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Randall K. Steverson

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Covenants and Equitable Servitudes in California

If two landowners enter into an agreement respecting the use of their land, the agreement as between them is enforceable in contract.\(^1\) If one of the landowners subsequently sells his land and the other landowner seeks enforcement against the transferee who has not assumed the obligation of the contract, the agreement can only be enforced as a covenant running with the land or through the equity powers of the court.\(^2\) In California there are two major provisions for covenants running with the land, Civil Code sections 1462 and 1468.\(^3\) Each section has its own set of requirements that must be met before a covenant can run with the land, and if the covenant fails to run under one, it may run under the other. If the covenant fails to run under either section, the court may still enforce it against a transferee taking with notice.\(^4\) This Note will explore the statutory covenants and the circumstances under which a court should grant equitable enforcement.\(^5\)

The Note first considers the four common law prerequisites to running covenants. The Note then analyzes Civil Code section 1462 and how the courts have misunderstood and unduly limited the section. The original provisions of section 1468 are briefly considered, followed by a more detailed analysis of the section as amended. The Note then traces the development in California of equitable servitudes. The Note points out that amended section 1468 will eventually supplant traditional equitable enforcement and suggests that the courts reconsider their equitable enforcement powers. The final section of the Note discusses various rules of construction, enforcement, and termination applicable to both covenants and equitable servitudes.

Historical Background

A covenant is a promise by one party to do or refrain from doing a certain thing.\(^6\) The person making the promise is the covenanantor and the one receiving the benefit is the covenantee. Between the

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5. The Note will not discuss covenants of title or covenants in a lease.
original covenanting parties there is a contract, and any action to enforce the covenant would be in contract.\(^7\) If either the covenantor or covenantee sells his property, the question arises whether the transferee of the covenantor is bound or whether the transferee of the covenantee has any right of enforcement. If the covenantor specifically delegated the burden of the covenant to his transferee and the transferee assumed the obligation, the agreement could still be enforced in contract.\(^8\) Likewise, if the covenantee assigned his rights to his transferee, the transferee could enforce the contract.\(^9\) If no delegation or assignment were made, however, the promise could not be enforced in contract.\(^10\)

At early common law, assignment of contract rights and delegation of duties were not recognized,\(^11\) so that even if the parties wanted to continue the life of the contract, the covenantor could not delegate the duty to a transferee, and the covenantee could not assign his benefit. Yet the early common law recognized a need for the continuation of promises respecting the use of property, and out of that recognition arose the concept of covenants that run with the land.\(^12\) The burden of the covenant was said to run with the land of the covenantor, and the benefit ran with the land of the covenantee, so that any subsequent grantee acquiring the land of either the covenantor or covenantee would also acquire the burden or the benefit.\(^13\)

There is some dispute as to how the concept of running covenants developed at common law,\(^14\) but the important consideration today is the prerequisites for a covenant to run with the land. There is general agreement that at common law four requirements must be met before the covenant will run: (1) the covenant must be in writing, (2) the original parties to the promise must intend the covenant to run, (3) the covenant must have some relationship to the land, and (4) the party seeking to enforce the covenant must be in privity of estate with the party against whom the covenant is enforced.\(^15\)

\(^12\) Powell, supra note 11, at § 671.
\(^13\) Id. n.3.
\(^14\) C. Clark, Real Covenants and Other Interests Which "Run With Land" 119-22 (2d ed. 1947) [hereinafter cited as Clark].
\(^15\) Id. at 94; Powell, supra note 11, at §§ 672-75.
Necessity of a Writing

Because a promise respecting the use of land creates an interest in property the Statute of Frauds applies, and the promise must be in writing to be valid. The courts in California have been adamant in refusing to give effect to an oral promise, even when it would appear equitable to do so.

In numerous California cases a subdivider has orally promised his purchasers that he was putting covenants in all the deeds to limit a tract of land to single family residences but through either negligence or intentional deception has failed to act on the promise. Although the purchasers relied upon the developer's oral representations, the courts have refused to enforce the oral promise against the developer or those taking with notice. In light of the basic principle of equity that land use restrictions will be enforced against those taking with notice, the refusal of the California courts to give effect to the restrictions seems both harsh and inconsistent with modern practice.

If there is no dispute that the oral promise has been made, neither the developer nor his successors taking with notice should be allowed to invoke the Statute of Frauds to obtain an advantage over those who acquired the property in reliance upon the oral representations.

16. The California Statute of Frauds is embodied in CAL. CIV. CODE § 1624 (West 1973): "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: . . . An agreement . . . for the sale of real property, or of an interest therein . . . ." See also Riley v. Bear Creek Planning Comm., 17 Cal. 3d 500, 509-10, 551 P.2d 1213, 1220, 131 Cal. Rptr. 381, 388 (1976). CAL. CIV. CODE § 1462 (West 1954) provides for covenants contained in a "grant of an estate" and a "grant" is defined in CAL. CIV. CODE § 1053 (West 1970) as a transfer in writing. CAL. CIV. CODE § 1468 (West Supp. 1977) also contemplates the covenant will be in writing, because the land benefited by the covenant must be particularly described and the instrument containing the covenant must be recorded.


22. The purpose of the Statute of Frauds is to prevent fraud and perjury. Riley
The Statute of Frauds has a further requirement that the writing be signed by the person against whom it is enforced. The acceptance of a deed or written instrument containing the covenant, however, is considered the equivalent of signing an agreement to perform the promise. Thus the promise must be in writing, but it need not be signed by the promisor.

Intent of the Parties

Unless the original parties to the covenant intend that the covenant bind their successors in interest, the covenant will be considered personal to them. Although formal or technical terms such as "assigns" may be used to show intent, such technical terms are generally not necessary. Under the common law and the provisions of Civil Code section 1462, intent can be shown by a statement in the deed that the covenant runs with the land. Under Civil Code section 1468, however, a more specific statement of intent may be required.

The intent of the parties should be analyzed separately as to the running of the benefit and the running of the burden. Under the common law and Civil Code section 1462, express words are not necessary for the benefit of a covenant to run. An intent that the benefit pass may be determined from the nature and subject matter of the covenant. Thus, if the covenant is beneficial to the land and does not seem to be personal to the covenantee, the benefit passes as an in-
incident to the ownership of the land. For example, a covenant to maintain a ditch to prevent salt water flooding was transferable to a grantee of the covenantee without any mention in the deed of an intent that the covenant run with the land.\(^\text{31}\) Under Civil Code section 1468, however, the covenant may have to state expressly that it is for the benefit of the land of the covenantee before the benefit will run, if the courts strictly construe the provisions of that section.\(^\text{32}\)

If the parties wish the burden of a covenant to pass, under both the common law and under the provisions of sections 1462 and 1468, they must expressly state their intent. Because there is a judicial preference for the free use of land, covenants burdening the land will be strictly construed,\(^\text{33}\) and courts will be slow to declare a burden on real property.\(^\text{34}\)

**Relationship to the Land**

If a covenant is to bind whoever is the owner of the land, logically the covenant must relate to the land, or, as is sometimes said, the covenant must "touch and concern" the land.\(^\text{35}\) The promise, however, need not physically concern the land but may affect only the title or interest in the estate of the covenantee.\(^\text{36}\) For example, a covenant providing for the removal of a lien unfetters title and directly benefits the land.\(^\text{37}\) Likewise, a covenant to quitclaim oil rights restores the rights to the landowner and benefits the land.\(^\text{38}\) Promises to take out insurance, to repair, and to develop mineral resources are covenants relating to the land.\(^\text{39}\)

**Privity of Estate**

Considerable disagreement exists among legal scholars and among jurisdictions as to what constitutes privity of estate.\(^\text{40}\) Privity means a "connection of interest," and the requirement of privity of estate means a sufficient connection between two parties such that one party

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32. See text accompanying notes 88-87 & 97-105 infra.
34. Bresee v. Dunn, 178 Cal. 98, 100, 172 P. 387, 389 (1918).
35. Powell, supra note 11, at § 675.
40. Clarke, supra note 14, at 92-93.
can enforce an agreement concerning an estate in land against the other party.\textsuperscript{41} Between the original covenancing parties there is privity of contract, and the agreement is enforceable in contract.\textsuperscript{42} If one of the original parties transfers his land, the transferee is not in privity of contract, and the covenant can only be enforced if the transferee is in privity of estate.\textsuperscript{43}

Suppose A owns two parcels of land and conveys one parcel to B with a promise from B that the land will be used only for a residence.\textsuperscript{44} If B later conveys the land to Y, whether Y is in privity of estate with A depends on how privity is defined, and it has been defined in the various jurisdictions in four different ways.\textsuperscript{45}

The strictest definition of privity requires a tenurial relationship between the parties — that one party holds his estate subordinate to the other party. A tenurial relationship is found in a lease, in which the tenant holds subordinate to the landlord and in a life estate, in which the life tenant holds subordinate to the reversioner.\textsuperscript{46} If either

\begin{itemize}
\item[A] is the original grantor conveying a parcel of land to B. At the time of that conveyance a covenant is made, either A's promising something with respect to the land he retains or B's promising something with respect to the land she receives. Subsequently, one or both of the following transactions occur: A transfers all or part of his remaining land to X or B transfers her land to Y. A and B are the original covenancing parties, and X and Y are their respective transferees.
\end{itemize}

\textsuperscript{41} Id. at 112-13.
\textsuperscript{42} Grange Co. v. Simmons, 203 Cal. App. 2d 567, 573, 21 Cal. Rptr. 757, 760 (1962).
\textsuperscript{43} Werner v. Graham, 181 Cal. 174, 180, 183 P. 945, 947 (1919); Los Angeles Terminal Land Co. v. Muir, 136 Cal. 36, 41, 68 P. 308, 309 (1902). These two California cases are cited as a reflection of general common law and not of California law. Although privity of estate is required at common law for the enforcement of a covenant, California is governed by statute that does away with the privity of estate requirement. \textit{Cal. Civ. Code} §§ 1462 & 1468 (West 1954 & Supp. 1977); Powell, \textit{supra} note 11, \S 674, at 180. The California courts, however, have misunderstood and at times ignored California statutes. See notes 48-64 & accompanying text infra.
\textsuperscript{44} Covenants usually involve at least two transfers of land, first from a grantor to a grantee and then to a later subsequent grantee. The relationship of the parties can be more easily understood if the following diagram is kept in mind:

\begin{center}
\begin{tikzpicture}
\node (A) at (0,0) {A};
\node (B) at (2,0) {B};
\node (X) at (1,-1) {X};
\node (Y) at (1,1) {Y};
\draw (A) -- (B);
\end{tikzpicture}
\end{center}

44. Covenants usually involve at least two transfers of land, first from a grantor to a grantee and then to a later subsequent grantee. The relationship of the parties can be more easily understood if the following diagram is kept in mind:

\textsuperscript{45} Powell, \textit{supra} note 11, at \S 674 (identifies four kinds of privity); Clark, \textit{supra} note 14, at 111-43 (identifies three kinds of privity). The discussion in the text follows the four definitions given by Powell.
\textsuperscript{46} A tenurial relationship also includes an estate for years.
the tenant or the life tenant conveys his entire estate to a transferee, the transferee continues to hold the estate subordinate to the landlord or the reversioner. The transferee is placed in a tenurial relationship with the landlord or reversioner, and any covenants the original tenant made devolve onto the transferee. If \( A \) gives \( B \) a lease and \( B \) assigns the lease to \( Y \), the benefits and burdens of \( B \)'s covenants pass to \( Y \).

