "horizontal" privity) for the promise to run with the land.[39] There have been three interpretations of horizontal privity of estate. English courts defined horizontal privity as requiring that the two original parties to the agreement have continuing mutual interests in the same land—effectively restricting the making of covenants to landlords and their tenants (this has been called "tenurial" privity).[40] American courts have tended to relax the restrictions of horizontal privity. The second kind of horizontal privity, "Massachusetts" privity, extends the permissible mutual continuing interests that could satisfy horizontal privity to include the right to an easement held by one of the parties in the land to the other party.[41] A still more liberal formulation of horizontal privity articulated by some American courts is that of "instantaneous" privity, which arises when a party transfers an interest in land to another party. The interest transferred, however, must be something other than the promise itself.[42]

In general, any requirement of horizontal privity restricts the making of running promises to those people who transfer land or interests in land to one another.[43] Adjacent landowners, for example, may not add running restrictions to their land without transferring some other interest in land along with the restriction. The

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37. 5 R. POWELL, *supra* note 13, at ¶ 673[2][c].

38. 3 T.R. 393, 100 Eng. Rep. 639 (K.B. 1789).

39. After ascribing the honor of inventing the requirement to Lord Kenyon, Professor Bordwell reports that Lord Kenyon abandoned his position in Stokes v. Russell, 3 T.R. 678, 100 Eng. Rep. 799 (1790). Bordwell, *supra* note 12, at 492 n.57.

40. *See* Browder, *supra* note 13, at 15-16.

41. Morse v. Aldrich, 36 Mass. 449, 454 (1837).

42. *See, e.g.,* Carlson v. Libby, 137 Conn. 369, 77 A.2d 332 (1950); Sexauer v. Wilson, 136 Iowa 357, 113 N.W. 941 (1907); Burbank v. Pillsbury, 48 N.H. 475 (1869). Some courts have allowed restrictive agreements to stand so long as some valuable consideration, not necessarily an interest in land, passes between the parties. *E.g.,* Erichsen v. Tapert, 172 Mich. 457, 138 N.W. 330 (1912).

43. The praises of horizontal privity of estate have been sung by commentators who believe that limiting the opportunities for making restrictive promises has a "salutory effect in restricting the encumbrances of land by the creation of real covenants to those which are already encumbered." Reno, *supra* note 12, at 969.

requirement of horizontal privity limits the ability of landowners to modify the relations between their property. Requiring any horizontal privity of estate for the creation of promises running with the land is a minority position among American courts,[44] and some scholars argue vigorously that no such requirement should ever be imposed.[45]

The relaxation of the privity requirement demonstrates the evolution of the scope of promises running with the land since the concept was first enunciated in *Spencer's Case*. The evolution has been halting, however, because courts have been unable to determine proper boundaries for the use of such promises. Generally, the purpose of these promises is to allow long-term structuring of relationships between parcels of land, but the specific forms that have embodied this purpose have engendered conceptual difficulties.[46] Since, for example, a promise running with the land begins with a promise between two people, the clearest legal analogy to promises running with the land is contract law.[47] The contract analogy, however, had some unfortunate consequences. For example, some courts have ruled that since the original promisor binds himself by entering into a contract, the promise actually creates two duties, one in the estate in land, the other personal to the promisor.[48] Under his personal obligation, the promisor could be held responsible for fulfilling the duties of the promise even after he had conveyed the burdened estate to someone else.[49] This possibility, along with the limits placed on legal covenants by the privity of estate requirement, made legal covenants less than optimal

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44. Browder, *supra* note 13, at 23. Decisions requiring horizontal privity include, Choisser v. Eymann, 22 Ariz. App. 587, 529 P.2d 741 (1974); Albright v. Fish, 136 Vt. 387, 394 A.2d 1117 (1978); Leighton v. Leonard, 22 Wash. App. 136, 589 P.2d 279 (1979). For a complete compilation of states requiring horizontal privity, see 5 R. Powell, *supra* note 13, at ¶673[2] n.113.

45. *E.g.*, C. Clark, *supra* note 12, at 96; Newman & Losey, *supra* note 3, at 1337.

46. *See* C. Clark, *supra* note 12 at 3, 7.

47. *See* Reno, *supra* note 12, at 1067. The analogy is not precise:

> Since restrictions on the use of land are created by contract and the obligations of a contract cannot be assigned without consent to the assumption of the obligations, justification for the enforcement of the obligation against subsequent acquirers of the land had to be supplied from some source other than contract law.

Newman & Losey, *supra* note 3, at 1322.

48. *See, e.g.*, Jones v. Parker, 163 Mass. 564, 40 N.E. 1044 (1895); Wall v. Hinds, 4 Gray 256 (Mass. 1855).

49. Reno, *supra* note 12, at 963; *see, e.g.*, City of Glendale v. Barclay, 94 Ariz. 358, 385 P.2d 230 (1963); and cases cited *supra* at note 4.

tools for structuring land use.[50]

Courts may have circumscribed the scope of promises running with the land at law because they regarded any restriction on land use with disfavor.[51] Furthermore judges may have feared that these burdens could restrict the alienability of land and place onerous burdens upon unsuspecting purchasers of land.[52] A more flexible device for creating a transferable relationship between parcels of land was needed. In England, the device was supplied by the equitable servitude—a promise running with the land that would be enforced on equitable principles.[53]

The English Chancery created the equitable servitude in *Tulk v. Moxhay*.[54] The court in *Tulk* held that a person who acquired land with notice of a restriction on that land would be held to the restriction.[55] The plaintiff in *Tulk* was a landlord who had sold one of his buildings and an adjoining park subject to the restriction that the purchaser would maintain the park for the benefit of the tenants of plaintiff's retained buildings. Although defendant acquired the park through intermediary owners, he acquired the land with notice of the restriction. He tried to avoid the duty to maintain the park by arguing that the promise did not validly run with the land. Certainly under British law, there was no tenurial privity on these facts.[56] The *Tulk* chancellors, however, disregarded the privity problem, because the question for them did "not depend upon whether the covenant runs with the land."[57] Instead, the court required only that defendant took the land with notice of the restriction.[58]

The principle behind the *Tulk* holding was simple: a bona fide purchaser of land without notice of the restriction would not be

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50. Reno, *supra* note 12, at 970-71.

51. *See, e.g.*, Werner v. Graham 181 Cal. 174, 183 P. 945 (1919); Ball v. Milliken, 31 R.I. 36, 76 A. 789 (1910); Beech Mountain Property Owners' Ass'n v. Seifart, 48 N.C. App. 286, 269 S.E.2d 178 (1980); Hall v. Risley, 188 Ore. 69, 213 P.2d 818 (1950).

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

53. *See generally*, C. CLARK, *supra* note 12, at 96; Browder, *supra* note 13, at 16; Reno, *supra* note 12, at 970-71.

54. 2 Ph. 774, 41 Eng. Rep. 1143 (Ch. 1848).

55. *Id.* at 778, 41 Eng. Rep. at 1144.

56. See *supra* text accompanying note 40.

57. 2 Ph. at 778, 41 Eng. Rep. at 1144.

