

RUNNING WITH THE LAND IN MONTANA

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I. INTRODUCTION

In 1895 the legislature of the young state of Montana enacted its first Civil Code. The Code was largely a copy of one drafted by David Dudley Field for his own state of New York—where the proposal had proved most controversial, for Field advocated nothing less than the reduction to statutory form of the entire scope of private law: contracts, property, torts, agency, and many other subjects. All of these traditionally had been the preserve of the courts alone.

By enacting the Field Code, Montana adopted a comprehensive statute that had been designed for New York but had been rejected there, although similar versions had been enacted into law in the Dakota Territory in 1866 and in California in 1872. Neither the legislature of Dakota nor that of California had made many changes in Field's original draft. The same was true in Montana. Among the portions left untouched was a cluster of eleven sections in a Title called "Transfer of Obligations." The last eight of these sections set forth special rules for "covenants running with the land."

Nearly a century has passed since Montana became a Field Code state. Upon the statute books the sections on "covenants running with the land" still lie undisturbed. Their history in the courts, however, has been a different matter.

This article reviews the background of those provisions and their life in the Montana courts. It relates the story of the substantive law as it began, as it developed, as it stands today. That story includes the theme of a native jurisprudence struggling to free itself from a cage of foreign statutes, and it may serve as a homily on the risks of pre-mature codification.

This article consists of six Parts. Part I is this Introduction. Part II outlines the common law of running covenants as it appeared upon the eve of codification. Because the Field Code was, for the most part, a summary of the then-existing common law, understanding that law assists one in comprehending the intent and meaning of the Code provisions we shall consider here. Part

III describes the origin and theory of the Field Civil Code. Part IV combines information from Parts II and III to arrive at a conclusion as to the "original intent"—the meaning—of the codifiers and of the legislature that adopted the statutes regulating land covenants. This original intent is, of course, supposed to be binding upon the Montana state courts.¹

Part V is a review of the law of the Montana courts—the judicial development of the subject to the present day. As we shall see, that judicial development has often been at odds with the intent behind the statutes.

Finally, Part VI offers some observations on the Montana jurisprudence of land covenants; suggests that it be liberated from the statutes; and predicts, in rough outline, the shape of a new common law, free of a code designed for New York, and distinctive to Montana.²

1. MONT. CODE ANN. § 1-2-102 (1989).

2. *Note on Sources.*

The law review article most frequently cited in this study is Fisch, *The Dakota Civil Code: More Notes for an Uncelebrated Centennial*, 45 N.D.L. Rev. 9 (1968) [hereinafter *Fisch*]. Other articles are cited fully in the succeeding notes.

The treatises, historical works, and book-length essays relied upon are listed below. Several of the editions cited have been superseded. In my analysis of 19th century law, I used the available editions published closest to the time under study.

The treatises, historical works, and book-length essays, together with short citation form, are as follows:

AMERICAN LAW INSTITUTE, *RESTATEMENT OF THE LAW OF PROPERTY* (1944) [hereinafter *RESTATEMENT OF PROPERTY*].

AMERICAN LAW OF PROPERTY (J. Casner ed. 1952) [hereinafter *ALP*].

S. AMOS, *AN ENGLISH CODE* (1873) [hereinafter *AMOS*].

J. BEHAN, *THE USE OF LAND AS AFFECTED BY COVENANTS AND OBLIGATIONS NOT IN THE FORM OF COVENANTS* (1924) [hereinafter *BEHAN*].

W. BLACKSTONE, *COMMENTARIES* [hereinafter *BLACKSTONE*].

J. CARTER, *LAW: ITS ORIGIN, GROWTH AND FUNCTION* (1907) [hereinafter *CARTER*].

C. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* (1981) [hereinafter *COOK*].

R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *THE LAW OF PROPERTY* (1984) [hereinafter *CUNNINGHAM*].

D. DOBBS, *HANDBOOK OF THE LAW OF REMEDIES* (1973) [hereinafter *DOBBS*].

D. FIELD, *SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* (T. Coan ed. 1890) [hereinafter *DDF Works*]. Each citation to this book is to a paper or speech by Field; I have dispensed with identifying the original date, place, and source of each paper and speech.

L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973).

C. GALE, *A TREATISE ON THE LAW OF EASEMENTS* (9th ed. 1916) [hereinafter *GALE*].

J. GODDARD, *A TREATISE ON THE LAW OF EASEMENTS* (8th ed. 1921) [hereinafter *GODDARD*].

J. KENT, *COMMENTARIES ON AMERICAN LAW* (O. Holmes ed. 1873) [hereinafter *J. KENT*].

R. NATELSON, *LAW OF PROPERTY OWNERS ASSOCIATIONS* (1989) [hereinafter *NATELSON, POA*].

J. POMEROY, *A TREATISE ON EQUITY JURISPRUDENCE* (2d ed. 1892) [hereinafter *POMEROY*].

II. THE COMMON LAW AT THE TIME OF CODIFICATION

A. *Introduction to the Nineteenth Century Common Law*

In the late nineteenth century, burdens upon land included servitudes created by grant, reservation, or prescription and servitudes created by contract. Those created by grant, reservation, or prescription were the incorporeal hereditaments, the most important of which were easements, rents, and profits.³ Those created by contract were divided into real covenants and equitable servitudes.