A slightly less restrictive definition of privity requires a simultaneous or mutual interest between the parties. This second definition includes not only the lease and life estate but also cotenancies.\(^47\) The landlord has a simultaneous interest in the same parcel of land as the tenant; the landlord owns the reversionary interest, and the tenant owns an estate for term. Likewise, the life-estate reversioner owns a simultaneous interest with the life-tenant. Cotenants own a simultaneous, equal, and undivided interest in the cotenancy. If \( A \) and \( B \) are cotenants and \( B \) conveys his share to \( Y \), \( Y \) acquires an equal and undivided interest in the cotenancy and has a simultaneous interest in the same land as \( A \). The benefit and burden of the covenants between \( A \) and \( B \) pass to \( Y \).

A third definition establishes privity between a grantor and grantee. The only requirement for privity under this definition is that the covenant be created at the time of the conveyance of an estate. This definition includes covenants contained in a deed conveying a leasehold, a life estate, a cotenancy interest and adds, most importantly, covenants contained in a deed conveying a fee. Covenants between two persons who already own their respective interests in land are not included. As long as the covenant is contained in the deed conveying any estate from \( A \) to \( B \), the covenant will run to the transferee \( Y \).

The fourth and most liberal definition establishes privity between any parties who are successors in interest to the original covenantor and covenantee. The covenant can be created either in the conveyance of an estate or between two parties who are already landowners. The only requirement is that the transferee acquire an estate that is benefited or burdened by a covenant. If \( A \) and \( B \) are adjoining landowners at the time \( B \) makes his promise to \( A \) and \( B \) later sells his land to \( Y \), \( Y \) is bound by the promise as a successor in interest to the land of \( B \).

California follows at least the tenurial definition of privity, establishing privity of estate between a landlord and tenant and between a reversioner and life tenant.\(^48\) California also appears to follow the

\(^{47}\) The holder of an easement also has a simultaneous interest with the owner of the fee.

\(^{48}\) See Standard Oil Co. v. Slye, 164 Cal. 435, 442, 129 P. 589, 591 (1913); Bonetti v. Treat, 91 Cal. 223, 229, 27 P. 612, 613 (1891); Salisbury v. Shirley, 66 Cal.
simultaneous or mutual definition, establishing privity between cotenants. Although no California case has directly decided that privity of estate exists between cotenants, two cases discussed covenants running between cotenants under the apparent assumption that privity did exist. California has unquestionably rejected the grantor-grantee and successor-in-interest definitions. In the early case of Los Angeles Terminal Land Co. v. Muir, the court adopted the view that if there is a conveyance of the fee, no reversion is left in the grantor, and no privity of estate can exist between the grantor and grantee and their successors in interest. The court added, however, that even if there is no privity of estate, the benefit of a covenant can run, but the burden never runs.

223, 225-26, 5 P. 104, 106 (1884). No California case was found specifically holding there is privity of estate between a life tenant and a reversioner. Because a tenurial relationship exists, the reasoning of the cases establishing privity between a landlord and a tenant must apply.

49. Harrison v. Domergue, 274 Cal. App. 2d 19, 78 Cal. Rptr. 797 (1969); Higgins v. Monckton, 28 Cal. App. 2d 723, 83 P.2d 516 (1938). In Harrison the covenant was held not to run with the land because the purpose of the covenant had ceased. In Higgins the covenant was not enforceable by the plaintiff-lessees because they did not acquire the entire estate of their lessors. For a discussion of this requirement, see note 205 & accompanying text infra.


52. By 1834 the English courts had decided that although the burden of a covenant did not run between owners in fee, the benefit did run. The English courts decided that only a tenurial relationship satisfied privity of estate, and burdens only ran if there was such a tenurial relationship. Berger, A Policy Analysis of Promises Respecting the Use of Land, 55 MINN. L. REV. 167, 180 (1970). Most American jurisdictions, on the other hand, moved away from the strict definition of privity and held privity of estate existed between a grantor and grantee, thus allowing the running of both burdens and benefits between owners in fee. Id. at 181. Whether the Muir court was attempting to adopt the English view is unclear. In support of its discussion that only benefits run, the court quoted Raule on Covenants for Title (W. Rawle, PRACTICAL TREATISE ON THE LAW OF COVENANTS FOR TITLE (3d ed. 1860)). Covenants of title are related to covenants respecting the use of land, but they are significantly different.

The general rule is that if there is a conveyance of a fee, only the benefit of a covenant of title runs, and the burden does not run. Powell, supra note 11, ¶ 911. Covenants of title in the conveyance of a fee, however, are intrinsically limited to the running of the benefit because the covenant only affects the title of the land conveyed. The covenant has no relationship to any land the grantor may have retained. Covenants respecting the use of land, however, do intrinsically involve the running of benefits and burdens because both the benefited and burdened property are affected by the covenant. B's promise to restrict his land to residential use burdens his land for the benefit of A's retained land.
The court's conclusion that a benefit runs but a burden never runs is at best mere dicta and at worst contrary to the provisions of the California statutory covenants as they were enacted in 1872. The Muir case concerned a grantor who had imposed a burdensome covenant on his grantee and was seeking to enforce the burden against a transferee of the grantee. The case did not involve the running of a benefit; therefore the discussion of benefits was irrelevant. The burden imposed on the Muir grantee did not run under the provisions of the statutes, but failure of the burden to run in this case does not mean a burden never runs. To the contrary, if a covenant is for the benefit of the land of the grantee, the statutes expressly provide for the running of the burden on the grantor's land. The court's statement that a burden never runs was either broad dicta or contrary to the express provisions of the California Civil Code.

Statutory Scheme

Sections 1462 and 1460

When the Civil Code was enacted in 1872, the main provisions for running covenants were sections 1462 and 1460. The sections remain the same today. Section 1462 provides that a covenant runs to it must be for the direct benefit of the property conveyed. See also Pedro v. County of Humboldt, 217 Cal. 493, 496, 19 P.2d 776, 777 (1933); Lyford v. North Pac. Coast R.R. Co., 92 Cal. 93, 95, 28 P. 103 (1891). The Muir court inappropriately cited a treatise concerning covenants of title in support of its decision that only a benefit runs in a covenant respecting the use of land. The court failed to analyze why only the benefit should run in a covenant respecting the use of land. The court's discussion also failed to consider the California statutory provisions which allow the running of burdens. Civil Code sections 1462 and 1460.


54. CAL. CIV. CODE §§ 1462 and 1460 (West 1954) must be read together. See generally notes 55-71 & accompanying text infra. Section 1462 provides that a covenant contained in a grant of real property runs with the land if it is for the direct benefit of the land conveyed. Section 1460 provides that a covenant that runs with the land binds the assigns of the covenantor and vests in the assigns of the covenantee. See also Coulter v. Sausalito Bay Water Co., 122 Cal. App. 480, 493-94, 10 P.2d 780, 785 (1932).

55. CAL. CIV. CODE §§ 1460, 1462 (1872) (see the transmittal letter at the front). Section 1462 is logically followed by section 1460, therefore they are considered in reverse order.

56. CAL. CIV. CODE § 1462 (West 1954): "Every covenant contained in a grant
with the land if it is contained in a grant of an estate and if it is for the direct benefit of the land conveyed. The section establishes two requirements: the covenant must be contained in the conveyance of an estate and it must be for the benefit of the estate conveyed. Section 1460 provides that if a covenant runs with the land, it is binding on the transferees of the covenantor and vests in the transferees of the covenantee. Under the section, both the burden and the benefit run. When the court in Los Angeles Terminal Land Co. v. Muir stated that only the benefit ran, it ignored section 1460, which expressly provides for the running of both the benefit and the burden.

The Muir court could have limited the application of sections 1462 and 1460 to covenants contained in the conveyance of a lease or a life estate. Section 1462 requires only that the covenant be in a grant of an estate. The section does not specify what kinds of estates are included, and the court could have omitted the conveyance of a fee. The court could then have reasoned that because benefits and burdens run only if there is a conveyance of less than a fee and because the statutes allow the running of benefits and burdens, the statutes must therefore only apply when there is a conveyance of less than a fee. The court's decision would then have been consistent with the statutes.

The Muir court, however, stated that the benefit of a covenant runs with the conveyance of a fee and cited section 1462 in support. If section 1462 includes the conveyance of a fee and the benefit runs then under section 1460 the burden must also run. Section 1462 is basically a definition of the kinds of covenants that run with the land: those that are for the benefit of the estate conveyed. Section 1460 of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land."
defines what a running covenant does: it binds the transferee of the covenantor and vests in the transferee of the covenantee. If a particular covenant is within the definition of section 1462, the covenant must necessarily run as described in section 1460. The general rule of statutory construction is that the various parts of a statutory enactment must be read together as a whole. Each section must be given effect if possible, and any construction making some parts surplusage should be avoided. The Muir court was in error in construing section 1462 without considering section 1460.

The Muir decision created an uncertainty as to the meaning of sections 1462 and 1460 that persists. Muir stated that in the conveyance of a fee the benefit runs but the burden never runs. Sections 1462 and 1460 provide that both the benefit and the burden run if the covenant is for the benefit of the land conveyed. The uncertainty can be resolved in one of two ways. The Muir statement that benefits run and burdens never run can be dismissed as broad dicta, and the holding of the case can be limited to the well-accepted rule that under section 1462 the burden does not run on the grantee's land. A preferable resolution is an interpretation that would reconcile Muir with the statutes. From such a reconciliation the rule emerges that benefits and burdens run under the statutes, but if for some reason a covenant fails to run under the statutes, the benefit can run in any case. The better rule is that the benefit always runs if the covenanting parties intended it to run, but the burden only runs if it qualifies under the statute.