58. Professor Reno reports that Hills v. Miller, 3 Paige 254 (N.Y. 1832), the first American case using the equitable principle of notice, antedated *Tulk v. Moxhay*. Reno, *supra* note 12, at 971 n.65. Nevertheless, *Tulk v. Moxhay* is regarded as the seminal case.

bound by it.[59] Conversely, an adverse possessor of land with notice of a restriction would be bound by it even though not in vertical privity of estate with any promising party.[60] The notice requirement obviated fears that an innocent taker of land could be bankrupt by an unknown and onerous burden.[61] The purchaser of land would not shoulder the burden unless he knew of it. Likewise, a person who takes land knowing of a restriction would not be able to avoid the restriction.[62]

The equitable servitude doctrine solved the problem of binding a covenantor after he had rid himself of the burdened land, because the servitude was interpreted as creating property rights rather than contract rights.[63] As such, these rights were enforceable only against or by the current holders of the burdened or benefited land. Moreover, the equitable servitude allowed injunctive relief and thus ensured that a landowner would receive full value for a promise through specific performance.[64]

Historically, the element that distinguished the servitude from the real covenant was the notice requirement. Courts generally incorporated the elements both of intent and of touching and concerning the land into the requirements for equitable promises to run.[65] Despite the similarity, courts responded to real covenants and equitable servitudes as two separate doctrines, and they preserved the formal differences between the two.[66] An explanation for the continued distinction may lie in the jurisdictional split be-

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59. American cases following this principle include Hall v. Snavely, 93 Fla. 664, 112 So. 551 (1927); Stanton v. Schmidt, 45 Ohio App. 203, 186 N.E. 851 (1933); Hall v. Risley, 188 Ore. 69, 213 P.2d 818 (1950); Yates v. Chandler, 162 Tenn. 388, 38 S.W.2d 70 (1931).

60. *See, e.g., In re* Nisbet & Potts Contract, 1 Ch. 386 (C.A. 1906).

61. The creation of equitable servitudes did not allay the controversy over the theoretical basis for promises running with the land. Both contract law and property law continued to claim parentage. The contract explanation is that *Tulk* represents an equitable recognition of the need for specific performance of contracts concerning land. The property explanation is that *Tulk* creates equitable easements not recognized or enforceable at law. Reno, *supra* note 12, at 973.

62. C. Clark, *supra* note 12, at 148.

63. *See* Goldberg v. Nicola, 319 Pa. 183, 178 A. 809 (1935); Reno, *supra* note 12, at 1085.

64. *See* Newman & Losey, *supra* note 3, at 1336.

65. *See, e.g.*, Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938); Goldberg v. Nicola, 319 Pa. 183, 178 A. 809 (1935); Stewart v. Beghtel, 38 Wash. 2d 870, 234 P.2d 484 (1951).

66. Not only did courts find differences between privity and notice requirements in the two forms, but some courts dispensed with the need for the equitable promise to be in writing while keeping the writing requirement for real covenants. *See, e.g.,* Thornton v. Schobe, 79 Colo. 25, 243 P. 617 (1925).

tween law and equity, or simply in a respect for tradition. Courts have rarely asked, however, if there is any substantive difference between the two concepts.[67]

II. Promises Running with the Land in Vermont: Early Cases

The Vermont Supreme Court accepted the doctrine of promises running with the land in 1834 in *Kellogg v. Robinson*.[68] The requirements it announced for such promises were traditional: 1) "the nature and purpose" of the promise must concern the land;[69] 2) the original parties to the promise must intend the promise to run with the land;[70] 3) the parties in dispute must be in "vertical" privity of estate.[71]

Kellogg v. Robinson concerned an affirmative covenant to build and maintain a fence.[72] Plaintiff Kellogg had acquired land in Bennington from defendant Robinson in 1824. The land was supposedly free of encumbrances. Kellogg subsequently learned, however, that a deed to the land in the late eighteenth century obligated the then owner, Noah Smith, to build and maintain a fence around the lot.[73] When Kellogg acquired the land, the premises were still charged with the duty. Kellogg sued Robinson for damages of $500 for breach of covenant against encumbrances.[74] Robinson demurred, saying that the promise by Noah Smith was merely personal and did not bind him.[75] Although the court held against plaintiff, it did assert that a "covenant in a conveyance, to build and maintain the fences, runs with the land."[76]

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67. The question has never been answered satisfactorily, or even raised except by Judge Clark, why the reasons for granting equitable relief in the enforcement of restrictions created by agreement between landowners are not equally relevant with regard to granting relief in damages, or why the reasons for granting relief in damages in the enforcement of restrictions created by deeds conveying the property are not equally relevant in the enforcement of restrictions created by agreement between landowners.

Newman & Losey, *supra* note 3, at 1339 (footnote omitted).

68. 6 Vt. 276 (1834).
69. *Id.* at 280.
70. *Id.*
71. *Id.* at 282.
72. *Id.* at 276.
73. *Id.*
74. *Id.* at 276-77.
75. *Id.* at 277, 279.
76. *Id.* at 282.

The court viewed the covenant in *Kellogg* as one "of doubtful or equivocal character [that] may be treated either as merely personal, or as annexed to and running with the land."[77] The distinction between merely personal covenants and covenants running with the land depended upon the application of the three requirements of *Spencer's Case*. The most important element for distinguishing between personal covenants and covenants running with the land was the "nature and purpose" of the covenant.[78] Determining the nature and purpose of the covenant entailed evaluating the effect of the covenant on the parties' lands.[79] The nature and purpose evaluation thus served essentially the same function as the touch and concern requirement.[80]

In cases where the promise was of an equivocal character, the nature and purpose of the promise could be difficult to divine; where there was any question, the court reasoned that the intent of the parties should determine whether the promise should run with the land.[81] While the court conceded that the promise in *Kellogg* concerned the land,[82] it reasoned that the promise would not run without evidence of the parties' intent that it should run. The original parties could have made the promise run with the land simply by announcing that intent.[83] The covenanting parties in *Kellogg* neglected to state their intent, however, and the court was left with the task of inferring it.

The court reasoned that the covenantee "could not have full

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77. *Id.* at 280. The court contrasted covenants of equivocal character with covenants against waste or to repair buildings which pass with the land "of necessity." *Id.* at 279. Apparently, the latter covenants may be permitted to run without further analysis. The *Kellogg* court's distinction between covenants that run necessarily and those of an equivocal character appears in Albright v. Fish, 136 Vt. 287, 394 A.2d 1117 (1978), confusing the analysis in that case. *See infra* note 154.

78. 6 Vt. at 280.

79. *Id.*

80. See *supra* text accompanying notes 24-30.

81. 6 Vt. at 280.

82. "That [the promise] concerns the land . . . is not to be questioned." *Id.* at 281.