Real covenants were contractual servitudes that qualified for enforcement by a court of law. Violation of a real covenant was the basis for a claim for money damages by the promisee or his assigns against the promisor or his assigns. Equitable servitudes were contracts running with the land in equity. Violation of an equitable servitude was the basis for a suit in a chancery court for an injunction against the assigns of the promisor or an equitable lien against the servient estate. Most real covenants qualified for treatment as equitable servitudes also. The prerequisites for enforcement in equity, however, were somewhat different than at law; therefore equity would enforce some contracts that did not run with the land at law.

The law of the late 19th century contained all the conditions necessary for enforcement of another kind of servitude: the continuing equitable lien based not upon contract but upon a theory of

PROGRESSIVE MEN OF THE STATE OF MONTANA (1902) (subscribed biographical compilation) [hereinafter PROGRESSIVE MEN].

1 R. RAYMER, MONTANA: THE LAND AND THE PEOPLE (1930) [hereinafter RAYMER].

W. RAWLE, A PRACTICAL TREATISE ON THE LAW OF COVENANTS FOR TITLE 334-35 (3rd. ed. 1860) [hereinafter RAWLE].

Root, *The Courts and Lawyers of Montana* in H. SANDERS, A HISTORY OF MONTANA (1913) [hereinafter Root].

F. C. VON SAVIGNY, THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (A. Hayward trans. 1831) [hereinafter SAVIGNY].

H. SIMS, A TREATISE ON COVENANTS WHICH RUN WITH THE LAND OTHER THAN COVENANTS FOR TITLE (1901) [hereinafter SIMS].

C. SPENCE, TERRITORIAL POLITICS AND GOVERNMENT IN MONTANA, 1864-89 (1975) [hereinafter SPENCE].

W. WALSH, A TREATISE ON EQUITY (1930) [hereinafter WALSH].

3. Today, because the practice of creating easements by contract rather than by conveyance is so prevalent, it is easy to forget that the practice is technically incorrect. The distinction between easements (created by grant, reservation, or prescription) and equitable servitudes (created by contract) was better understood in the days of the codifiers:

[A]t common law an easement can be created only by express or implied grant or by prescription; the doctrine of [equitable servitudes] has no connection with either grant or prescription; it is founded exclusively upon principles of the law of contract

BEHAN, *supra* note 2, at 45. At the time of the codifiers, when the parties purported to create an easement by covenant, the covenant was construed as a grant or reservation.

unjust enrichment. A brief description of the uses of this lien appears in Section D of this Part II.

B. Real Covenants

Real covenants have a long history in Anglo-American jurisprudence. At least one case on the subject appears in the English Year Books of the 14th century,⁴ and a decision by the Court of King's Bench dating from Elizabethan times⁵ remains the leading case on the subject.

Most of the real covenants found in the early cases imposed affirmative obligations upon the servient owner, such as the obligation to pay rent or improve the land.⁶ By the time of the Montana codification in 1895, however, English and American courts had validated numerous other affirmative covenants. Among these were the title covenants of quiet enjoyment, warranty, and further assurances;⁷ promises to repair, maintain, and turn over in good repair;⁸ to pay rent, either perpetually or for a term;⁹ to share the expenses for maintaining a dam;¹⁰ to supply water and other substances;¹¹ to lay out a certain amount of money for repairs in the event of a fire;¹² to insure against fire;¹³ to erect new structures,

4. Pakenham's Case, Y.B. Hil. 42 Edw. 3, pl. 14 (1368).

5. Spencer's Case, 5 Co. Rep. 16a, 77 Eng. Rep. 72 (K.B. 1583).

6. For example, in Pakenham's Case, a convent (monastery) was a tenant of the lord of a manor. As part of the services to be rendered, the prior of the convent promised that its monks would always sing at religious services at the manor's chapel. The court held that the lord's successors in interest (i.e., the "heirs and assigns" of the reversioner) could enforce that promise against the prior and his convent—that, in modern parlance, the "benefit of the covenant ran with the land."

In Spencer's Case, a tenant for years promised to build a brick wall upon the land. See also *Brewster v. Kitchin*, 1 Ld. Raym. 317, 91 Eng. Rep. 1108 (K.B. 1696) (covenant of "farther assurance").

The right of the heirs of a reversioner to the running of the benefit was established definitively by statute in 1540. See 32 Hen. VIII, c. 34 (1540).

7. *Allen v. Culver*, 3 Denio 284 (N.Y. Sup. Ct. 1846); *Verplanck v. Wright*, 23 Wend. 506 (N.Y. Sup. Ct. 1840); *Lawrence v. Montgomery*, 37 Cal. 183 (1869); *Salmon v. Vallejo*, 41 Cal. 481 (1871).