The scope of sections 1462 and 1460 can be most readily understood by way of example. Suppose A owns two adjoining parcels of land and conveys one parcel to B with the promise from B that the land will be used only for a residence. B, on the other hand, must receive her water from a well located on A's land. A therefore promises in the deed to B that A will maintain the well on his land and supply B with water. Thus the grantee has made a promise concerning the property conveyed, and the grantor has made a promise concerning an adjoining parcel that the grantor retains.

If B later conveys her land to Y and A for some reason stops supplying the water, Y will have no difficulty enforcing the covenant to supply water against A. A's promise is a benefit to the land conveyed.

to B, and the benefit runs with the land to the grantee's transferee, Y.\textsuperscript{66}

If A conveys his remaining parcel to X, however, and X stops supplying the water to the land of B, the California courts have had difficulty in deciding that the burden of A's promise devolves onto X and that B can enforce the promise as a covenant running with the land. In several cases a grantor had promised to supply water to a grantee, and the grantee sought to enforce the promise against a transferee of the grantor.\textsuperscript{67} Each time the court held that the grantee could enforce the covenant but never on the ground there was a covenant running with the land. The oldest case reasoned that the water was still a part of the grantor's realty until it actually flowed onto the grantee's land. Thus the promise to supply water was an executory contract for the sale of land which could be enforced against a successor in interest who took with notice of the agreement of sale.\textsuperscript{68}

Although the courts did not mention \textit{Los Angeles Terminal Land Co. v. Muir},\textsuperscript{69} they were no doubt aware of the case and had difficulty allowing the running of a burden when there had been a conveyance of a fee. As previously noted, the \textit{Muir} court was in error in stating that the burden did not run.\textsuperscript{70} The facts of the water cases completely satisfied the statutory requirements for the running of a covenant: the covenants were contained in the conveyances of estates and were for the direct benefit of the lands conveyed. Under section 1460, therefore, the covenants were binding on the transferees of the grantor-covenantors and vested in the transferees of the grantee-covenantees. The covenants ran with the land. Under a correct interpretation of \textit{Muir} and a correct application of the statutes, B in the example above can enforce A's promise to supply water against A's transferee, X.\textsuperscript{71}

If B conveys her land to Y, A cannot enforce the promise to use the land only for a residence. B's promise imposes a burden on the

\textsuperscript{68} Stanislaus Water Co. v. Bachman, 152 Cal. 716, 728, 93 P. 858, 863 (1908). The later cases built upon the basic holding of \textit{Stanislaus}. Henrici v. South Feather Land & Water Co., 177 Cal. 442, 448, 170 P. 1135, 1137 (1918), held the agreement to furnish water conferred upon the grantee an unspecified interest in real property that affected the grantor's land. Relovich v. Stuart, 211 Cal. 422, 428, 295 P. 819, 821 (1931), held the grantee had an easement to take water from the land retained by the grantor.
\textsuperscript{69} 136 Cal. 36, 68 P. 308 (1902).
\textsuperscript{70} See notes 56-58 & accompanying text supra.
\textsuperscript{71} If B conveys his land to Y, Y can also enforce the covenant against X.
land conveyed, and section 1462 requires that the covenant be a benefit. In numerous decisions the courts have held that a covenant imposing a burden on the land of the grantee does not run with the land to the transferee of the grantee. Y can use the land for nonresidential purposes.

If A conveys the remaining parcel to X and X seeks to enforce the residential-use promise against B only, an interesting question is raised. The courts have held that section 1462 is a definitional provision and that if a covenant is not a benefit to the land conveyed, it is not a covenant that runs with the land at all. Neither the burden nor the benefit runs. The running of a benefit, however, should be considered as a separate question from the running of a burden. If the benefit is not allowed to run, B is relieved of her contractual obligation to restrict her land to residential use by the fortuitous conveyance of the remaining parcel from A to X. The courts have held that the benefit can be assigned to the transferee of the grantor, thus preserving B's obligation. The distinction thus becomes that the benefit does not automatically run and that the grantor must specifically assign it. If B has undertaken a contractual obligation, she should not be relieved of her obligation simply because A has transferred his land to X and has failed specifically to assign his rights. Policy considerations would favor continuing the benefit of the promise to X regardless of such an oversight on the part of A. Furthermore, under the preferred interpretation of Los Angeles Land Co. v. Muir, the benefit of a covenant should always run, even if a covenant fails to run under the statute. X should be able to enforce the benefit of the covenant against the original covenantor, B.

The general rule under section 1462 is that before a covenant runs with the grantee's land, the covenant must be a benefit to the land. A corollary of the general rule is that if the covenant imposes a burden but the burden results in a benefit to the grantee's land, the burden runs along with the benefit to a transferee of the grantee.

75. CLARK, supra note 14, at 101-11.
77. See text following note 65 supra.
In *Anthony v. Brea Glenbrook Club*, the subdivider imposed a burden on all the lot purchasers to become members and pay membership dues to the subdivision recreation club. The court held that maintenance of a well-kept clubhouse and swimming pool enhanced the value of each lot in the subdivision and that the burden of maintaining membership was in reality a benefit to the grantees' own land. Thus the burden ran with the land as a benefit under section 1462.

A New York case decided in 1862 closely parallels the reasoning of the *Anthony* decision. *Denman v. Prince* is one of several cases listed in the original 1872 Annotated California Civil Code and its precursor, the 1865 Field Code. In *Denman v. Prince*, a grantor owned two mills, one of which he conveyed, promising at the time of the conveyance to share in the expense of maintaining the dams on the stream that provided power to the mills. The grantee later incurred expenses in repairing the dams and sought to enforce the promise against a transferee of the grantor's remaining mill. Although there was no question the burden ran because under New York law there was privity of estate, the court especially noted that the burden of maintaining the dams was a benefit to the covenantor's own land. Under well-established principles the covenantor was bound to share the burden because he was at the same time receiving a benefit.

As the law has developed under section 1462, if a covenant is in a grant of an estate and is for the benefit of the estate conveyed, the benefit of the covenant runs to a transferee of the grantee. Although early cases created uncertainty, the statutes provide that the burden of the covenant runs to the transferee of the grantor. If the covenant imposes a burden on the land conveyed, the burden does not run. Even though the courts have held that the benefit also does not run, the better view is that the benefit should always run if the original covenanting parties intended it to run, and the benefit should run to the transferee of the grantor.

**Section 1468**

In 1905 the running of the burden was liberalized slightly when

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79. 40 Barb. 213 (N.Y. Sup. Ct. 1892).
80. The 1872 California Civil Code was based upon the civil code prepared in 1865 by David Dudley Field for the state of New York. Van Alstyne, *Preface to Cal. Civ. Code 9* (West 1954); 2 D. Field, *Speeches, Arguments, and Miscellaneous Papers* (A. Sprague ed. 1884) reprinted in 10 *Classics in Legal History* 482-83 (1972). Sections 1460 through 1467 of the California code dealing with covenants were copied verbatim from sections 691 through 698 of the Field Code. Court decisions from various jurisdictions were often appended to the code sections in order
section 1468 was enacted. Although the statute was significantly amended in 1968 and 1969, the amendments most likely will not be applied retroactively, and therefore all covenants created before 1968 will be governed by the law as it existed at the time of their creation.

The section as originally written provided:

A covenant made by the owner of land with the owner of other land to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, and which is made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with both of such parcels of land.

The section set up four requirements for the running of the covenant: (1) the covenantor and covenantee must already be owners of land at the time the covenant is made; any covenant contained in the grant of an estate would be governed by section 1462, (2) the covenant must concern some act on the covenantor’s property, (3) the covenant must be for the benefit of the land of the covenantee, and (4) the covenant must state that it is for either the assigns of the covenantor or the assigns of the covenantee.

The section provided that both the burden and the benefit would run: the covenant was to run with “both such parcels of land.” For a covenant to run, however, the section established requirements in addition to those found in section 1462. For example, under section 1462 there is no requirement that the covenant expressly state it is a benefit; the court may ascertain from the nature of the covenant whether it is beneficial to the land. By contrast, under section 1468 as enacted and as amended, the covenant must expressly state that it is “for the benefit of the land of the covenantee.” In the absence of that express statement, one court held that a covenant would not run under section 1468. Nonetheless, the court was

to provide examples and to “explain the reason and intent of the law.” Preface to ANN. CAL. CIV. CODE vi (C. Raymond & J. Burch ed. 1872).

81. 1905 Cal. Stats., ch. 450, § 1, at 610.
82. Aetna Cas. & Sur. Co. v. Industrial Accident Comm’n, 30 Cal. 2d 388, 393, 182 P.2d 159, 161 (1947): “It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.” Accord, Werner v. Graham, 181 Cal. 174, 183, 183 P. 945, 948 (1919).
83. CAL. CIV. CODE § 1468 (West 1954) (current version at CAL. CIV. CODE § 1468 (West Supp. 1977)).
apparently aware that it was making a technical distinction because it declared an equitable servitude existed even though the criteria for an equitable servitude had not been met.\textsuperscript{87} With little difficulty the court could have determined whether the covenant was in fact beneficial to the land of the covenantee, and if it was a benefit, the court should not have allowed what appears to be a technical distinction to prevent the running of the covenant.

The original section also required that the covenant expressly state it was made for the assigns of either the covenantor or the covenantee.\textsuperscript{88} No case has yet decided if the failure to make any mention of assigns would prevent the running of either the benefit or the burden under the 1905 version of section 1468. Although the courts would probably insist on an express statement, it would be preferable to follow the general rule that an intent the benefit run can be determined from the nature and subject matter of the covenant without any express words, although an intent that the burden run should be explicitly indicated.\textsuperscript{89} Thus if a covenant under original section 1468 fails to state expressly that it was made for the assigns of either the covenantor or covenantee, the benefit should nonetheless run, although the burden may not run.

Even though the benefit and burden would run under former section 1468, the section as enacted was limited to covenants between two landowners. Covenants most often occurred in grants of estates, and under section 1462 the burden of a covenant did not run on the grantee's land.\textsuperscript{90} The failure of the covenant to run was a harsh result for those who purchased land relying on the covenant to provide certain restrictions.\textsuperscript{91} Thus the courts held that even if the covenant failed to run at law, the covenants could be enforced in equity against a transferee who acquired property with notice of the restrictions.\textsuperscript{92}

\textsuperscript{87} The agreement was not in the deed, no dominant tenement was described, and the covenants were not expressed to be for the benefit of the other landowners.\textit{Id.} For a discussion of the criteria for equitable servitudes, see notes 116-39 & accompanying text \textit{infra}.

\textsuperscript{88} The current statute requires that successive owners of the land involved be expressly bound by the covenant. \textit{Cal. Civ. Code} § 1468 (West Supp. 1977). See text accompanying notes 105-06 \textit{infra}.