83. *Id.* at 279-80. The court acknowledged that it was following the rules established in *Spencer's Case. Id.* at 280. The court side-stepped the in esse requirement of *Spencer's Case.* See *supra* note 17 and accompanying text. The court avoided the in esse requirement by ingenuous construction. The court reasoned first that if it were to apply the requirement to the covenant at the time of enforcement, then it could determine that the fence was certainly in being at *that* time. 6 Vt. at 281. However, if the court were to apply the requirement to the time that the promise was made, then, since the promise related to the land and the land was in being at the time of the promise, the requirement was fulfilled. *Id.* The second line of argument essentially collapses the in esse requirement into the touch and concern requirement.

benefit of [the promise], unless it runs with the land. It is not to be supposed that the parties intended Smith should be bound after parting with the land, nor that the obligation to maintain the fence should cease with the transfer of the estate."[84] The court determined the intent of the original covenanting parties by evaluating the practical effect of the agreement on the parties and resolving whether the agreement could sensibly be construed to create merely personal obligations between them. From the point of view of the promising party, construing the covenant to create obligations upon him after he had conveyed the estate would place a heavier burden upon him than he had bargained for.[85] From the point of view of the profited party, the benefit would be less than he bargained for if it were allowed to evaporate after a transfer of the estate by the promising party. Even without an explicit statement in the covenant, the court reasoned that the promise would make little sense unless the court inferred the intent to run.[86]

The *Kellogg* court also required that the parties in dispute receive their estates in a succession of ownership from the original promising parties for the promise to run.[87] The court labelled this requirement "privity in estate," and this was the requirement that defeated plaintiff Kellogg.[88] In pleading his case, Kellogg neglected to show that defendant Robinson had derived her title from the original covenantor, Noah Smith. "For aught that appears, the title of the defendant, and which she conveyed to the plaintiff, might have been derived from a different source, and might have been adverse to the title of [the original covenantor]."[89] Consequently, the court required that a promise running with the land must meet a standard of vertical privity of estate.[90]

The *Kellogg* court did not state clearly whether it required horizontal privity of estate[91] between the original parties to the promise. The court was "of [the] opinion . . . that a covenant in a conveyance . . . runs with the land."[92] Although the context suggests that this statement refers to the conveyance between Noah

84. 6 Vt. at 281.
85. *Id.*
86. *Id.*
87. *Id.* at 282.
88. *Id.*
89. *Id.*
90. See *supra* text accompanying notes 35-37.
91. See *supra* text accompanying notes 38-45.
92. 6 Vt. at 282.

Smith and his grantor,[93] it does not necessarily mean that the court required all covenants to be in a conveyance in order for them to run with the land. The court's link of the covenant to a conveyance ended its lengthy discussion of whether the parties actually intended the promise to run with the land. Rather than establishing a separate requirement of horizontal privity of estate, the court more probably established an evidentiary standard. By placing in a conveyance a promise which touches and concerns the land, parties indicate strongly that they intend the promise to run with the land.

Although the court in *Kellogg v. Robinson* did not resolve all questions regarding promises running with the land,[94] it did recognize the utility of such promises and appeared ready to accommodate them. With only a cryptic comment regarding privity of estate, the court's emphasis was on exploring the element of touching and concerning the land as it might reveal the intent of the parties. As the court developed its discussion of the requirements, it suggested that the two are not completely separate analytically.[95] The intent of the parties concerning a promise affecting

93. The Court reasoned that if the promise were regarded as "a condition of the grant, and in a deed poll" there would be no question that the promise was intended to run with the land. *Id.* at 281-82. The grant referred to was, apparently, the grant made when the promise was first put into effect.

94. One question the court did not answer was whether there is any difference between promises running with the land at law and in equity. *Kellogg* has been characterized as allowing either money damages or specific performance, Browder, *supra* note 13, at 19, but the question was not directly before the court. Although plaintiff was asking $500 damages, he was suing for breach of covenant against encumbrances (a covenant of title), not on the covenant running with the land. 6 Vt. at 276. The suit charged that the land conveyed to the plaintiff, supposedly clear of burdens, actually was encumbered with this covenant running with the land. A covenant against encumbrances is breached or not breached according to the facts at the time of delivery of the deed. It does not run with the land. 6 R. POWELL, *supra* note 13 ¶¶ 898, 902.

Kellogg v. Robinson did recognize that the covenant clouding the title did run with the land. Would a ruling that the covenant runs with the land at law preclude equitable relief? An equity court in Vermont would not accept jurisdiction if plaintiff had an adequate remedy at law. Deveraux v. Cooper, 15 Vt. 88 (1843). An equity court would not, however, refuse jurisdiction merely because a remedy existed at law. Currier v. Rosebrooks, 48 Vt. 34 (1875). Although some cases involving property rights imply the adequacy of a damage remedy to protect those rights, *e.g.*, Watkins v. Childs, 79 Vt. 234, 65 A. 81 (1906), cases brought for the enforcement of covenants running with the land were usually brought in equity. *See, e.g.*, Addison County v. Blackmer, 101 Vt. 384, 143 A. 700 (1928); Morton v. Thompson, 69 Vt. 432, 38 A. 88 (1897); Clement's Admin'r v. Putnam, 68 Vt. 285, 35 A. 181 (1896); Cross v. Frost, 64 Vt. 179, 23 A. 916 (1892).

95. 6 Vt. at 281. Some courts have erected a presumption of intent to run based on a finding of the presence of the touch and concern requirement. *See, e.g.*, Baker v. Lunde, 96 Conn. 530, 114 A. 673 (1921); Johnson v. Robertson, 156 Iowa 64, 135 N.W. 585 (1912); Ball

land use may be gauged by the degree to which the promise affects the value of the land to its owner.[96] In analyzing the promise before it, the *Kellogg* court relied less on abstract form than on practical evaluation. Rather than establishing a checklist to enable promises to run with the land, the court adopted running promises by identifying the concerns behind the intent of the parties to have the promises run.[97]

The Vermont Supreme Court did not turn its attention to the requirements for a promise to run with the land for another hundred years.[98] In *Queen City Park Association v. Gale*,[99] the court adopted the equitable servitude principle of *Tulk v. Moxhay*.[100] The promise in *Queen City* concerned an assessment against a lot in a residential subdivision.[101] Plaintiff was a corporate owner of a tract of land in South Burlington which it had subdivided into res-

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v. Milliken, 31 R.I. 36, 76 A. 789 (1910); Stewart v. Beghtel, 38 Wash. 2d 234 P.2d 484 (1951). *See* Stoebuck, *supra* note 13, at 875. The current edition of POWELL asserts that presuming intention from the presence of the touch and concern requirement "emasculates the intent requirement." 5 R. POWELL, *supra* note 13 ¶ 673[2][b], at 60-48 n.57.

96. The *Kellogg* court was not unique in noting this connection. *See, e.g.*, Bauby v. Krasaw, 107 Conn. 109, 139 A. 508 (1927); Post v. Weil, 115 N.Y. 361, 22 N.E. 145 (1889); Schneider v. Eckhoff, 188 Wis. 550, 206 N.W. 838 (1926).

97. "[T]he construction of a deed, as to its operation and effect, will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in a given case." 4 J. KENT, COMMENTARIES ON AMERICAN LAW 132 (1873).

98. In Morton v. Thompson, 69 Vt. 432, 38 A. 88 (1897), the Vermont court did address the elements of a covenant running with the land. The covenant concerned a right-of-way between two urban parcels of land. The covenantor had promised to keep a space open between his tavern and the lot he had conveyed to the covenantee. *Id.* at 433-34, 38 A. at 88-89. The court avoided a covenant analysis and decided that the promise, although "in the guise of a covenant," was actually an easement. *Id.* at 435, 38 A. at 89.

The case indicates the strong family relationship between covenants and easements. Professor Reno distinguishes between the two in Hohfeldian terms: rights arising by covenant are entirely personal vis-a-vis the parties to the covenant, while rights arising under easement create correlative rights in the public regarding the agreement. Reno, *supra* note 12, at 961. Since the *Morton* promise bound the owner of the burdened estate merely to keep open some means of access for the benefited estate, the agreement was, arguably, a covenant rather than an easement. Rather than a grant in land, it was a personal agreement between landowners.