8. *Bally v. Wells*, Wilm. 339, 97 Eng. Rep. 130, 132 (C.P. 1769); *Allen*, 3 Denio 284; *Verplanck*, 23 Wend. 506; *Myers v. Burns*, 33 Barb. 401 (N.Y. App. Div. 1861); *Martyn v. Clue*, 18 Q.B. 661, 118 Eng. Rep. 249 (1852); *Wakefield v. Brown*, 9 Q.B. 209, 115 Eng. Rep. 1254 (1846); *Demarest v. Willard*, 8 Cow. 206 (N.Y. Sup. Ct. 1828).

9. E.g., *Van Rensselaer v. Read*, 26 N.Y. 558 (1863) (perpetual); *Tyler v. Heidorn*, 46 Barb. 439 (N.Y. App. Div. 1866) (perpetual); *Allen*, 3 Denio 284 (term); *Verplanck*, 23 Wend. 506 (term).

10. *Denman v. Prince*, 40 Barb. 213 (N.Y. App. Div. 1862).

11. *Id.* (water); *Jourdain v. Wilson*, 4 B. & Ald. 266, 106 Eng. Rep. 935 (K.B. 1821) (water). See also *Bally*, Wilm. 341, 97 Eng. Rep. 130 (wheat straw).

12. *Allen*, 3 Denio 284.

13. *Vernon v. Smith*, 5 B. & Ald. 1, 106 Eng. Rep. 1094 (K.B. 1821); *Laffan v. Naglee*,

such as fences;¹⁴ to cultivate the land in a particular manner;¹⁵ to reside on the servient premises;¹⁶ to pay certain charges on behalf of the lessor, such as taxes¹⁷ and assessments;¹⁸ to afford a party the pre-emptive right to purchase the land;¹⁹ and to pay the assessed value of improvements at the end of a term.²⁰ In addition, the judiciary had upheld a wide range of restrictive covenants—covenants that imposed no affirmative duties upon the servient possessor but reduced his freedom of action in some manner. These covenants included promises to refrain from erecting certain kinds of structures upon the servient property²¹ or to erect them only in compliance with certain specifications;²² to refrain from cutting timber;²³ and to refrain from carrying out a certain trade on the premises.²⁴

Although the common law courts proved flexible enough to recognize a great number of real covenants, their love for form and their desire to keep the number of land restrictions at a manageable level induced them to impose several prerequisites to legal enforcement. First, a real covenant had to be a *covenant*, i.e., it had to be contained in a written instrument under seal.²⁵ If the grantor was the covenantor, the instrument in question could be a deed poll signed by him. Traditionally, if the grantee was the covenantor, then he would have to sign and seal an indenture, lease, or other instrument. By the late 19th century, however, some courts would enforce a covenant by the grantee contained in a deed poll if the grantee had accepted the deed.²⁶

Before they would enforce a real covenant against the assigns of a promisor, the common law courts required that the burden of

9 Cal. 663 (1858).

14. *Spencer's Case*, 5 Co. Rep. 16a, 77 Eng. Rep. 72 (K.B. 1583); *Bronson v. Coffin*, 108 Mass. 175 (1871); *Easter v. Little Miami R.R.*, 14 Ohio St. 48 (1862).

15. *Verplanck*, 23 Wend. 506; *Martyn*, 18 Q.B. 661, 118 Eng. Rep. 249.

16. *Verplanck*, 23 Wend. 506.

17. *Id.*; *Salisbury v. Shirley*, 66 Cal. 223, 5 P. 104 (1884); *Ellis v. Bradbury*, 75 Cal. 234, 17 P. 3 (1888).

18. *Post v. Kearney*, 2 N.Y. 394 (1849).

19. *Laffan v. Naglee*, 9 Cal. 663 (1858).

20. *Bailey v. Richardson*, 66 Cal. 416, 5 P. 910 (1885).

21. *Allen v. Culver*, 3 Denio 284 (N.Y. Sup. Ct. 1846); *St. Andrew's Lutheran Church's Appeal*, 67 Pa. 512 (1871).

22. *Winfield v. Henning*, 21 N.J. Eq. 188 (1870).

23. *Verplanck v. Wright*, 23 Wend. 506 (N.Y. Sup. Ct. 1840).

24. *Id.*; *Norman v. Wells*, 17 Wend. 136 (N.Y. Sup. Ct. 1837). Other covenants recognized by the end of the 19th century are listed in *Northern Pac. Ry. v. McClure*, 9 N.D. 73, 81 N.W. 52 (1899). See also 4 KENT, *supra* note 2, at 126 n.1 (note by Oliver Wendell Holmes, Jr.).

25. 2 ALP, *supra* note 2, § 9.9 at 364.