\textsuperscript{89} See notes 25-34 & accompanying text \textit{supra}.


\textsuperscript{91} Covenants were most frequently used to impose desired building restrictions in subdivision tracts. The most common provisions limited the tract to single family residences and required the residences to be set back from the street a minimum distance. \textit{E.g.}, McBride v. Freeman, 191 Cal. 152, 215 P. 678 (1923); Werner v. Graham, 181 Cal. 174, 183 P. 945 (1919).

The equitable enforcement of covenants, however, will most likely be supplanted by the amended provisions of section 1468.

Amended Section 1468

In 1968 and again in 1969 the provisions of Civil Code section 1468 were expanded to cover not only covenants between two landowners but also covenants in grants of estates. As a result, both the benefits and burdens of covenants in grants of estates will run on either the grantor or grantee's land under section 1468, unlike the more limited provisions of section 1462. Amended section 1468 establishes several stringent requirements before a covenant will run. Consequently, covenants created after 1968 that may not run under amended section 1468 may still be enforceable under section 1462 or in equity.

The first amendment to section 1468 became effective November 13, 1968, and provided that covenants made by owners of land or made by a grantor with the grantee would run with both the land owned by the covenantor and the land of the covenantee if the covenant were expressed to be for the benefit of the covenantee. The amendment added the provision that if the grantor imposed a burden on his own property, the burden would run against his successors in interest, and the benefit would run to the transferees of the grantee. Whether a burden will run on the grantor's side under section 1462 is uncertain. This amendment to section 1468 was initiated by land title associations so that if an owner of a shopping center promised his grantees that he would not sell or lease other property in the center to competing businesses, the promise could be enforced against any subsequent grantee. The amendment was questioned for arbitrarily distinguishing between the running of burdens on the grantor's side and the running of burdens on the grantee's side, because it provided for covenants made by the grantor but did not provide for covenants made by the grantee. Thus the promise of the grantor A to supply water was binding on A's transferee X, but the promise 

(1940). Equitable enforcement of covenants is discussed in the text accompanying notes 116-44 infra.

93. 1968 Cal. Stats., ch. 680, § 1, at 1377: “Each covenant, made by an owner of land with the owner of other land or made by a grantor of land with the grantee of land conveyed, to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, runs with both the land owned by the covenantor and the land owned by or granted to the covenantee and shall . . . . benefit or be binding upon each successive owner, during his ownership . . . .”


95. Id. at 295.
of the grantee B to use the property only for a residence was not binding on B's transferee Y. Covenants imposing a burden on the transferee of the grantee, however, have traditionally been enforced as equitable servitudes, and to provide for the running of the burden under section 1468 would change that large body of law.

Nonetheless, a second amendment was enacted, effective November 10, 1969, providing that covenants of the grantee would run with the land and be binding on the transferees of the grantee. After 1969 both the benefit and the burden run freely in covenants either between landowners or between grantors and grantees if the covenant is expressed to be for the benefit of the covenantee and if the covenant meets the statutory requirements set out in subsections (a) through (d). If the courts insist, however, on literal interpretations of those statutory requirements, covenants may still fail to run because of technicalities.

96. 1969 Cal. Stats., ch. 245, § 1, at 594. The section as amended is substantially what is found in the code today, CAL. CIV. CODE § 1468 (West Supp. 1977):

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

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

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

(c) Each such act relates to the use, repair, maintenance or improvement of, or payment of taxes and assessments on, such land or some part thereof, or if the land owned by or granted to each consists of undivided interests in the same parcel or parcels, the suspension of the right of partition or sale in lieu of partition for a period which is reasonable in relation to the purpose of the covenant;

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

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

The underlined passage indicates the amendment that was enacted in 1973. 1973 Cal. Stats., ch. 474, § 1, at 948.
The statutory requirements are as follows: (a) the lands to be benefited and burdened must be particularly described in the instrument creating the covenant, either the deed between grantor and grantee or the agreement between landowners, (b) the successors of the covenantor must be expressly bound for the benefit of the land of the covenantee, (c) the covenant must relate to the use, repair, maintenance, or improvement of the property or the payment of taxes and assessments; it may include an agreement between cotenants not to seek partition, and (d) the agreement must be recorded.

The first two requirements, the description of the affected property and the express statement that the covenant is for the benefit of the covenantee, are apparent codifications of requirements that have developed around equitable servitudes, and that law may thus be used to ascertain the scope of the requirements under section 1468.

In the usual equitable servitude case, a landowner would subdivide his property and sell lots to individual owners. He would impose a restriction on each lot that it be used only for residential purposes, but because the restriction was a burden on the property, it would not run as a covenant with the land under section 1462. The court would enforce the restriction against a subsequent grantee of the lot owner if the subsequent grantee took the land with notice that it was restricted. As the subdivider issued the first deed with the restrictions, he imposed a servitude upon the grantee's lot for the benefit of the land he retained. As the subdivider sold each additional lot the benefit and burden would pass as an incident. Thus mutually enforceable restrictions were created, each lot burdened for the benefit of all the other lots and each lot receiving the benefit of the burdens on the other lots. If the first grantee received a deed that declared her lot was restricted without stating who was to receive the benefit of the restrictions, the courts reasoned that the grantee might assume the restrictions ran in favor of the subdivider only. The grantee might in fact be completely unaware that the grantor owned other land. The grantee might be willing to accept the burden of a restriction in favor of one person, whom she might be able to persuade to release the restrictions at some future time, although she might not be willing to accept the restrictions in favor of twenty to a hundred other lot owners, any one of whom could bring an action to enforce the restrictions. Thus courts held that before the covenant could be enforced by another lot owner, the land

to be benefited had to be particularly described. 101 The first require-
ment of 1468 apparently embraces that reasoning and policy.

If the grantee were truly surprised at the extent to which her restric-
tions could be enforced by others, the court could appropriately deny enforcement of the covenant because the grantee did not have adequate notice. The court should not refuse to enforce the covenant on the technical ground that the benefited property was not sufficiently described. If the covenant were between two neighboring landowners, the covenantor and her transferee in most circumstances would understand that the covenant was made for the benefit of the neighbor's land only, although it might fail to describe particularly the adjoining property. In the case of a large subdivision, most housing tracts have fairly demarcated boundaries. Determining the extent of the tract would not be difficult. If there were any uncertainty as to who could enforce the covenant, the courts could turn to the law of easements for guidelines to determine the extent of a burden that has not been specifically stated.

When an easement does not specifically define the burden imposed upon the servient tenement, it nonetheless entitles the easement holder to a use that is reasonably necessary and consistent with the purpose for which the easement was granted. 102 The easement is not declared void because the grant of the easement does not specify the extent of the burden. If a restrictive covenant were imposed upon land and it was not clearly stated who could enforce it, the court could determine what the restriction was intended to accomplish and who should have the right to enforce it in order for the purpose to be reasonably and consistently carried out. The courts should attempt to effectuate the intent of the landowners 103 to restrict their land to particular uses rather than allow a transferee to escape the restriction because the covenating parties failed to describe sufficiently the property to be benefited.

As the law of equitable servitudes has developed, the courts have rigidly adhered to the requirement that the benefited property be specifically described. 104 If the courts continue that hardline ap-

103. Cf., Willard v. First Church of Christ, Scientist, 7 Cal. 3d 473, 476, 498 P.2d 987, 989, 102 Cal. Rptr. 739, 741 (1972) (intent of grantor to reserve property interest should take precedence over rigid common law rules).
proach in interpreting requirement (a) of Civil Code section 1468, covenants may fail to run even though all the parties had actual notice of who had the right to enforce the covenant. The courts should adopt a more flexible approach in order to accomplish the intent of the parties to restrict their land. If a covenant is unclear as to who has the right of enforcement, the courts can adopt guidelines analogous to those found in the law of easements that would allow enforcement of the covenant to the extent reasonably necessary and consistent with the purpose for which the covenant was created.

Subsection (b) of section 1468 requires that the covenant expressly state that the successive owners of the land of the covenantor are bound for the benefit of the land of the covenantee. The successors of the covenantor must be expressly bound in order to establish an intent that the burden run, although only the covenantee need be mentioned in order for the benefit to run. Rather than reading the subsection literally, that the successors of the covenantor must be expressly mentioned, it would be preferable to understand the subsection as embodying the general rule that no particular words or terms are necessary so long as the court can find an intent that the covenant run with the land; a statement simply that the covenant runs with the land should be sufficient. To require that the assigns of the covenantor be expressly named is to revert to that medieval formalism which modern courts attempt to avoid.

The third requirement, that the covenant relate to the use, repair, maintenance, or improvement of the land, simply codifies the kinds of promises found in the case law to concern real property. The provision that a covenant may provide for the payment of taxes and assessments restates what is found in Civil Code section 1463. In 1973 an amendment was added to subsection (c) to include covenants between cotenants not to partition the cotenancy. Such agreements were most likely valid even under section 1462.

105. See note 26 & accompanying text supra.
108. CAL. CIV. CODE § 1463 (West 1954): "Covenants which are for the direct benefit of the property include: ... covenants for the payment of rent, or of taxes or assessments upon the land, on the part of a grantee."
110. Section 1462 requires that the covenant be a benefit to the land. Whenever there is a simultaneous interest in the land, such as in a lease or a cotenancy, the covenant will be beneficial to one owner and therefore beneficial to the land, even though it is a burden to other owners. Thus in a lease, the covenant to pay rent is a benefit to the landlord and the leasehold estate, although it is a burden to the tenant. The covenant not to partition a cotenancy is a benefit to the cotenants who do not want the land partitioned and thus a benefit to their undivided interest in the cotenancy,
The fourth requirement, that the deed or agreement be recorded, is new to the law of covenants. The law is clear that the covenant must be in writing,\textsuperscript{111} but California has no general requirement that an instrument affecting property must be recorded in order to be valid. Unrecorded instruments are valid as between the parties and all subsequent purchasers taking with notice.\textsuperscript{112} If a transferee takes an estate without actual inquiry, or constructive notice that the land is subject to the burden of a covenant, he will not be held bound to the covenant.\textsuperscript{113} If the transferee acquires an estate of a covenantor with notice that the land is subject to a covenant, however, he should not escape enforcement of the covenant on the technicality that it is not recorded. Subsection (d) should be considered merely directory and not mandatory.

How strictly the requirements of subsections (a) through (d) will be enforced remains to be seen. If the courts rigidly adhere to the language of these subsections, the enforcement of covenants may be defeated on a number of technical grounds: inadequate description of the benefited property, failure to state expressly that the assigns of the covenantor are bound, or simply a failure to have the covenant recorded. The history of covenants in the first part of this century has been one of strict construction and general judicial hostility.\textsuperscript{114} The observation has been made, however, that through zoning regulations, restrictions have been imposed on the use of land that far exceed what has ever been attempted by private agreements.\textsuperscript{115} Zoning restrictions have long been accepted, and private restrictions should now take their proper place in land use regulations. The courts should construe the provisions of the statute liberally in order to effectuate the intent of the covenanting parties to restrict their land to certain uses.