Regardless of the court's theory of deciding the case and its relevance to the general theory of promises running with the land, *Morton* did not make a significant contribution to the law of promises running with the land in Vermont. It has been cited by the Vermont court only once. Deavitt v. Washington County, 75 Vt. 156, 162, 53 A. 563, 564 (1903).

99. 110 Vt. 110, 3 A.2d 529 (1939).

100. 2 Ph. 774, 41 Eng. Rep. 1143 (Ch. 1848). See *supra* text accompanying notes 54-62.

101. The Vermont case is very similar to the landmark Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938). Decided six months after *Neponsit*, *Queen City* makes no mention of its New York cousin.

idential lots in 1885.[102] As part of the development plan, all lots were sold with a restriction in the deeds binding the new owners to pay a five dollar annual assessment to the residential association to defray the costs of maintenance.[103] Defendant Gale obtained her lot in the development in 1929 through several intermediary owners. Whether her deed actually contained restrictions was unclear, but the conditions were definitely in her chain of title.[104] Although the assessment had been paid regularly from the time of the original conveyance, defendant Gale stopped paying in 1934. The landowners' association sued to recover the assessments.[105]

The court decided that the promise in the case was a covenant, and that *Tulk* provided a model for characterizing the covenant.[106] Quoting *Tulk,* the court stated that the central issue in the case was:

> whether the party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor and with notice of which he purchased. Of course the price would be affected by the covenant and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.[107]

The balance of the opinion stressed that equity may enforce promises that are not strictly promises running with the land at law.

Why the promise in *Queen City* could not run at law was unclear,[108] but the court stressed that it was enforcing an equitable

102. 101 Vt. at 112, 3 A.2d at 530.

103. Each deed also contained a $10 penalty assessment for violation of the restriction. *Id.* at 114, 3 A.2d at 530.

104. *Id.* at 113-14, 3 A.2d at 530. Whether the restriction was actually in defendant's deed was unclear because, when plaintiff amended its complaint, it obscured the point. *Id.*

105. Plaintiff also asked the court to force defendant to forfeit her land, arguing that the conditions incorporated into the deed meant that defendant had acquired a fee upon a condition subsequent. The court ruled that such fees are not favored and that the condition providing for a $10 penalty stated plaintiff's complete remedy for breach. *Id.* at 114-15, 3 A.2d at 531.

106. *Id.* at 117, 3 A.2d at 532.

107. *Id.* (quoting Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143, 1144).

108. The court used the following definition of a covenant: "an agreement between two or more persons, entered into by deed, whereby one of the parties promises the performance or nonperformance of certain acts, or that a given state of things does or shall, or does or shall not exist." *Id.* at 116, 3 A.2d at 532 (citation omitted).

promise that should be distinguished from a promise running at law: " '[The promise] is not binding on [the defendant] merely because [she] stands as an assignee of the party who made the agreement, but because [she] has taken the estate with notice of a valid agreement concerning it. . . .' "[109] Although privity may be necessary for promises to run at law to assignees,[110] notice of a restriction is sufficient to allow the restriction to run in equity. For the *Queen City* court, the more compelling duty seemed to be not on those parties who met the legal requirements of assignees, but rather on a purchaser who knew of the restrictions at the time she acquired land. If a court's inquiry determines that she did have notice the court should enforce the bargain as completed by the parties.[111] Since there was no question that the defendant took her property with notice of the annual assessment, the court held that the promise to pay bound the defendant.[112]

In addition to adopting the notice principle of *Tulk,* the court in *Queen City* clarified the requirement of touching and concerning the land for promises running in equity. In a motion for reargument, defendant Gale complained that the court had misconstrued *Tulk v. Moxhay* in deciding her case on the original appeal.[113] She maintained that *Tulk* applied only to restrictions that involved the use of the land.[114] The court agreed that some cases insisted that a promise could run with the land only if it concerned "the physical use or occupation of the land."[115] The court reasoned, however, that, at least under equitable principles,[116] the payments in question were "intimately connected with the use and occupation of the land."[117] The effect of this reasoning is to make the traditional Clark-Bigelow test for determining touching and concerning the land more inclusive. At least in equity, all promises that affect land values will touch and concern the land, regardless of whether the object of the promise which affects the value is tangible.

109. *Id.* at 118, 3 A.2d at 532 (quoting Whitney v. Union R. Co., 11 Gray 359, 364 (Mass. 1860).

110. The privity requirements for assignees are outlined in the text *supra* notes 33-45.

111. 110 Vt. at 118, 3 A.2d at 532.

112. *Id.*

113. *Id.* at 118, 3 A.2d at 532.

114. *Id.* at 118, 3 A.2d at 532-33.

115. *Id.* at 119, 3 A.2d at 533.

116. *Id.; see* Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 257, 15 N.E.2d 793, 796 (1938).

117. 110 Vt. at 119, 3 A.2d at 533.

Recent Vermont case law asserts that differences in the requirement of touching and concerning the land and in the requirements of notice and privity demarcate the two concepts of promises running with the land at law and in equity.[118] A comparison of *Queen City* and *Kellogg*, however, reveals little substantive difference between promises running at law and in equity. The discussion of touching and concerning the land in *Queen City* suggests that the court was willing to make the requirement broader for promises running with the land in equity. The *Queen City* court stretched the concept of touching and concerning the land from paying to maintain a fence to include paying an annual association fee.[119] The expansive treatment of the touch and concern element makes the element of little use in differentiating between the two kinds of promises.

The differences between notice and privity seem at first to be more compelling. Notice requires an evaluation of the parties' understanding at the time of the transfer of property; privity requires a determination of the parties' relative status as defined by legal rules. Despite this difference, and despite the court's assertion in *Queen City* that the notice requirement is different from privity,[120] the promise in *Queen City* would have met the privity standard defined by *Kellogg*.[121] Should a distinction remain, it must distinguish between the relationship of parties to the different kinds of promises.

If the *Kellogg* opinion is construed to hold that privity means vertical privity and is only a succession of valid conveyances in the same land,[122] then the differences between the relationships that notice and privity demarcates are very slim.[123] The Vermont recording statute eliminates most of the room for distinction.[124] In

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118. Albright v. Fish, 136 Vt. 387, 394 A.2d 1117 (1978); Chimney Hill Owners' Ass'n v. Antignani, 136 Vt. 446, 392 A.2d 432 (1978).

119. 110 Vt. at 117-18, 3 A.2d at 532.

120. See *supra* text accompanying note 109.

121. The standard of privity in *Kellogg* requires that the owner of the land benefited or burdened by the promise derives title in a direct line from an original party to the promise. Defendant Gale acquired her title directly from the original holder of the burdened estate. *Id.* at 113, 3 A.2d at 530. Since defendant's predecessor in title made the promise in a transfer by deed, *id.*, the promise also met a requirement of instantaneous horizontal privity.

122. See *supra* text accompanying notes 91-93.

123. *See generally*, Cross, *supra* note 3, at 1324; Stoebuck, *supra* note 13, at 921.

124. VT. STAT. ANN. tit. 27 § 342 (1975). The *Queen City* court operated under a recording statute identical to Vermont's current statute. *Compare* VT. STAT. ANN. tit. 27, § 341 (1975) *with* VT. P.L. tit. 11, § 2592 (1933).