26. *Id.* at 365.

the promise fall upon the promisor and his assigns as owners of a servient estate. Strictly speaking, the servient estate was not the land itself, but some present or a future interest in land. Nevertheless, the test applied for determining if the servient estate was duly burdened was to ask whether or not the promise "touched and concerned" the *land*. In other words, the promise had to affect the use or enjoyment of the land in some way, not merely the liabilities of the land owner. If it did not affect the use or enjoyment of the land, the promise was deemed merely a "personal" covenant—enforceable against the original promisor, but not against his heirs or assigns.²⁷

Moreover, for a covenant to run with the land, the covenant had to benefit some dominant estate owned by the person seeking enforcement. In other words, real covenants could not be held in gross.²⁸ The dominant and servient estates might be interests in the same land (e.g., a leasehold and a reversion) or they might be interests in different parcels.

Although the dominant estate, like the servient estate, was an *interest* in land and not the land itself, the covenant had to improve the desirability of the *land* in which the estate was held. With the exception of promises to pay rent, covenants did not run if the benefit merely served the unrelated business interests of the dominant owner.²⁹ Thus, a lessee's engagement to maintain the im-

27. *Spencer's Case*, 5 Co. Rep. 16a, 77 Eng. Rep. 72 (K.B. 1583); *Norman*, 17 Wend. 136. What constitutes "touching and concerning" has been a matter upon which a great deal of ink has been spread. 2 ALP, *supra* note 2, § 9.4. The classic modern judicial treatment of the topic is found in *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938). I propose the following definition: A promise "touches and concerns" both the burdened land and the benefited land if the burdened and benefited parcels are so situated that breach of the promise would injure the possessor of the benefited parcel in a way that could not normally be cured by substitutionary relief.

28. *Bronson v. Coffin*, 108 Mass. 175 (1871). This remains true in most jurisdictions today. See *Marra v. Aetna Constr. Co.*, 15 Cal. 2d 375, 101 P.2d 490 (1940); RESTATEMENT OF PROPERTY, *supra* note 2, §§ 542, 542 comment c, & 549. Professor Krasnowiecki of the University of Pennsylvania reports that in a national search involving many hundreds of cases, he was able to find only two in which a covenant was enforced at the request of a plaintiff who held no benefited land. Krasnowiecki, *Townhouses with Homes Associations: A New Perspective*, 123 U. PA. L. REV. 711, 721 & 721 n.43 (1975). For a more recent analysis, see Roberts, *Promises Respecting Land Use—Can Benefits be Held in Gross?* 51 Mo. L. REV. 933 (1986).

According to the Appellate Court of Illinois, that state may not enforce the requirement that land be benefited quite as rigorously as most jurisdictions. *Merrionette Manor Homes Improvement Ass'n v. Heda*, 11 Ill. App. 2d 186, 136 N.E.2d 556 (1956). See also *VanSant v. Rose*, 260 Ill. 401, 103 N.E. 194 (1913) (equitable relief).

29. The reversion (or remainder) is the dominant estate for a leasehold rent. At common law, fee simple rents, like easements, are incorporeal hereditaments, and do not require a dominant estate. For cases relied upon by the drafters of the original Field Code, see *Van Rensselaer v. Read*, 26 N.Y. 558 (1863); *Tyler v. Heidorn*, 46 Barb. 439 (N.Y. App. Div.

provements on leasehold property benefited the land and could run with both the leasehold and the reversion,³⁰ but a promise to provide a property owner with free railroad tickets did not.³¹

Furthermore, a promise was not an enforceable real covenant unless there was a property relationship between the original contracting parties at the time of contracting. This prerequisite has come to be known as the requirement of *horizontal privity*.³²

At the beginning of the 19th century, the common law courts required that the property relationship between the covenanting parties be tenurial in nature. Thus, a landlord could enter into a running covenant with his lessee, and a reversioner with his life tenant;³³ but the grantor and grantee of a fee simple absolute, who were not parties to a tenurial relationship, were unable to benefit or bind their respective assigns. In the ensuing years, however, American judges broadened the scope of the relationships that would fulfill the horizontal privity requirement. For example, in the celebrated Massachusetts case of *Morse v. Aldrich*,³⁴ Cook had conveyed to Hull a tract of land in fee, together with an easement over Cook's retained land. This easement permitted Hull to dig out and carry away soil from Cook's mill pond for fertilizer. Hull conveyed his dominant parcel to the plaintiff (Morse), who later covenanted with Cook that Cook would "draw off his said pond when thereto requested by said Morse, in the months of August and September . . . for the purpose of giving said Morse an opportunity of

1866); *Allen v. Culver*, 3 Denio 284 (N.Y. Sup. Ct. 1846); *Verplanck v. Wright*, 23 Wend. 506 (N.Y. Sup. Ct. 1840).

30. See *supra* note 8.

31. *Lyford v. Northern Pac. Coast R.R.*, 92 Cal. 93, 28 P. 103 (1891).

32. The reporters of the Restatement of Property have taken the position that horizontal privity is necessary only to the running of the burden. Under this theory, if A and B, being neighboring landowners (i.e., not in privity of estate), covenant with each other that A shall not operate a tavern on his property, both B and the assignees of B will be able to enforce the promise against A, but neither B nor his assigns will be able to enforce A's promise against A's successors. 2 ALP, *supra* note 2, § 9.11 at 370. Precursors to the RESTATEMENT view date from the late 19th century. *Id.* at n.11.