Even if the courts require strict compliance and find that a covenant does not run under section 1468, the covenant may still run although it is a burden to a cotenant who does want partition. One California case discussed a covenant not to partition the cotenancy but did not reach the issue whether the covenant was a benefit. Harrison v. Domergue, 274 Cal. App. 2d 19, 78 Cal. Rptr. 797 (1969).


\textsuperscript{112} \textsc{Cal. Civ. Code} § 1217 (West 1954): “An unrecorded instrument is valid as between the parties thereto and those who have notice thereof”; Merritt v. Rey, 104 Cal. App. 700, 707, 286 P. 510, 513 (1930).

\textsuperscript{113} \textit{See}, e.g., Pollard v. Rebman, 162 Cal. 633, 124 P. 235 (1912).


\textsuperscript{115} Ellickson, \textit{Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls}, 40 U. Chi. L. Rev. 681, 715-16 (1973).
under section 1462. Section 1462 has only two requirements: that the covenant be contained in a grant of an estate and that it be a benefit to the land conveyed. There is no requirement for a description of the covenantee's land, for an express intent that the covenant run, or for the covenant to be recorded. Under section 1462, both the benefit and burden run if the covenant is for the benefit of the land conveyed. If the covenant imposes a burden on the land of the grantee, the burden does not run. A strong policy argument can be made that even if the burden does not run on the grantee's land, the benefit ought to run on the grantor's. If the covenant is both a burden and a benefit, the burden runs with the benefit and is binding on a transferee. If a covenant is not enforceable under either section 1462 or 1468, it may be enforceable in equity.

**Equitable Servitudes**

One of the first California cases to recognize the equitable enforcement of covenants quoted from *Pomeroy's Equity Jurisprudence*:

"[I]f the owner of land enters into a covenant concerning the land, concerning its uses, subjecting it to easements or personal servitudes and the like, and the land is afterwards conveyed or sold to one who has notice of the covenants, the grantee or purchaser will take the premises bound by the covenant, and will be . . . restrained from violating it; and it makes no difference whatever with respect to this liability in equity whether the covenant is or is not one which 'in law runs with the land.'"  

The basic concept is that when the covenant fails to run with the land at law, the courts will enforce it against a transferee taking with notice.  

Because the court is enforcing the covenant in equity, it may grant enforcement in any case in which it would be inequitable to permit the transferee to avoid the restrictions, and it may withhold enforcement if it determines that a violation would not be injurious to the covenantee's property.

Although equity may be applied if only two or a few landowners are involved, the usual case has involved a subdivision with twenty to a hundred or more lot owners. Typically, because a subdivider

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wanted to restrict his tract to single family use, he inserted in the deed to each lot in the tract a promise that the lot owner would construct only a single family residence. Because the restriction imposed a burden on the land of the grantee, it would not run with the land under Civil Code section 1462, but the courts were willing to enforce the restriction in equity.\textsuperscript{120}

In the unique circumstances of subdivisions, the courts developed the doctrine of mutual equitable servitudes, reasoning that the lot owners had entered into a mutual agreement that each owner would restrict her land for the benefit of all the other owners in the tract.\textsuperscript{121} When the subdivider sold the first parcel, the lot owner promised to restrict her land for the benefit of the land the subdivider retained, and the subdivider promised to restrict his remaining land for the benefit of the first parcel. Based upon that first conveyance, mutual equitable servitudes sprang into existence: both the land of the lot owner and the remaining land of the subdivider became a servient tenement in favor of the other’s dominant tenement. As the subdivider sold each additional lot, the burden and benefit of the mutual promises passed as an incident to the subsequently conveyed land. The second parcel conveyed was burdened by the subdivider’s promise and benefited by the restriction on the first parcel and the restrictions on the subdivider’s remaining land.

Following this analytical model, the courts concluded that both the subdivider and the first lot owner must agree to enter into this mutually binding agreement. The intention of the subdivider alone to impose a servitude on his development is not sufficient.\textsuperscript{122} The courts also stated that the only place the parties could express their intent was in the deed, which was the final memorial of their agreement.\textsuperscript{123} Thus the courts began to veer away from the basic equitable concept that covenants would be enforced against all those purchasers taking with notice and began constructing a set of rules as rigid and technical as those found in the enforcement of covenants running at law. In one case the subdivider read the restrictions to all the lot owners individually so that they all had actual notice and presumably had agreed to the restrictions because they subsequently bought the property.\textsuperscript{124} The court held, nonetheless, that because the restrictions were not in the deeds, they were not enforceable.

The entire set of restrictions does not have to be set out in each

\textsuperscript{120} Ross v. Harootunian, 257 Cal. App. 2d 292, 294, 64 Cal. Rptr. 537, 538 (1967).
\textsuperscript{121} Werner v. Graham, 181 Cal. 174, 183-85, 183 P. 945, 949 (1919).
\textsuperscript{122} Id. at 184; Orinda Homeowner’s Comm. v. Board of Supervisors, 11 Cal. App. 3d 768, 777, 90 Cal. Rptr. 88, 93 (1970).
\textsuperscript{123} 181 Cal. 174, 185, 183 P. 945, 949 (1919).
deed. The subdivider can file a declaration of restrictions that will serve as record notice. The mere filing of the declaration, however, is only a manifestation of the subdivider's intent to impose restrictions and does not manifest the joint intent of the subdivider and the lot owners. The subdivider must insert the agreement in at least one of the deeds in order to legally establish that he and the lot owner agree to be bound by the restrictions on file.

If the subdivider fails to insert the agreement in the first deed but remembers to insert it in the fifth deed, for example, the equitable servitude springs into existence from deed five onwards. The restrictions do not apply to the first four lots because the subdivider no longer has any interest in those lots and cannot place a restriction on them in favor of the rest of the tract. If the subdivider inserts the agreement in deeds five and six and then fails again to put them in seven and eight, the courts have held that lot owners five and six can enforce the restrictions against seven and eight, but seven and eight cannot enforce them against each other. When the subdivider put the agreement in the deeds to lots five and six, he agreed to burden the rest of the unsold subdivision. When he sold lots seven and eight, the burden of his agreement passed as an incident to lots seven and eight in favor of lots five and six. There was no agreement between lot owner seven and the subdivider that the subdivider burden the rest of his tract in favor of lot seven. Thus when the subdivider conveyed lot eight, there was no burden to pass incident to the land in favor of lot seven. Lot seven can enforce the restrictions against lots five and six, however, because just as the burden of the agreement between the subdivider and five and six passed as an incident to lot seven, so should the benefit of that agreement pass. The subdivider had the benefit of enforcing the restrictions against five and six, and that benefit passes to seven.

If the subdivider resumes placing the agreements in the deeds to lots nine and ten, lot owners seven and eight cannot enforce the restrictions against nine and ten, and similarly nine and ten cannot enforce them against seven and eight. When the subdivider conveyed nine and ten, he no longer had any interest in seven and eight.

He could neither impose a restriction on them in favor of anyone else nor confer a benefit on them.\textsuperscript{130} The foregoing analysis of lots five through ten may be logical, but is it equitable? If lot owner eight had actual or constructive knowledge of the restrictions, the court should allow lot owner seven to enforce them. Lot owner eight took her land with notice, and her conscience should be bound.\textsuperscript{131}

From the basic premise that the lot owner must agree with the subdivider to the mutually enforceable servitude, there have evolved a number of other rules. The agreement must expressly state that the restrictions are for the benefit of all the other lot owners in the tract and must particularly describe the tract.\textsuperscript{132} If the subdivider fails to state that the restrictions are for the benefit of other lot owners, the court will assume that the restrictions are for the personal benefit of the subdivider.\textsuperscript{133} If the subdivider fails to describe the dominant tenement, the lot owner is held not to have had adequate notice that his restrictions can be enforced by others; the lot owner is assumed to have thought that the restrictions ran in favor of the subdivider only.\textsuperscript{134} There may have been a particular case in which a lot owner truly did not know that the restrictions on his land could be enforced by someone other than the subdivider. In such a case the court could have found it inequitable to allow another lot owner to enforce the restriction.

The requirements that the dominant tenement be described, and the express statement that the other lot owners are benefited, have unfortunately become inflexible rules that have defeated the enforcement of what should be valid servitudes. The courts have lost sight of the basic principle that they are enforcing covenants in equity that have failed to run at law.

One additional rule that has caused problems is that the restrictions must be pursuant to a uniform plan.\textsuperscript{135} Because the lot owners are entering into mutually enforceable servitudes, each lot owner should have the right to enforce the same restrictions against every other lot owner. As one court said, it would be inequitable to en-

\textsuperscript{130} Id. at 507, 551 P.2d at 1219, 131 Cal. Rptr. at 387.
\textsuperscript{133} McBride v. Freeman, 191 Cal. 152, 158-59, 215 P. 678, 681 (1923); Berryman v. Hotel Savoy Co., 160 Cal. 559, 564-65, 117 P. 677, 679 (1911).
force the restrictions if there were no general scheme. One lot owner might acquire a benefit that was denied the other lot owners. All of the restrictions do not have to be exactly alike, however, and some variation is allowed.

A general scheme can be established by a reference in the deed to a subdivision map. From the map the court can determine such things as uniform setback lines and uniform lot sizes. There does not have to be any particular document or statement that the subdivider is following a uniform plan. All that is necessary is a sufficient uniformity in the development to indicate unmistakably that a designated plan is being followed.

From the basic principle that covenants will be enforced in equity, the courts have erected a superstructure of rules and doctrines in dealing with subdivision restrictions. They have set up four main requirements for enforcing the restrictions: (1) the subdivider and his lot owners must intend to enter into mutually enforceable restrictions and must state that intention in the deeds to the lots, (2) the restrictions must be pursuant to a general scheme, (3) the restrictions must expressly state that they are for the benefit of all the other lots in the tract, and (4) the dominant and servient tenements must be shown. These rules may be appropriate in dealing with large subdivisions in order to ensure that the lot owners have adequate notice of who has the right to enforce the covenants and that the burden and benefits are uniformly distributed. The rules, however, should be considered, at the very most, only as guidelines to help the court in deciding when to exercise its equitable powers. They should not become roadblocks that prevent equitable enforcement. The fundamental principle is that the court is enforcing a covenant which has failed to run at law in a case in which the court believes it would be inequitable to allow the transferee of the land to avoid the restriction.