Vermont, the validity of a transfer of an estate or interest in real property depends upon compliance with the state's recording act.[125] The purpose of the recording act in Vermont is to afford notice to subsequent purchasers.[126] By definition, each successor of an original party to a promise running with the land through transfer by deed is in vertical privity of estate with the original party. For each successive transfer by deed to be valid, however, each deed must be recorded. If the deed is recorded, then each subsequent recipient of the land has notice of all restrictions in the chain of title. At the very least, the notice requirement includes all cases of vertical privity of estate. The greatest dissimilarity between the vertical privity and the notice requirements would arise in cases of adverse possession. In such cases, as the *Kellogg* court suggested,[127] the privity requirement would not be satisfied by the adverse possessor and could not bind him to a promise running with the land. Equity should bind an adverse possessor, however, whether he took with our without notice.[128]

The addition of a requirement of horizontal privity of estate would add a further distinction between the requirements of privity of estate and notice. "Instantaneous" privity would require that some interest in land other than the promise intended to run would have to pass between the promising parties.[129] The horizontal privity requirement would mean that adajacent landowners could not agree to restrict the use of their land and, without more, have that agreement run with the land at law. Since the notice requirement applies only to successive interests in the land, however, such a promise between adajacent landowners would bind their successors in equity.

For these landowners to be sure that their promise runs in equity, however, they would be well advised to record the promise in accordance with the statute. Recording the promise would constitute constructive notice to all subsequent takers.[130] Moreover it

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125. VT. STAT. ANN. tit. 27, § 342 (1975).

126. "The object of enrollment is notice . . . ." Bigelow v. Topliffe, 25 Vt. 273, 283 (1853).

127. 6 Vt. at 282.

128. *See In re* Nisbet & Potts Contract, 1 Ch. 386 (C.A. 1906). Professor Stoebuck asserts that equitable principles will hold an adverse possessor regardless of whether the promise to be enforced is legal or equitable. Stoebuck, *supra* note 13, at 901.

129. See *supra* text accompanying notes 42-43.

130. *See, e.g.*, Sands v. United States, 198 F. Supp. 880 (W.D. Wash. 1960); Everett Factories & Terminal Corp. v. Oldtyme Distillers Corp., 300 Mass. 451, 15 N.E.2d 829

would also ensure the validity of the promise itself, because the validity of a transfer of an interest in land in Vermont is contingent upon compliance with the recording statute.[131] Certainly, promises running with the land are significant enough to be characterized as interests in land.[132] Recording the promise, therefore, best ensures that it will run with the land and effect the parties' intent.[133]

A landowner who attempts to bind his land with a restrictive promise would go through the same process of recording whether the promise were eventually to be interpreted as running at law or in equity. Even if a court were to require horizontal privity of estate for a promise to run with the land, all promises that run at law will run in equity, and most promises that run in equity will also run at law. There is a narrow margin where the two concepts do not coincide because the technical requirements of privity of estate exclude a small number of cases involving adverse possessors. In order for the Vermont court to maintain the difference at the margin, however, the margin must comprise cases in which there is a purpose for allowing injunctive relief when money damages would be undesirable. The history of promises running with the land suggests, however, that the distinctions between promises running at law and in equity are more semantic than substantive.

III. Current Vermont Decisions

In 1978 the Vermont Supreme Court decided two cases that maintained the formal separation of promises running with the land at law and in equity. Of the two cases, *Albright v. Fish*[134] and *Chimney Hill Owners' Ass'n v. Antignani*,[135] *Albright* did more to

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(1938); Popplewell v. City of Mission, 342 S.W.2d 52 (Tex. Civ. App. 1960).

131. Vt. Stat. Ann. tit. 27, § 342 (1975).

132. *See, e.g.*, Olcott v. Southworth, 115 Vt. 421, 63 A.2d 189 (1949) (easement created by exception); Claremont Bridge v. Royce, 42 Vt. 730 (1870)(right to control passage over land adjacent to bridge); Barnard v. Whipple, 29 Vt. 401 (1857)(right to pew in a meeting house). *See* Newman & Losey, *supra* note 3, at 1340.

Conversely, recording an agreement that concerns an interest not connected to the land will not afford constructive notice. *See, e.g.*, Pennock v. Goodrich, 104 Vt. 134, 157 A. 922 (1932)(recorded executory agreement to convey does not constitute notice). Ruling that promises running with the land are not interests in land would create the anomaly whereby a promise intended to run with the land which was recorded would afford no notice because recording an instrument that does not contain an interest in land gives no notice.

133. *See* Cross, *supra* note 3, at 1320; Newman & Losey, *supra* note 3, at 1336.

134. 136 Vt. 387, 394 A.2d 1117 (1978).

135. 136 Vt. 446, 392 A.2d 423 (1978).

define the different standards the court would apply to running promises.

The fact pattern of *Albright* is complicated. In 1972 a pair of real estate developers began to sell parcels of land from a seventy-two acre tract in Norwich. The Millers bought a parcel of 18.9 acres which was described by deed as consisting of twenty acres "more or less."[136] The Wells bought the remaining two parcels of thirty-eight and fifteen acres.[137] Each deed contained a restrictive promise limiting the lot size to a minimum of ten acres and stating the parties' intent that the promise should run with the land for fifty years.[138] In 1973 the Millers subdivided their parcel into lots of 10 acres and 8.9 acres, in violation of the promise. They obtained a quitclaim deed from the developers that purported to free the land from the burden of the restrictive promise. The Albrights purchased the 8.9 acre lot.[139] Subsequently the Wells sold their fifteen acre parcel to the Sachs and their thirty-eight acre parcel to the Teachouts.[140]

In 1975 the Sachs and Teachouts notified the Albrights that the Albright lot violated the restrictive promise and that the Albrights should not build on it. The Albrights sued the Sachs, Teachouts and Millers.[141] In 1976 the Sachs and Teachouts settled with the Albrights by purchasing undivided one-half shares in the 8.9 acre lot. The Sachs and the Teachouts then filed a cross-claim against the Millers seeking damages for breach of a restrictive promise running to their benefit.[142] The parties agreed to try separately the questions of liability and extent of damages.[143] Reversing

136. 136 Vt. at 390, 394 A.2d at 1119.

137. *Id.*

138. *Id.*

139. The Fishes purchased the ten acre lot. Although they were little involved in the ensuing litigation, they were honored in the caption of the case.

140. *Id.* at 391, 394 A.2d at 1119.

141. *Id.* The Albrights asked either that the Millers be forced to reacquire the offending lot of that the Albrights be permitted to build on their lot and be reimbursed for damages caused by the delay.

142. *Id.* Part of the Millers' defense was that the quitclaim deed obtained by them from the developers released them from the burden of the promise. The court held that the developers could not release the burden of the promise because they had already conveyed the balance of the benefited land before making the quitclaim deed. *Id.* at 394, 394 A.2d at 1121.