33. This is the sort of privity required by *Spencer's Case*, 5 Co. Rep. 16a, 77 Eng. Rep. 72 (K.B. 1583). See also the discussion in *Bally v. Wells*, Wilm. 341, 97 Eng. Rep. 130, 131-32 (C.P. 1769). There is an abundance of landlord-tenant/running covenant cases from the nineteenth century. Leading American decisions cited by the codifiers include *Allen*, 3 Denio 284; *Norman v. Wells*, 17 Wend. 136 (N.Y. Sup. Ct. 1837); *Myers v. Burns*, 33 Barb. 401 (N.Y. App. Div. 1861); *Demarest v. Willard*, 8 Cow. 206 (N.Y. Sup. Ct. 1828); *Davis v. Morris*, 35 Barb. 227 (N.Y. App. Div. 1861); *Salisbury v. Shirley*, 66 Cal. 223, 5 P. 104 (1884); *Bailey v. Richardson*, 66 Cal. 416, 5 P. 910 (1885); *Ellis v. Bradbury*, 75 Cal. 234, 17 P. 3 (1888); and *Hill v. McKay*, 94 Cal. 5, 29 P. 406 (1892). For a case involving a life tenant and reversioner, see *Verplanck*, 23 Wend. 506.

34. 36 Mass. (19 Pick.) 449 (1837).

digging and carrying out mud, &c”³⁵ Although the covenant was not made between parties in a tenurial relationship, the court held that Cook’s successors were bound by it:

To create a covenant which will run with the land, it is necessary that there should be a privity of estate between the covenantor and covenantee. In these [cited] cases, and in most of the cases on the same subject, the covenants were between lessors and lessees; but the same privity exists between the grantor and grantee, where a grant is made of any subordinate interest in land; the reversion or residue of the estate being reserved by the grantor, all covenants in support of the grant, or in relation to the beneficial enjoyment of it, are real covenants and will bind the assignee.³⁶

In other words, a reversion is only one interest to which the benefit of a covenant will attach; an easement or profit in the servient land will suffice.

Another nineteenth century Massachusetts decision, *Bronson v. Coffin*,³⁷ carried matters a good deal farther. It is of interest here because its legal methodology foreshadows a 1980 Montana case.³⁸ In *Bronson*, the defendant’s testator, a farmer, conveyed a tract of land to a railway company. In the deed of conveyance the grantor covenanted for himself and his assigns to “make and maintain a sufficient fence through the whole length of that part of the railroad which runs through my farm.”³⁹

After the farmer’s death, his estate sold the farm by warranty deed to the plaintiff who upon learning of the covenant in favor of the railroad sued the estate on the covenant against incumbrances. The estate’s defense was that the covenant to maintain the fence was not an incumbrance because it did not run with the land, and therefore did not bind the plaintiff. The estate argued that in the absence of a tenurial relationship or easement relationship between the railroad and the defendants’ testator at the time they entered into the covenant, no privity of estate existed and the covenant could not run.

Nevertheless, the court ruled that the covenant bound the plaintiffs:

Words sounding in covenant only may operate by way of grant of an easement, wherever it is necessary to give them that

35. *Id.* at 450.

36. *Id.* at 453-54 (citations omitted).

37. 108 Mass. 175 (1871).

38. *Reichert v. Weeden*, 190 Mont. 95, 618 P.2d 1216 (1980); see *infra* Part V(D).

39. 108 Mass. at 176.

effect in order to carry out the manifest intention of the parties.

In order to make a covenant run with the land of the covenantor and bind his heirs and assigns, the covenantee must, according to all the authorities, have such an interest in that land as to amount to a privity of estate between the parties to the covenant. In this Commonwealth, at least, it is not necessary that their relation should be that of landlord and tenant; but an interest in the nature of an easement in the land which the covenant purports to bind, whether already existing, or created by the very deed which contains the covenant, constitutes a sufficient privity of estate to make the burden of a covenant to do certain acts upon that land, for the support and protection of that interest and the beneficial use and enjoyment of the land granted, run with the land charged.⁴⁰

The reasoning of the *Bronson* court is circular: (1) a valid covenant creates an interest in the servient land in the nature of an easement, (2) the mutual interests of the covenanting parties in the servient land constitutes horizontal privity, and therefore, (3) the covenant is valid. Whatever the shortcomings in the *Bronson* analysis, however, the case expanded the notion of horizontal privity to include any successive grantor/grantee relationship, even if the grantor retains no reversionary interest in, and no true easement over, the lands of the grantee.