Other jurisdictions recognize the inequity of allowing a sub-

136. *Id.* at 411, 2 P.2d at 855.
141. The court in *Werner v. Graham*, however, took a very strict view and held that it was not a question of applying its equitable powers; the restrictions did not in fact exist. 181 Cal. 174, 186, 183 P. 945, 950 (1919). The court's reasoning is circular: equitable servitudes did not exist because the court refused to invoke its equity powers.
divider to represent orally that a tract is restricted and then permitting him to profit by selling part of the tract for commercial use.\textsuperscript{143} Those jurisdictions are willing to use equitable enforcement against the subdivider or his successors taking with notice, even though there has been no written document outlining the restrictions.

The argument for applying this superstructure of rules is even weaker if the court is dealing, not with a subdivision but with a covenant between two landowners. If one of the landowners has transferred her property to a purchaser taking with notice, the requirement of a description of the dominant tenement or an express statement that the covenant is for the benefit of the neighbor seems unnecessary. The covenanting parties and their transferees can determine from the circumstances surrounding the covenant whom the covenant is intended to benefit. If there is any ambiguity or disagreement about the extent to which the covenant should be enforced, the court can borrow the rule applicable to easements and hold that the burden of the covenant will extend only as far as is reasonably necessary or to the extent to which the parties have previously acquiesced or consented.\textsuperscript{144} The court should have no hesitance in enforcing the covenant if the transferee has taken the land with notice and if it would be inequitable to permit him to avoid the burden.

Section 1468 and Equitable Servitudes

For subdivision restrictions that have been created after 1969 the courts should no longer need to resort to equitable servitudes. The burden of a covenant imposed on a grantee of land will run with the land under Civil Code section 1468.\textsuperscript{145} When the subdivider puts a restriction in the deed to the lot he sells, that restriction will now run at law.

Section 1468, however, sets up requirements that parallel the doctrines developed for equitable servitudes: the land benefited must be particularly described and the covenant must be expressed to be for the benefit of the covenantee.\textsuperscript{146} Both of these requirements are desirable in ensuring that a transferee in a subdivision will know exactly who has the right to enforce the restrictions on his land. If the subdivider fails to comply with these requirements under section 1468 but the transferee has taken with adequate notice, the courts

\textsuperscript{143} Powell, supra note 11, at § 672, and authorities cited therein.

\textsuperscript{144} City of Pasadena v. California-Michigan Land & Water Co., 17 Cal. 2d 576, 582, 110 P.2d 983, 986 (1941); Winslow v. City of Vallejo, 148 Cal. 723, 725, 84 P. 191, 192 (1906).

\textsuperscript{145} See notes 93-96 & accompanying text supra.

\textsuperscript{146} See notes 96-106 & accompanying text supra.
should be willing to step in and enforce the covenant either on the
grounds that there has been substantial, though not literal compliance
with the requirements of section 1468 or that equity will enforce the
covenant if the covenant is insufficient to run at law. Because the
burden of covenants can now be enforced at law, the courts have an
opportunity to reconsider what should be the proper function of its
equitable enforcement powers. The courts should return to the basic
premise set out in Pomeroy's *Equity Jurisprudence*, that equity will
enforce a covenant against one who has taken with notice. No
other set of rules or doctrines need be encrusted on this basic
principle.

**Construction, Enforcement, and Termination**

Whether a covenant runs with the land at law or in equity, a
number of factors may facilitate or prevent the covenant's enforce-
ment. The courts must sometimes interpret whether they are in fact
dealing with a covenant or some other property interest, such as an
easement or condition subsequent. Because both Civil Code sections
1462 and 1468 require that the covenant benefit the land, the court
must determine what is considered beneficial. Finally, the covenant
may no longer be enforceable because of a change in the surrounding
community or because of the actions of the parties.

**Construction**

If A wanted to convey part of his land to B but wanted to ensure
that B used it only for residential purposes, he could accomplish his
goal in a number of ways. He could convey to B a fee simple de-
determinable or a fee simple subject to a condition subsequent, or he
could extract from B a promise. If the language in the deed stated
that A conveyed to B only so long as B used the property for resi-
dential purposes, A would have created a fee simple determinable,
and when B ceased to use the property for a residence, the land would
automatically revert to A. If the deed stated that A conveyed to
B, provided that, or upon condition that, the land be used only for
a residence, A would have created an estate subject to a condition
subsequent, and when B failed to use the property as a residence, A
would have the power to terminate the estate. If the deed merely
stated that B agreed to use the property for a residence, the deed
would only have created a covenant, and B would not lose his estate

147. 2 J. Pomeroy, *Equity Jurisprudence* § 689 (1886).
149. Id. at § 188; Rosecrans v. Pacific Elec. Ry. Co. 21 Cal. 2d 602, 605, 134 P.2d
245, 246 (1943).
if he failed to maintain a residence, but A could get an injunction to prevent him from using it for any other purpose.

Because special limitations and conditions subsequent can lead to a forfeiture, the courts will construe such estates to be covenants if such a construction is at all possible. If the intent of the grantor to create a condition subsequent is clear and unmistakable, however, the courts will enforce a forfeiture. Language such as “provided,” “upon express condition that,” and “however,” has been held sufficient to create a condition subsequent, as well as the simple statement that the grantor retains a right of re-entry or power of termination. Language that stated the land was conveyed for railroad purposes was held to have been a limitation upon the estate, sufficient to create a condition subsequent. Language that sounds in promise, however, will be construed as a covenant. For example, a promise to build a road constitutes a covenant and does not confer a road easement.

Once the language is construed as creating a covenant, the court may have to interpret the covenant’s meaning. Traditionally, there has been a strong judicial policy in favor of the free use of land, and any ambiguity or doubt has been resolved against the covenant’s enforcement. More recently some courts have expressed a greater willingness to construe the deeds so as to accomplish the intent of the parties. The deed may be interpreted in the light of surrounding circumstances, and extrinsic evidence may be admitted to establish the intent of the parties, although evidence cannot be admitted to vary the terms of the covenant. The words of the covenant should be understood in their common meaning, unless they are used in a technical sense. The terms of the covenant must be clearly

159. Moss Dev. Co. v. Geary, 41 Cal. App. 3d 1, 9, 115 Cal. Rptr. 736, 741 (1974);
expressed, however, because the courts will not read restrictions into the agreement by implication.160

The court may have to construe the extent to which the original parties intended a covenant to run. Under Civil Code section 1468, of course, the covenant must expressly state that it is for the benefit of the land of the covenantee and that it is binding on the successive owners.161 By contrast, under section 1462, no special words are necessary.162 Nonetheless, even under 1462, if the parties fail to show an intent that the covenant run, the covenant will be considered personal to them.163 Even if the covenant is clearly expressed to run with the land, the court may find the parties only intended the covenant to run as long as it accomplished a certain purpose.

In Harrison v. Domergue,164 a number of cotenants had agreed to offer each other the right of first refusal before seeking any partition of the land held in common. All of the original cotenants had died, and the present cotenants were the successors in interest. One of the successor cotenants brought a partition suit, and the remaining successor cotenants argued that he had to offer them the right of first refusal. The court found that the intention of the original parties was to control who might become their cotenants, but because there were no longer any original cotenants, the intent and purpose of the covenant had ceased, and the covenant did not run beyond the life of the last original cotenant.165

Types of Restrictions and Benefits

Restrictions that are considered unreasonable or that violate the policy of the law will not be upheld.166 For a number of years the courts were willing to enforce racial restrictions,167 but the United States Supreme Court held in 1948 that enforcement of such restrictions by the courts was state action in violation of the equal protection guarantee of the fourteenth amendment of the United States Constitution.168 Subsequently, California statutes were enacted which

161. See note 105 & accompanying text supra.
162. See note 22 & accompanying text supra.
165. Id. at 22-23, 78 Cal. Rptr. at 799.
void any provision in a written instrument that purports to forbid or restrict the use of real property on the basis of sex, race, or religion.\textsuperscript{169}

The California courts have most often had to consider what is an unreasonable covenant in the area of restrictions on competition. The covenant may restrict the use of land from a particular business, and such a provision is a separate issue from restricting the person.\textsuperscript{170} The restriction will be upheld if it does not create a monopoly or amount to an unreasonable restraint on competition.\textsuperscript{171} In one case, a grocery store owner moved his business several blocks from his old building, which he sold. The court found that it was not unreasonable to want to prevent another grocery store from operating in the same neighborhood and thus to restrict the old property from grocery store use.\textsuperscript{172}

Because the covenant must be for the benefit of the land of the covenantee, the court may have to determine what is a benefit. The promise need not physically benefit the land. Any covenant that affects the title or any interest in the estate of the covenantee may be beneficial.\textsuperscript{173} A covenant providing for the removal of a lien is for the unfettering of title and is for the direct benefit of the land.\textsuperscript{174} A covenant to quitclaim oil rights restores those rights to the landowner and is for the benefit of the land.\textsuperscript{175} An agreement between adjoining landowners to share any litigation expense to protect water rights is a benefit.\textsuperscript{176} Promises to take out insurance, to repair, to renew a lease, and to develop mineral resources are all considered beneficial to the property and are covenants running with the land.\textsuperscript{177}

Prior to 1969 the rule was that a burden would not run on the grantee’s land and that therefore the covenant was unenforceable against the successor to the grantee, even if the covenant was a ben-
efit to the grantor. A promise to run a railroad did not benefit the land on which the railroad ran but rather the grantor's retained land, and therefore was not a covenant that ran with the land against the successor in interest to the railroad.\textsuperscript{178}

After the 1969 amendment to section 1468, however, a burden will run on the grantee's land if the grantee's promise is a benefit to the land of the grantor-covenantee. Under amended section 1468, the successor to the railroad would have had to continue running trains on the land conveyed to it because the promise to run the trains was a benefit to the land of the grantor-covenantee.

Enforcement

If a landowner is entitled to the benefit of a covenant, he may either bring an action for damages or seek an injunction against the one who has the burden of the covenant and is in violation.\textsuperscript{179} If money damages are sought, actual damage must be shown.\textsuperscript{180} If an injunction is sought, a complainant need only show that the covenantor is violating the covenant in order for an injunction to issue.\textsuperscript{181} The courts will not question the wisdom of a particular covenant, so long as the covenant does not violate public policy.\textsuperscript{182} An owner of land may extract from his covenantee such covenants as he pleases, touching and concerning the land, and he has a right to define what constitutes an injury to him.\textsuperscript{183} The right is not absolute, however, because the courts will not deal with trifles. If the violation is innocent, the injury is slight, and the cost of rectification would be disproportionate to the loss, the court may decline enforcement.\textsuperscript{184} The disproportion of redress to injury, however, is not the test; the court may require correction if there is injury to the plaintiff and will certainly require correction if the defendant knowingly violated the covenant.\textsuperscript{185}

Both damages and an injunction may be awarded: damages


\textsuperscript{179} Alderson v. Cutting, 163 Cal. 503, 506, 126 P. 157, 158 (1912); Doo v. Packwood, 265 Cal. App. 2d 752, 756, 71 Cal. Rptr. 477, 480-81 (1968).