143. *Id.* at 392, 394 A.2d at 1120. The question of damages subsequently came before the Vermont Supreme Court in Albright v. Fish, 138 Vt. 585, 422 A.2d 250 (1980). The court ruled that the proper measure of damages was the difference in value of the land before and after the breach of the promise. *Id.* at 589, 422 A.2d at 253. Since plaintiffs introduced no evidence of diminution of value, the court awarded nominal damages in recognition of the

the trial court, the supreme court held that the promise ran with the land in favor of the Sachs and Teachouts.[144]

The court used a three-step reasoning process to reach its conclusion. In its initial step, the court stated that since the Sachs and Teachouts asked for money damages, the promise they were trying to enforce must run "at law."[145] The second step was to state the requirements for a promise to run with the land at law. "First, the covenant must be in writing. Secondly, the parties must intend that the covenant run with the land. Thirdly, the covenant must 'touch and concern' the land. Lastly, there must be privity of estate between the parties."[146] These requirements are essentially those announced in *Kellogg v. Robinson,* the case relied upon in *Albright.*[147]

In its third step, the court fit the facts of the case to these requirements. It examined the promise from both the burden side and the benefit side. The promise itself satisfied the court that the burden was meant to run, because the parties stated their intent expressly within the promise.[148] This statement of intent was, apparently, sufficient evidence for the court. Resolving the question of whether the *burden* should run with the land simply on the expressed intent of the parties inverts the usual analysis of promises running with the land. The intent of the parties generally is effective with respect to the burden only if the other requirements are also met.[149]

In *Albright* the intent of the parties with respect to the *benefit* was not clear to the court. Consequently the court felt a need to examine the surrounding circumstances to discover whether it could infer such an intent.[150] As with its approach to the running of the burden, the court's concern over whether the benefit was

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violation of property rights. *Id.* at 592, 422 A.2d at 254.

144. 136 Vt. at 395, 394 A.2d at 1121.

145. *Id.* at 393, 394 A.2d at 1120. On the difficulties attendant to characterizing a promise running with the land by the relief sought, *see* Cross, *supra* note 3, at 1326 n.42.

146. 136 Vt. at 393, 394 A.2d at 1120.

147. *Id.* at 394, 394 A.2d at 1120-21. The writing requirement was derived from the other authority cited by the court, 5 R. Powell, The Law of Real Property ¶ 672 (rev. ed. 1977). In the current edition, see 5 R. Powell, *supra* note 13 at ¶ 671.

148. 136 Vt. at 393, 394 A.2d at 1120.

149. *See, e.g.*, Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938); Raintree Corp. v. Rowe, 38 N.C. App. 664, 248 S.E.2d 904 (1978); Hall v. Risely, 188 Ore. 69, 213 P.2d 818 (1950).

150. 136 Vt. at 393, 394 A.2d at 1120.

intended to run is somewhat anomalous.[151] Usually, difficulties are more likely to rise over the running of the burden.[152] Moreover, a conveyance of property, like the conveyance in *Albright,* in which the selling party retains property affected by the promise usually means that both the benefit and the burden are intended to run with the land.[153]

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151. *See* 5 R. POWELL, *supra* note 13 ¶ 673[2][b] at 60-56. California requires that the instrument itself reveal the intention of the parties that the benefit should run. Werner v. Graham, 181 Cal. 174, 183 P. 945 (1919). Usually, however, difficulties are more likely to arise over the running of the burden of the promise. *See* Browder, *supra* note 13, at 14.

The intent regarding the running of the burden and the benefit should be analyzed separately. 5 R. POWELL, *supra* note 13 ¶ 673[2][b], at 60-53. The separate analysis is to prevent the assignment of a personal burden or benefit by a party who has no land. For example, if, in the original hypothetical with *X* and *Y* and the one story house, *X* had subsequently sold all his property, could the new owners of *X*'s property claim the benefit of the *X-Y* promise? Should subsequent purchasers of *Y*'s property bear the burden of the promise? The issue is to be resolved by determining the intent of *X* and *Y* when they made their promise and by determining whether the remaining requirements are met for the running of the burden or benefit. *See* Traficante v. Pope, 115 N.H. 356, 341 A.2d 782 (1975); Raintree Corp. v. Rowe, 38 N.C. App. 664, 248 S.E.2d 904 (1978).

There is a debate over whether the benefit or the burden of a promise should run with the land if its counterpart does not, for example, whether the burden should run with the land if the benefit of the promise is purely personal. While the case law is unsettled, POWELL gives limited approval to the running of a burden or benefit when the other side is personal. 5 R. POWELL, *supra* note 13 ¶ 673[2][b], at 60-54. It should be emphasized that, although a burden or benefit can be personal, at the time the promise was made the burdened or benefited party had to have owned land with which the promise could have run.

The split in the case law is more pronounced regarding the running of a burden because burdens tend to make land less valuable. 5 R. POWELL, *supra* note 13, ¶ 673[2][b], at 60-43 to 60-46. For the position that the burden can run when the benefit is personal, *see, e.g.,* Smith v. Gulf Refining Co., 162 Ga. 191, 134 S.E. 446 (1926); Merrionette Manor Home Improvement Ass'n v. Heda, 11 Ill. App. 2d 186, 136 N.E.2d 556 (1956); Bald Eagle Valley R.R. v. Nittaney Valley R.R., 171 Pa. 284, 33 A. 239 (1895). For the position that the burden cannot run, *see, e.g.,* Blodgett v. Trumbell, 83 Cal. App. 566, 257 P. 199 (1927); Carroll County Development Corp. v. Buckworth, 234 Md. 547, 200 A.2d 145 (1964); Auerbacher v. Smith, 22 N.J.S. 568, 92 A.2d 492 (1952).

In a classic controversy, Professor Oliver Rundell, in the RESTATEMENT OF PROPERTY, adopted the restrictive view that both burden and benefit must touch and concern the land for the promise to run. RESTATEMENT OF PROPERTY, § 537, comment c (1944). The RESTATEMENT coupled this position with a restrictive requirement for privity of estate. *Id.* § 534. Judge Clark led a passionate attack on the RESTATEMENT position. *See* Clark, *supra* note 30. Professor Rundell replied in the same forum, Rundell, *Judge Clark on the American Law Institute's Law of Real Covenants: A Comment,* 53 YALE L.J. 312 (1944).

The benefit of a promise is usually allowed to run with the land even if the burden is merely personal. *See, e.g.,* Greenspan v. Rehberg, 56 Mich. App. 310, 224 N.W.2d 67 (1974); City of Reno v. Matley, 79 Nev. 49, 378 P.2d 257 (1964). The reason for permitting the benefit of a promise to run is that the benefit running with the land will enhance the land's value, 5 R. POWELL, *supra* note 13 ¶ 673[2][a], at 60-43.

152. *See* Browder, *supra* note 13, at 13-14.

153. *See* 5 R. POWELL, *supra* note 13 ¶ 673[2][b], at 60-54.

Nevertheless, the court investigated and was ultimately satisfied that the surrounding circumstances indicated that the intent of the parties was for the benefit to run with the land.[154] The court also concluded that the promise touched and concerned the land because the promise was "bound up with the use of the land and benefit[ed] the [Sachs and Teachouts] in their capacity as landowners."[155] In finding the privity requirement satisfied, the court stated, "because both horizontal privity of estate and vertical privity of estate are present on these facts, the privity of estate requirement is, of necessity, met."[156] The necessity can be questioned, however, because the definition of horizontal privity of estate is far from clear.[157] Since the *Albright* facts do not meet the requirements of tenurial privity of estate or of Massachusetts privity of estate, the court probably meant that the facts met a requirement of instantaneous privity of estate.[158] Moreover, the court's statement is dicta, and it has left unclear whether the Vermont court now requires horizontal privity of estate for the running of promises with the land at law. If the court does, it has not

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154. 136 Vt. at 394, 394 A.2d at 1121. The court's analysis of whether the parties intended the benefit to run is somewhat confusing. The court began by echoing the *Kellogg* statement that some promises are so intimately connected to the land that they run of necessity. The court said that the *Albright* promise was that kind of promise. Presumably, that would mean that no further analysis was needed, but the court continued to infer the parties' intent from the surrounding circumstances. *Id.* The court raised, but did not answer, the question whether there are promises that run of necessity, and, if so, how much analysis is needed to show necessity.