The doctrine that a real covenant may be created in the grant of a fee simple absolute is sometimes called the doctrine of "instantaneous privity." By 1895, instantaneous privity had become the prevailing rule in the United States for the running of both benefits and burdens.⁴¹ A few American judges, however, were of the view that a tenurial relationship was necessary for the burden to run when the original covenantor was a grantee. In other words, these judges would not allow a covenant to run if it burdened property simultaneously conveyed in fee simple absolute. This view was particularly common in New York,⁴² and it became part of the Field Code.⁴³

Another prerequisite for the running of a real covenant was an

40. *Id.* at 180 (citations omitted).

41. See, e.g., *Denman v. Prince*, 40 Barb. 213 (N.Y. App. Div. 1862). See also the state-by-state review in SIMS, *supra* note 2, at 140-73.

42. There apparently was some thought that burdening a fee simple absolute was in derogation of an otherwise unconditional grant. See *Van Rensselaer v. Smith*, 27 Barb. 104 (N.Y. Sup. Ct. 1858); *Van Rensselaer v. Hays*, 19 N.Y. 68 (1859); *Van Rensselaer v. Read*, 26 N.Y. 558 (1863); *Van Rensselaer v. Bonesteel*, 24 Barb. 365 (N.Y. Sup. Ct. 1855). For additional information on the law of privity in the late 19th century, see 2 KENT, *supra* note 2, at 525-29 n.1 (note by Oliver Wendell Holmes, Jr.).

43. See *infra* Part IV(E).

adequate property relationship between the original covenantee and the person seeking enforcement and between the original covenantor and the person allegedly bound. This has come to be called the doctrine of *vertical privity*.

Vertical privity existed on the benefit side if the present possessor of the dominant estate had derived his title from the covenantee—as a purchaser, assignee, tenant, or subtenant.⁴⁴ On the burden side, the necessary connection between the covenantor and the present possessor existed only if the present possessor had taken the *entire estate* of the covenantor. Thus, both the assignee of a servient leasehold and the purchaser of a servient fee simple could be liable for damages if they violated their original covenantor's promise, but the tenant of a covenantor who owned the fee simple was not so liable. Neither was the subtenant of a lessee-covenantor. For in the latter two cases, the present possessor had not taken the covenantor's entire estate.⁴⁵

The nineteenth century courts divided on whether a purchaser of a fee simple at a foreclosure sale was in vertical privity with a covenanting party who had owned the property previous to the sale. Arguably, the purchaser had taken a new title at the sale rather than the estate of the former owner. In 1890, the New York Court of Appeals accepted this position, ruling that such a purchaser was not in vertical privity with the former owner, and that “[c]ovenants running with the land do not bind him, nor do him any good.”⁴⁶ Two years later, the Supreme Court of Indiana held to the contrary.⁴⁷

A nineteenth century judge deciding whether or not to enforce a promise as a real covenant looked at the instrument for some indication that the contracting parties intended that the promise run with the land. The parties did not need to set forth this intent in express words unless the covenant was to construct some object

44. 2 ALP, *supra* note 2, § 9.20 (relying mostly on 19th century cases).

45. In *Davis v. Morris*, 35 Barb. 227 (N.Y. Sup. Ct. 1861), for example, L leased to T-1, who in turn conveyed his entire leasehold, except for the last day of the term, to T-2, who took possession. T-2 promised to pay rent to T-1, but did not assume T-1's obligation to L. T-1 became insolvent and failed to pay rent to L. L evicted T-2 and sued him for arrearages of rent. *Held*: no privity of estate existed between L and T-2, therefore T-2 could not be personally bound to remit unpaid rent.

Similarly, in *Post v. Kearney*, 2 N.Y. 394 (1849), L leased to E who assigned to J. W took J's leasehold in foreclosure and assigned it to P who subleased to S. L's assignee sued P. *Held*: P was in privity of estate with L and personally liable on the lease covenants. S was not.

See also COKE ON LITTLETON 385a; 2 ALP, *supra* note 2, § 9.14.

46. *O'Donnell v. McIntyre*, 118 N.Y. 156, 162, 23 N.E. 455, 456 (1890) (tax sale).

47. *Lake Erie & W. R.R. v. Priest*, 131 Ind. 413, 31 N.E. 77 (1892).

not in existence at the time of contracting. In the latter event the courts required that the promisor covenant explicitly for himself and his assigns.⁴⁸

Finally, when more than one person had purchased parts of the benefited or burdened estate, there was no requirement that they sue or be sued jointly, "[f]or if lessee assigns twenty parts to twenty persons, [the reversioner] may follow the assignee of every part. If a reversion is broken into parts, the assignee of each part may sue."⁴⁹

C. *Equitable Servitudes*

In the nineteenth century, as today, an equitable servitude was a contract running with the land in equity. Most real covenants qualified as equitable servitudes. When a defendant had breached a real covenant but the legal remedy was inadequate, the chancery courts provided relief, usually in the form of an injunction.⁵⁰

The more important equitable servitude cases involved promises that, for one reason or another did not qualify as real covenants. If the possessor of the servient estate had taken his interest with notice of the promise, a court might still enforce the promise in equity despite its deficiencies at law.⁵¹

Equitable servitude doctrine seems to have developed in response to inflexibilities in real covenant and negative easement law. The English courts borrowed negative easement doctrine from Roman legal sources.⁵² Negative easements had entered the com-

48. On this topic, see 2 ALP, *supra* note 2, § 9.3, a section based largely on 19th century and early 20th century cases.