\textsuperscript{183} Id.

\textsuperscript{184} Morgan v. Veach, 59 Cal. App. 2d 682, 690, 139 P.2d 978, 980 (1943).

\textsuperscript{185} Id.
for the actual injury from the beginning of the violation until the issuance of the injunction and the injunction to prevent further damage.\textsuperscript{186}

The party who is burdened with a covenant may bring an action to test its validity in either a suit for declaratory relief or a suit to quiet title.\textsuperscript{187} A declaratory relief action asking the court to construe restrictions may result, however, in some restrictions being found unenforceable while others remain. The action is not the same as one to quiet title.\textsuperscript{188}

Generally, one is entitled to enforce a covenant only so long as he owns land benefited. Civil Code sections 1462 and 1468 require that the covenant be a direct benefit to "the property" or the "land of the covenantee." Once a landowner has conveyed all his land to a subsequent grantee, he is no longer personally entitled to the benefit of the covenant and may not bring an action to enforce it.\textsuperscript{189} If a party is seeking to enforce an equitable servitude, he must possess a dominant tenement.\textsuperscript{190} A power of termination has been held not to constitute a sufficient interest in land to allow the holder of the power to enforce a restriction if he owns no other property in the area.\textsuperscript{191} The retention of a parking lot has also been held an insufficient interest because the parking lot was not benefiting from the residential use restrictions.\textsuperscript{192}

A power of termination together with utility easements, however, has been held to constitute a sufficient interest to enable the holder to defend against an attempt by one of the lot owners to have the restrictions declared void.\textsuperscript{193} This result would seem to be desirable, if not entirely consistent. Although the holder may not have sufficient interest to enforce the restrictions, he is considered to have enough interest to defend them in a declaratory action.

A subdivider may establish a committee or homeowners association to oversee the enforcement of the restrictions. Often the committee is given an active role in approving or disapproving building plans.\textsuperscript{194} If the subdivider appoints a committee composed of mem-

\textsuperscript{186} Doo v. Packwood, 265 Cal. App. 2d 752, 756, 71 Cal. Rptr. 477, 480 (1968).
\textsuperscript{188} Forman v. Hancock, 3 Cal. App. 2d 291, 39 P.2d 249 (1934).
\textsuperscript{189} See Firth v. Marovich, 160 Cal. 257, 260, 116 P. 729, 731 (1911).
\textsuperscript{191} Blodgett v. Trumbull, 83 Cal. App. 566, 571-72, 257 P. 199, 201 (1927).
bers who do not own land in the subdivision, the committee can enforce the restrictions so long as the subdivider retains property in the tract; the subdivider has simply assigned his right of enforcement to a committee of his own choosing.\(^{195}\) Once the subdivider has sold all of his interest, it does not necessarily follow that the committee no longer has any power of enforcement. As one court said, the committee is acting on behalf of the lot owners in the tract.\(^{196}\)

The lot owners had the power to elect their own committee, but the court decided that the owners should have a right to continuation of the committee's function until a new committee was elected. To have decided otherwise would have left a period of time when no enforcing body was in existence to approve the plans, during which time any kind of construction could have proceeded.

A homeowners association will most likely be composed of lot owners in the tract, but the association may not own any land in the subdivision. If the association seeks to enforce the tract restrictions in its own name, the question is raised as to what right the association has to bring the action. The California courts have held that the association has a duty to protect the interests of its members.\(^{197}\)

Other jurisdictions have looked beyond the association and held that because the members as landowners had a right to enforce the restrictions, an action by the association was simply a convenient way of enforcing a common right.\(^{198}\)

The extent of the committee or association's power will be limited by the rights and restrictions set out in the deeds. The restrictions cannot be added to or expanded by implication.\(^{199}\) The court will not hamstring effective enforcement, however, by adhering to a literal understanding of the scope of the restrictions; a right to approve building plans includes the right to determine that a severed portion of an original lot is too small for the type of dwellings found in the tract.\(^{200}\) Any determination by the association must be in good faith. Its power can not be exercised capriciously or arbitrarily.\(^{201}\)

When two parties enter into a covenant, they have in effect entered into a contract respecting the use of land. Even after the original covenantor has parted with the land, he can be held liable

\(^{198}\) Powell, supra note 11, ¶ 681.
in contract for a breach of the covenant by his transferees. The transferees of the original covenantor, on the other hand, are only bound by the covenant through their ownership of the land. The transferees did not personally enter into any contract with the covenantant and are bound only because the covenant runs with the ownership of the land. Consequently, a transferee is only liable for the breach of a covenant that occurs during his ownership and is not liable for any breaches that occurred before he acquired the land or after he has parted with it.

If a particular parcel of land is subject to the burden of a covenant and the parcel is later broken up into several smaller parcels, Civil Code section 1467 requires the burden be apportioned among the new owners according to the value of each parcel. If the value cannot be determined, the burden will be apportioned according to the relative size of each parcel.

If an owner has a particular interest in land, such as a fee simple or a life estate, Civil Code section 1465 requires that a transferee acquire the same interest before he can be bound by any covenant running with the land. Although the section would seem to apply only to the running of burdens, the courts have interpreted it to include both burdens and benefits. A transferee must acquire the same interest before he can be subject to a burden or receive the benefit of a covenant running with the land. Thus the grant of a road easement or a leasehold estate from one holding a fee does not transfer either the burden or the benefit of any covenant to the easement holder or lessee. Section 1465 is limited, however, to covenants running under Civil Code section 1462 and the 1905 provisions.

203. Miller & Lux, Inc. v. San Joaquin Agricultural Co., 58 Cal. App. 753, 209 P. 592 (1922); CAL. CIV. CODE § 1466 (West 1954): "No one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for a breach of the covenant before he acquired the estate, or after he has parted with it or ceased to enjoy its benefits."
204. CAL. CIV. CODE § 1467 (West 1954): "Where several persons, holding by several titles, are subject to the burden or entitled to the benefit of a covenant running with the land, it must be apportioned among them according to the value of the property subject to it held by them respectively, if such value can be ascertained, and if not, according to their respective interests in point of quantity."
205. CAL. CIV. CODE § 1465 (West 1954): "A covenant running with the land binds those only who acquire the whole estate of the covenantor in some part of the property."
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of section 1468. Covenants running under amended section 1468 are expressly exempted from the requirements of section 1465.\(^{208}\)

Thus applying the rules of sections 1465 and 1467, suppose A owns an acre in fee and he grants a quarter acre to B in fee and another quarter acre to C in a life estate. B acquires one-fourth of the burden of any covenant running on A's land because he has acquired one-fourth of the property in fee. C is not liable for the burden, however, because he did not take the whole estate A had but a lesser life estate. A has been relieved of one-fourth of the burden on C's quarter acre. A can, of course, impose the same burden on C in the grant of the life estate to which he is subject, so that if C violates the covenant and A is held liable, A can recover from C.

A covenant for the addition of some new thing runs only so far as the assigns who are expressly mentioned in the covenant.\(^{209}\) If a transferee is not expressly stated to be bound, he does not acquire the burden of producing the new thing.

If a covenant is placed in a deed conveying land from A to B and if B later conveys the land to Y but fails to repeat the provisions of the covenant in the deed to Y, Y will nonetheless be bound if the deed from A to B containing the covenant has been recorded. A subsequent transferee, such as Y, has constructive notice of any covenants in the deeds in his chain of title and is bound thereby.\(^{210}\) The transferee is held to have constructive notice even before he takes title, therefore, any construction on the property before title passes must conform to the restrictions.\(^{211}\)

Defenses to Enforcement

Prior to the 1969 amendments to Civil Code section 1468, most land use restrictions did not run at law, and thus any action to en-

\(^{208}\) CAL. CIV. CODE § 1468 (West Supp. 1977) provides in pertinent part: "Each covenant . . . runs with the land owned by or granted to the covenantor and the land owned by or granted to the covenantee and shall . . . notwithstanding the provisions of Section 1465, benefit or be binding upon each successive owner, during his ownership, of any portion of such land affected thereby and upon each person having any interest therein derived through any owner thereof . . . ." (emphasis added).

\(^{209}\) Marin County Hosp. Dist. v. Cicurel, 154 Cal. App. 2d 294, 301, 316 P.2d 32, 37 (1957); CAL. CIV. CODE § 1464 (West 1954): "A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with land so far only as the assigns thus mentioned are concerned."


force the restrictions had to be brought in equity. Because the action was in equity, the court could consider the equitable defenses of laches, unclean hands, and changed conditions. Under section 1468, land use restrictions can now be enforced at law, and the question arises whether a plaintiff seeking only money damages under section 1468 can avoid the equitable defenses.

Despite the merger of the forms of action with the adoption of code pleading, there still remains a distinction between law and equity. The rule is well established that the equitable defense of laches is not available in an action for money damages. The rule is equally well established, however, that the defense of unclean hands is available in a legal action. Although earlier cases held that the defense of changed circumstances could not be considered in a legal action, the more recent cases recognize the defense whether the restrictions are being enforced in law or equity.

The courts have held that a defendant in a legal action has a right to set up as many defenses as he has available, whether legal or equitable. Thus in an action for breach of restrictions in which the plaintiff is seeking only money damages, the courts will consider the defenses of unclean hands and changed conditions. The only equitable defense that is not available is laches, but the courts may find in the place of laches, the legal defense of waiver.

Laches, Waiver, and Estoppel

If a plaintiff delays in making an objection to the violation of a covenant and the delay causes the defendant to do or refrain from doing something to the defendant's injury, the plaintiff is guilty of laches. On the other hand, if the plaintiff acts in such a way as to warrant the inference that he has chosen to relinquish his legal right of enforcement, he has waived his cause of action. The dis-

214. See notes 93-96 & accompanying text supra.
tinction between laches and waiver is that laches requires the defendant to change his position to his detriment, whereas waiver involves only the conduct of the plaintiff.\textsuperscript{223} Although waiver must be an intentional relinquishment of a known right, the intent does not have to be proved. Waiver can be inferred from conduct.\textsuperscript{224}

If a plaintiff knows that a defendant is getting ready to pour the foundation of his house using foundation forms that are over the sidelines but the plaintiff does not make any objection until after the foundation is laid, the court may find the plaintiff subject to the defense of either laches or waiver. He may be subject to the defense of laches because he waited until the foundation was laid. He may be subject to the defense of waiver because with knowledge of the violation he took no immediate action, and it can thus be inferred he waived any objection. A plaintiff is free of laches or waiver, however, if he brings an action long after the violation has occurred but as soon as he learns of it, if there was nothing that should have put him on notice.\textsuperscript{225} The plaintiff is not required to go onto the defendant's land to determine if the use of the property is in conformance with the restrictions.\textsuperscript{226} The implication is that he is only held to the knowledge that a reasonably prudent person would have acquired from observations off the property.