The standards the court used for inferring intent were derived from 5 R. POWELL, *supra* note 13 ¶ 673[2][a]-[b]. Some of these standards, particularly the observation that the promise tended to render the land somewhat more valuable, 136 Vt. at 394, 394 A.2d at 1121, seemed to apply more clearly to the touch and concern requirement. Since the court found the presence of the touch and concern requirement in a conclusory sentence, the implication of the court's reasoning is that the presence of intent proves the presence of the touch and concern requirement. This reverses the usual order of things. See *supra* notes 95-96. (The court used the 1977 edition of POWELL; the current edition emphasizes more strongly the difference between the intent and touch and concern requirements. 5 R. POWELL, *supra* note 13 ¶ 673[2][a]-[b].)

155. 136 Vt. at 394, 394 A.2d at 1121. The language echoes both Queen City Park Owners' Ass'n v. Gale, 110 Vt. 110, 119, 3 A.2d 529, 531 and Kellogg v. Robinson, 6 Vt. 276, 281.

156. 136 Vt. at 394, 394 A.2d at 1121.

157. *See supra* text accompanying notes 43-45.

158. For the proposition that the facts of the case support a finding of horizontal privity, the court cites two authorities: Kellogg v. Robinson, 6 Vt. at 282 and 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 674, at 176-78 (rev. ed. 1977). Albright v. Fish, 136 Vt. at 394, 394 A.2d at 1121. Neither source uses the term "horizontal privity of estate." POWELL did discuss the various kinds of privity of estate that have developed through the years. He favored a privity requirement that would be most like vertical privity of estate. The current edition of POWELL cites *Albright* as an example of a court requiring horizontal privity. 5 R. POWELL, *supra* note 13, ¶ 673[2][c], at 60-61 n.110.

said why it does.

The *Albright* decision raised more questions than it settled regarding the meaning of promises running with the land at law. The confusion generated over the intent of the parties, the running of burdens and benefits, and the privity of estate requirement could be explained as incidental fallout from the imposition of formal concepts without regard to the substance beneath those forms. The more serious fallout comes from the maintenance of the distinction between promises running with the land at law and promises running in equity. The *Albright* court explicitly asserted the continuance of the distinction,[159] but the continuance of the distinction is best explored through an analysis of *Chimney Hill Owners' Association v. Antignani*,[160] a companion case to *Albright v. Fish*.[161]

In *Chimney Hill*, the court stated the requirements for a promise to run with the land in equity: the promise must be in writing, there must be intent that the promise run, the promise must touch and concern the land, and there must be notice.[162] The *Albright* court provided a gloss for these requirements in a footnote, stating that the requirements are used "[w]hen the plaintiff seeks to strictly enforce the covenant."[163] The major difference between a promise that runs at law and a promise that runs in equity is that for a promise to run in equity, a notice requirement replaces the privity requirement and the touch and concern requirement is "somewhat more easily met."[164]

The promise in *Chimney Hill* involved an annual maintenance assessment. Plaintiff was a successor in title to Chimney Hill Corporation. The corporation had begun a development of over 900 lots for recreational second homes in Wilmington. The developer retained over 300 acres of "common land" on which it constructed communal recreational and service facilities.[165] The developer included in each purchase and sale agreement and in each deed a "declaration of Protective Covenants, Restrictions and Reserva-

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159. 136 Vt. at 393 n.1, 394 A.2d at 1120 n.1.

160. 136 Vt. 446, 393 A.2d 423 (1978).

161. *Albright v. Fish* and *Chimney Hill Owners' Ass'n v. Antignani* were originally handed down on the same day. *Chimney Hill*, 136 Vt. at 454, 392 A.2d at 428. The current discrepancy in citation stems from the need for the court to dispose of a motion for reargument in *Albright v. Fish*.

162. 136 Vt. at 454-55, 392 A.2d at 428.

163. 136 Vt. at 393 n.1, 394 A.2d at 1120 n.1.

164. *Id.* (citations omitted).

165. 136 Vt. at 449, 392 A.2d at 425.

tions" which contained an annual charge against each lot in the Chimney Hill development.[166]

The three separate defendants in the case had acquired their lots from the developer.[167] After it had acquired the developer's retained land, plaintiff billed each defendant for back assessments. Each defendant had paid only a single assessment.[168] In its suit plaintiff claimed a right to recover on three different grounds[169] and was successful on its claim based on the promise running with the land.[170]

The promise in Chimney Hill easily met the requirements for a promise running with the land in equity. The promise was in writing.[171] The promise to pay the assessment stated the parties' intent regarding both the burden and the benefit of the promise,[172] and *Queen City* had already held that a promise to pay an annual assessment touched and concerned the land.[173] Recording the Declarations provided notice to all subsequent takers of the land.[174] The agreements required no analysis whatever to find that they ran with the land.

In *Chimney Hill* and *Albright*, the Vermont Supreme Court maintained the venerable distinction between promises that run with the land at law and those that run in equity. The court asserted that the requirements for a promise to run in equity are less

166. *Id.* A copy of the Declaration was filed at the Wilmington Town Clerk's Office. The charge was made collectible by suit and enforceable by a lien on the lot. The Declaration announced the intent of the parties that the promise should run with the land to all successors until 1988, when the promise would expire. *Id.*

167. *Id.* at 449-50, 392 A.2d at 425.

168. One defendant, Eastern Woodworking Company, obtained a release from the developer for ten of its eleven lots. The court ultimately upheld the validity of this release, relieveing Eastern from the duty to pay an assessment on those lots. *Id.* at 454, 392 A.2d at 428.

169. Plaintiff claimed as representative of all property owners in the Chimney Hill development and as assignees of Chimney Hill Corporation. The court denied recovery as representative because the evidence of representation was outweighed by the evidence that Chimney Hill Corporation held the promises for its own benefit as owner of the common land and not for the mutual benefit of all lot owners. *Id.* at 451-52, 392 A.2d at 426-27. The court held that defendants Antignani and Keatinge were liable to plaintiff because plaintiff's predecessor in title had not waived their assessments. The release referred to at *supra* note 168 served as a waiver for defendant Eastern Woodworking Company. *Id.* at 454-55, 392 A.2d at 428.

170. 136 Vt. at 455, 392 A.2d at 429.

171. *Id.* at 455, 392 A.2d at 428.

172. *Id.* at 449, 392 A.2d at 425.