Spencer's Case, 5 Co. Rep. 16a, 77 Eng. Rep. 72 (K.B. 1583), serves as an illustration of how technical the judges could be on this point. Spencer and his wife, the fee owners, had conveyed a term of years to a lessee. The lessee "covenanted for him, his executors, and administrators" that "he, his executors, administrators, or assigns, would build a brick wall." The lessee subsequently conveyed his leasehold to J., who in turn assigned it to the defendant. When the wall was not built, Mr. and Mrs. Spencer sued the defendant on the covenant. The plaintiffs lost because (1) the wall was not in existence at the time of contracting and (2) the original lessee had "covenanted for him, his executors, and administrators" that he or his assigns would build the wall but did not covenant for "him, his executors, administrators, and assigns." We can only speculate why the court read the covenant so strictly. Perhaps it sought to ensure that, in an era without a recording system, assignees of leases would be on notice of the scope of their obligations to the landlord.

49. *Bally v. Wells*, Wilm. 341, 346, 97 Eng. Rep. 130, 132 (C.P. 1769). See also *Van Rensselaer v. Bonesteel*, 24 Barb. 365 (N.Y. Sup. Ct. 1855).

50. See, e.g., *Rankin v. Huskisson*, 4 Sim. 13, 58 Eng. Rep. 6 (Ch. 1830); *St. Andrew's Lutheran Church's Appeal*, 67 Pa. 512 (1871).

51. See generally *infra* this Part II(C).

52. Four negative easements were thus imported: (1) the easement of *view* or *prospect*

mon law by the sixteenth century; they are prominent in reported cases dating from the Elizabethan and Stuart periods.⁵³ The value of negative easements lay in the fact that, because they were interests in property (incorporeal hereditaments), they could be conveyed from one landowner to another without the need for a privity relationship. Like other easements, negative easements could arise by prescription. Courts employed prescriptive negative easements as they employed the doctrine of nuisance: to protect a plaintiff's expectancy interest in a situation in which the plaintiff could rely upon no express contract or conveyance.

In the rapidly developing cities of the eighteenth and nineteenth centuries, negative easement doctrine was helpful, but it was not sufficient. The courts did not recognize new kinds of negative easements readily enough to suit the needs of the time. Moreover, land developers (and land preservers) needed a contractual device that would enable them to impose complex restrictions upon property without the strictures of common law privity. Equi-

(*q.v.*, *infra* this note), by which a dominant owner (or tenant) may prevent a servient owner (or tenant) from blocking the view from the dominant estate, (2) the easement of *light*, by which the servient owner can be prevented from blocking the passage of light into windows on the dominant property, (3) the easement of *support*, whereby the servient owner cannot change the contours of the property in such a way as to undermine land or buildings on the dominant estate, and (4) the easement of *water* or *water-drawing*, whereby the servient owner cannot interfere with the flow of water to the dominant estate through artificial channels laid over the servient land. According to some commentators, the easement of prospect was only a covenant or equitable servitude in English law, not a negative easement. GODDARD, *supra* note 2, at 112-13. However, GALE, *supra* note 2, at 304-06, states that restrictions on obstructing view may be created by grant as well as by covenant. Some of the confusion may have arisen because easements of prospect could not be created by prescription. *Id.*

Some modern writers claim the nineteenth century English courts limited negative easements to four because of the lack of a comprehensive deed recording system. But that statement may be misleading for two reasons. First, the total of four is accurate only if prospect is disqualified as an easement, which is not altogether certain. [The total of four may be based on a misreading of GALE, *supra* note 2, at 29 (the leading nineteenth century commentator), which contains a list of the four *principal* negative easements.] Second, the English courts could not have taken the deficiencies of the recording system too seriously, for they created the negative easement of air and developed the equitable servitude doctrine.

For the Roman prototypes of the English negative easements, see DIG. 8.1.5pr; 8.1.14.4; 8.3.1 (*aquae ductus*—water drawing); 8.2.4 (*ne officiendi luminibus vicini*—light); 8.2.12; 8.2.15 & 16 (*prospectus*—view); 8.2.1 (*onera vicini*—support).

53. See, e.g., *Sury v. Pigot*, Popham 166, 79 Eng. Rep. 1263 (1625) (water drawing). Nuisance theory was another prominent device of the era, especially among urban landowners. *Cox v. Matthews*, 3 Keble 133, 84 Eng. Rep. 636, 1 Ventris 237, 86 Eng. Rep. 159 (1673). Nuisance and negative easement theory were often conjoined. See, e.g., *Bowry and Pope's Case*, 1 Leon. 168, 74 Eng. Rep. 155 (Q.B. 1589) (*dictum*). For a case involving both nuisance and easement theory and some humorous Latin pleadings involving a pig sty, see *Aldred's Case*, 9 Co. Rep. 57b, 77 Eng. Rep. 816 (K.B. 1611).

table servitude law suited their needs almost perfectly.