Waiver may occur in two different circumstances: if the original grantor, the one who extracted the covenants, is seeking to enforce the restrictions and if subsequent grantees, the present lot owners, are seeking to enforce them. If the grantor has placed uniform restrictions on some of the property he has conveyed but failed to place restrictions on other lots, the court may find that he has manifested an intent to abandon his plan of restrictions and has waived his right to enforce those covenants that were imposed.\textsuperscript{227} In an action between subsequent grantees in which one or more lot owners are seeking to enforce the covenant against another lot owner, waiver may be found if violations in the tract are so numerous that the defendant lot owner was led to assume that the covenant was no longer in effect and if the court determines that enforcement of the covenant against the defendant will not restore the standard.\textsuperscript{228}

\textsuperscript{223} Id.; Lubin v. Lubin, 144 Cal. App. 2d 781, 794, 302 P.2d 49, 59 (1956).
\textsuperscript{226} Morgan v. Veach, 59 Cal. App. 2d 682, 689, 139 P.2d 976, 980 (1943).
be found even if the complainting lot owners have not personally violated the covenant but have failed to object to other violations in the tract.\textsuperscript{229} A number of violations will not constitute a waiver, however, if the essential purpose of the restrictions has been maintained.\textsuperscript{230} Thus, if an area is restricted to single family residences and over the years a number of homes have been turned into boarding houses, the court may find an abandonment of the single family restriction and hold that the lot owners have waived the right to keep out boarding houses. Nevertheless, if someone wants to erect a commercial building in the area, the court could find that boarding houses are within the residential purpose of the original restrictions and that the commercial use should still be excluded as contrary to the established use of the area.

If the party bringing suit is in violation of the restrictions, the courts usually do not say that he has waived his right of enforcement but that he is barred from enforcing the covenant.\textsuperscript{231} The court is merely saying the plaintiff has unclean hands. If the plaintiff is in material violation, one that defeats the purpose of the restriction, he will be barred from enforcing the restriction against others.\textsuperscript{232} Likewise, if the plaintiff has violated the same restriction that he seeks to enforce, he will be barred.\textsuperscript{233} If a plaintiff's violation is trivial and the defendant's violation is material, the plaintiff will not be prevented from proceeding against the defendant.\textsuperscript{234}

In California estoppel can be used only as a shield and not as a sword; it can be used to prevent the enforcement of restrictions, but it can not be used to stop a violation. For example, a subdivider who received consideration for releasing restrictions on several parcels in the subdivision was estopped from enforcing those same restrictions against other property owners.\textsuperscript{235} By contrast, a subdivider who has made oral representations that the land retained is covered by the restrictions will not be estopped from later asserting the land is not restricted.\textsuperscript{236} This harsh result stems from the strict California rule that any intent to place restrictions on land must be evidenced

\textsuperscript{232} Id.
\textsuperscript{233} Id.
\textsuperscript{234} Id.; see also Seligman v. Tucker, 6 Cal. App. 3d 691, 86 Cal. Rptr. 187 (1970).
\textsuperscript{235} Alexander v. Title Ins. & Trust Co., 48 Cal. App. 2d 488, 119 P.2d 992 (1941).
\textsuperscript{236} The finding of a possible estoppel in Smith v. Rasqui, 176 Cal. App. 2d 514, 1 Cal. Rptr. 478 (1959), was disapproved in Riley v. Bear Creek Planning Comm., 17 Cal. 3d 500, 512, 551 P.2d 1213, 1222, 131 Cal. Rptr. 381, 390 (1976).
by a written document.\textsuperscript{237} Even if a grantee takes land with actual knowledge of the restrictions and for several years acts in compliance, he will not be estopped from violating the restrictions if the grantor failed to place them in his particular deed.\textsuperscript{238}

\subsection*{Changed Conditions}

Restrictive covenants will not be enforced if changed conditions in the neighborhood have rendered the purpose of the restrictions obsolete or if it would be oppressive and inequitable to give the restrictions effect.\textsuperscript{239} Obviously, each case must be determined on its own facts.\textsuperscript{240} The court may find changed conditions in one part of a neighborhood and not in another, so that the restrictions would be released only on some parcels and enforced against the rest.\textsuperscript{241} Whatever the circumstances of the neighborhood, the court can only adjudicate the restrictions on the property belonging to the parties before the court.\textsuperscript{242} A decision to release the restrictions on their property does not release the restrictions on the rest of the tract belonging to property owners not before the court. Any determination by the court to keep the restrictions in force is not res judicata, because the conditions may continue to change such that at a later time the court may decide it would be oppressive to keep them in force.\textsuperscript{243}

Factors the court may consider in determining changed circumstances include the intrusion of commercial use into a residential neighborhood, the general deterioration of the neighborhood, and increased traffic, congestion, and noise.\textsuperscript{244} A rezoning by the city from residential to some other use may be admitted as evidence of changed circumstances, but the zoning itself does not affect the enforcement of private restrictions.\textsuperscript{245} Evidence that the property would be more valuable if the restrictions were lifted is not considered.\textsuperscript{246}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{237} Riley v. Bear Creek Planning Comm., 17 Cal. 3d 500, 551 P.2d 1213, 131 Cal. Rptr. 381 (1976).
\item \textsuperscript{238} Id.
\item \textsuperscript{241} Fairchild v. Raines, 24 Cal. 2d 818, 828, 151 P.2d 260, 265 (1944).
\item \textsuperscript{242} Hurd v. Albert, 214 Cal. 15, 28, 3 P.2d 545, 550 (1931).
\item \textsuperscript{243} Id.
\end{enumerate}
\end{footnotesize}
The courts have in several cases lifted the restrictions on property located on the perimeter of a residential tract that faced out onto a commercial street.\textsuperscript{247} The perimeter property was certainly less desirable for residential use, but allowing a commercial use simply pushed the problem one block back to the houses on the street behind. The better view is that the purpose of the restrictions was to prevent change on the restricted property in the event of change outside the tract. Therefore, the restrictions should be enforced when the anticipated change has occurred.\textsuperscript{248} Even if there has been change within the tract, the covenants should be enforced so long as the original purpose can be accomplished.

In determining whether conditions have changed, a court sitting without a jury has wide discretion. The power of the appellate court to review the trial court's decision is limited to the determination whether substantial evidence supports the trial court's conclusion.\textsuperscript{249} If the judge makes a personal inspection of the disputed area, his observations may be used along with other evidence.\textsuperscript{250} Obviously, the court's decision must be in accord with the evidence.\textsuperscript{251}

**Termination**

A covenant may cease to be enforceable for a number of different reasons. The covenant may terminate by its own terms if it was expressed to run only for a fixed number of years.\textsuperscript{252} The courts may terminate a covenant if neighborhood conditions have so changed that the purpose of the covenant can no longer be achieved or if the neighbors have indicated an intention to abandon the restrictions.\textsuperscript{253} The state may end a covenant if it takes property in eminent domain, although the state must pay compensation for the resulting decrease in value to the land that would have received a benefit.\textsuperscript{254} A change in zoning, however, does not affect the enforcement of private covenants that are more restrictive than the zoning.\textsuperscript{255}

\begin{itemize}
\item \textsuperscript{247} Key v. McCabe, 54 Cal. 2d 736, 356 P.2d 169, 8 Cal. Rptr. 425 (1960); Downs v. Kroeger, 200 Cal. 743, 254 P. 1101 (1927).
\item \textsuperscript{248} Fairchild v. Raines, 24 Cal. 2d 818, 827, 151 P.2d 260, 265 (1944); Powell, supra note 11, \S 684.
\item \textsuperscript{251} Jewett v. Albin, 90 Cal. App. 535, 546, 266 P. 329, 333 (1928).
\item \textsuperscript{252} Diederichsen v. Sutch, 47 Cal. App. 2d 646, 118 P.2d 298 (1941).
\item \textsuperscript{253} See notes 227-48 & accompanying text supra.
\item \textsuperscript{255} Hirsch v. Hancock, 173 Cal. App. 2d 745, 756, 343 P.2d 959, 968 (1959); Powell, supra note 11, at \S 686.
\end{itemize}
The owner of land receiving the benefit of a covenant can quit-claim all his rights and interest in the burdened property and thereby release the restrictions that run in his favor. If the restrictions run in the favor of many lot owners, however, a release by any one of them should not affect the right of enforcement of the rest.

The covenant may provide that it can be terminated by a vote of a certain percentage or number of lot owners, which may be less than a majority. If the requisite number vote to end the restrictions, the other lot owners cannot object, because they took with notice of the provision that the covenant could be terminated. Conversely, if the covenant expires on a fixed date, there may be a provision for its extension by a vote of a certain percentage of lot owners, and the losing lot owners cannot complain. They also acquired their lots with notice of the provisions.

Conclusion

Civil Code section 1468 was dramatically expanded in 1968 and again in 1969 to allow the running of both burdens and benefits in covenants contained in a conveyance of land or made between two landowners. For covenants entered into after 1969, section 1468 should be the controlling law in most cases. The section will not be applied retroactively to covenants that predate 1968. Therefore Civil Code sections 1462 and 1460, the pre-amendment provisions of section 1468, and equitable servitudes will still be in effect. For covenants made after 1969, section 1468 establishes a number of technical requirements that may defeat the running of the covenant, especially if the courts insist on literal compliance. If the covenant fails to run under section 1468, it may still run under the provisions of sections 1462 and 1460 or pursuant to the equity powers of the courts.

Sections 1462 and 1460 and equitable servitudes have traditionally been restrictively interpreted, and unreasonably limited in their application. Sections 1462 and 1460 have been misunderstood by the courts. Equitable servitudes have become encrusted with so many rules and distinctions that they have become as technical as covenants running at law. The courts need to reexamine the provisions of sections 1462 and 1460 and the basic principle that equity will enforce a covenant that has failed to run with the land at law. With the
combination of sections 1462, 1460, and 1468 and the equity powers of the court, there should never be a covenant in California that cannot be enforced if it would be inequitable to allow a transferee to avoid the restriction.

Randall K. Steverson*