173. Queen City Park Ass'n v. Gale, 110 Vt. 110, 119, 3 A.2d 529, 533.

174. Chimney Hill Owners' Ass'n v. Antignani, 136 Vt. at 455, 392 A.2d at 428.

demanding,[175] but a comparison of the two cases brings the same conclusions reached by a comparison of *Kellogg* and *Queen City*.[176] The equitable promises of *Chimney Hill* would have met the standards imposed on the promises running at law in *Albright*. Although the court reasserted the need for two tests and for two categories of promises running with the land, the cases used by the court to restate the two categories did not effectively discriminate between the two. Assuming the essential identity of the two kinds of promises, a reason for having the two categories may be supplied: promises running with the land at law must meet a more demanding test, because there are some cases in which money damages would be inappropriate while specific performance would be tolerable. Not only does this rationale invert the traditional relationship between money damages and injunctive relief, however, it also does not explain the cases decided by the Vermont court.

In *Chimney Hill* plaintiff sued to recover lost assessments and to ensure the prospective receipt of those assessments. The amount of past damages was the amount of payments that defendants had not made. Plaintiff recovered these payments, in effect receiving money damages from an equitable promise. Plaintiff also received the further protection of prospective enforcement of the agreements. In *Albright* the court granted money damages in a case that would make a court balk at awarding specific performance. To make the offending 8.9 acre lot conform to the ten acre restriction, the court would have had to merge the lot back into its original 18.9 acre parcel. Accomplishing that feat would have required either that the Fishes, the owners of the ten acre lot, purchase 8.9 acres of land they may not have wanted or could not afford, or that the Sachs, Teachouts and Fishes transfer the lots back to the Millers. Specific performance in this case would have meant unweaving the warp of history.

An alternative explanation for the more rigorous demands for promises running at law could be that the more strict requirements would prevent the convoluted situations, represented by the *Albright* case, from developing in the first place. The fact is, however, that the court allowed the *Albright* promises to run and announced

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175. The *Albright* court found the touching and concerning the land requirement because the promise was bound up in the use of the land and benefited the promisees as landowners. 136 Vt. at 394, 394 A.2d at 1121. These are the more easily met components of the *Queen City* requirement for touching and concerning the land.

176. See *supra* text accompanying notes 119-33.

that the distinguishing factor for the more strict requirements for promises running with the land at law was the money damages sought as relief. The comparison of *Albright* and *Chimney Hill* indicates that restrictions, if necessary at all, are more appropriate for limiting the use of the equitable remedy.[177] Realistically, the traditional principles of equity allow courts the flexibility to avoid disastrous results.[178] Attempting to categorize promises that run with the land by the relief sought by the contending parties misdirects the proper focus. A more fruitful approach would be for a court to determine whether the original promising parties intended the promise to run with the land and then, if they did, for the court to determine whether those parties attached the promise to the land sufficiently for subsequent holders of the land to know that they would be bound by the promise. If the court determines that the parties afforded notice to subsequent holders, then its task is to affix an appropriate remedy to resolve the controversy.

In deciding *Albright* and *Chimney Hill*, the Vermont Supreme Court missed an opportunity to distill from the traditional duality a unified, clear statement of the requirements for promises running with the land. Instead, it maintained the duality and did not clarify the policy behind it. The Vermont court may disagree with Justice Cardozo and believe that there is space between the paths of promises running at law and in equity. If the court has found a reason to choose between them, it has not articulated that reason. Basing the distinction on the relief sought is not adequate.

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177. Courts of equity extended promises running with the land to validate some promises which might have failed if evaluated by using the standards of promises running with the land at law. *See* Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 252, 15 N.E.2d 793, 798 (1938). Although courts of equity are not absolutely barred from granting money damages, their more usual grant of relief is the injunction. Writers have reasoned backwards from the relief granted to determine the category of promise running with the land: injunctive relief means that the court used the equitable restriction theory (Newman & Losey, *supra* note 3, at 1319) and money damages means that the case involved a covenant running at law (Stoebuck, *supra* note 13, at 906).

178. The Vermont court has avoided injunctive relief when the hardships of an injunction made money damages more appropriate. *See* Thompson v. Smith, 119 Vt. 488, 511, 129 A.2d 638, 652-53 (1957) (the court awarded money damages rather than force the demolition of a motel that violated a zoning ordinance). In McDonough v. W.W. Snow Constr. Co., 131 Vt. 436, 306 A.2d 119 (1973), however, the court distinguished restrictive promises from zoning ordinances. *Id* at 444, 306 A.2d at 124. The *McDonough* court ruled that injunctive relief is appropriate even though " 'there will be a greater hardship on the defendants than benefit to the plaintiff.' " *Id.* (quoting Welch v. Barrows, 125 Vt. 500, 508, 218 A.2d 698, 705 (1966)).

Conclusion

Justice Holmes wrote that the "substance of the law at any given time pretty nearly corresponds . . . with what is then understood to be convenient; but its form, and the degree which it is able to work out desired results, depends very much on the past."[179] Vermont's law of promises running with the land very nearly reverses this pattern. The substance of the law can be found in the past in *Kellogg v. Robinson*. The modern cases of *Albright v. Fish* and *Chimney Hill Owners' Association v. Antignani* purport to leave the law as they found it; more probably these cases add formal machinery that stands in the way of what is convenient.

The separate categories maintained by the Vermont court represent distinctions without a difference. Even with the new machinery, any promise that meets the requirements for running with the land at law also meets the requirements for running in equity. Promises running at law are, in effect, a subcategory of the more inclusive equitable concept.[180] Given the merger of courts of law and equity in Vermont,[181] the maintenance of the distinction between the two concepts is difficult to justify. A more productive approach to promises running with the land would be to articulate a single set of requirements for promises to run with the land[182] and encourage courts to fit an appropriate remedy to each case before them.[183]

Even if the Vermont court were to adopt a single standard for

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179. O. Holmes, The Common Law 1-2 (1881).

180. "[T]he real covenant has, or nearly has, disappeared into the equitable servitude." Cross, *supra* note 3, at 1327.

181. Vt.R.Civ.P. 2 (1971). Presiding judges are meant to act "in equity matters with the same flexibility with which they previously acted as chancellors." Vt.R.Civ.P. 1 (Rep. Note 1971).

182. Professor Stoebuck has restated the requirements for running promises:

> 1) a covenant enforceable to create an interest in land between the parties who made it, 2) the burden of which touches and concerns the covenantor's land (and the benefit of which may touch and concern the covenantee's land), 3) compliance with the applicable recording act as to the burdened land, and 4) a succession of interest in or possession of the burdened land (or in or of the benefited land if the benefit is to run).

Stoebuck, *supra* note 13, at 921.

183. The *Chimney Hill* decision granting past damages and prospective injunctive relief suggests that the Vermont Supreme Court has substantively adopted this pragmatic approach. The merger of courts of law and equity has pushed most jurisdictions to this expedient. 5 R. Powell, *supra* note 13 ¶ 676. Given the court's position on remedies, there is little to inhibit it from abandoning the confusing and archaic formal distinctions that it has attempted to maintain in *Albright* and *Chimney Hill*.

promises running with the land, the common law background of *Kellogg, Albright* and *Chimney Hill* would require the court to answer a number of questions. These include: 1) Can the burden of a promise run with the land if the benefit is personal?[184] 2) Does the touch and concern requirement function as a rule of construction to determine the parties' intent, or vice versa? Or are the two elements independent of each other?[185] 3) Can parties create a promise running with the land without transferring a separate interest in land?[186] By deciding these questions in the context of a unified theory, the court could concentrate on responding to the needs of landowners, rather than fitting answers to legal theory.

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184. *See supra* note 151.
185. *See supra* note 154 and accompanying text.
186. *See supra* text accompanying note 156.