Modern legal literature often repeats the inaccurate assertion that equitable servitudes originated in the 1848 case of *Tulk v. Moxhay*.⁵⁴ In fact the idea that equity would enforce land restrictions founded in simple contract can be traced at least as far back as the middle of the eighteenth century—and even earlier if, as has been suggested, the idea grew out of the marriage settlement cases.⁵⁵ Moreover, at least four other cases prior to *Tulk*, both from English and American courts, contain either holdings or *dicta* to the effect that covenants that do not run at law nevertheless may run in equity.⁵⁶

Many commentators unfamiliar with the prior history of equitable servitudes have cited a *dictum* from *Keppell v. Bailey*,⁵⁷ to the effect that Chancellors would not enforce promises not qualifying as real covenants. That the *dictum* was not typical of the period has already been shown, but it caught the fancy of David Dudley Field. When he drafted his Code, he included the doctrine of *Keppell* and eliminated most of the law of equitable servitudes.⁵⁸

Despite Mr. Field's hostility, equitable servitude doctrine

54. 2 Phillips 774, 41 Eng. Rep. 1143 (Ch. 1848). That this was not so can be discovered by reading the precedents cited in *Tulk* itself. Nevertheless, the myth of the initial position of *Tulk* is widespread. See, e.g., R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *THE LAW OF PROPERTY*, *supra* note 2 at 485-86 (1984); O. BROWDER, R. CUNNINGHAM & A. SMITH, *BASIC PROPERTY LAW* 626-33 (especially note 2 at 632).

55. The first explicit statement I have found is *Morris v. Lessees of Lord Berkeley*, 2 Ves. Sen. 453, 28 Eng. Rep. 289 (Ch. 1752), in which the plaintiff sought an injunction to prevent his neighbor from constructing a building which, the plaintiff alleged, would block his light. In denying the injunction, the chancellor stated, "Whoever comes into this court on such a right, must found it either on defendant's building so as to stop ancient lights, for which [the plaintiff] has prescription . . . or else on some agreement, either proved, or reasonable presumption thereof." *Id.* (emphasis supplied).

In the marriage settlement cases, a person (usually the father of the groom) had covenanted to give an espoused couple certain lands as a wedding gift, but had not honored the covenant. The courts charged the heirs with doing so as part of the price for entering into their inheritance. See, e.g., *Cannel v. Buckle*, 2 P. Wms. 243, 24 Eng. Rep. 715 (Ch. 1724); *Chilliner v. Chilliner*, 2 Ves. Sen. 528, 28 Eng. Rep. 337 (Ch. 1754). These cases and *Morris* all were cited by plaintiff's counsel in *Duke of Bedford v. Trustees of the British Museum*, 2 My. & K. 552, 39 Eng. Rep. 1055 (Ch. 1822).

56. *Duke of Bedford*, 2 My. & K. 552, 39 Eng. Rep. 1055 (Lord Eldon states that whether covenant can run at law is irrelevant to whether it can run in equity); *Whatman v. Gibson*, 9 Sim. 196, 59 Eng. Rep. 333 (Ch. 1838) (Vice-Chancellor enforced covenants in absence of horizontal privity); *Barrow v. Richard*, 8 Paige Ch. 351 (N.Y. Ch. 1840) (New York Chancellor enforced covenants that would not run at law); *Mann v. Stephens*, 15 Sim. 377, 60 Eng. Rep. 665 (Ch. 1846) (Vice-Chancellor enforced covenant despite lack of horizontal privity; Lord Chancellor affirmed).

57. 2 My. & K. 517, 39 Eng. Rep. 1042 (Ch. 1834).

58. See *infra* Part III(A).

thrived in the American courts of the nineteenth century. The analogy to real covenants encouraged the chancellors to impose some prerequisites similar or identical to those required for real covenants. Specifically, chancellors, as well as the common law judges, looked for a contract that "touched and concerned" both dominant and servient estates. They examined the terms of the contract to ensure that the parties had intended to bind and benefit their respective successors.⁵⁹ But the contract that served as the basis for the servitude could be quite informal;⁶⁰ if the intention of the covenantee so indicated, the benefit of the servitude could be "reserved in a stranger;"⁶¹ and there was no horizontal privity requirement.⁶²

On both the benefit and the burden side, the equity courts reduced the vertical privity rule to a requirement merely that the person bound be in possession of the same land as that formerly occupied by the initial promisor. The courts symbolized this development by saying that equitable servitudes adhered to the *land*, not to the promisor's estate in land. Contracts running in equity were enforceable, not just against assignees, but against subtenants, licensees, and others who did not succeed to the entire estate of the promisor.⁶³

The statement that equitable servitudes adhered to land and not to estates or to persons could be misleading. Equitable servitudes did not invariably adhere to land, irrespective of persons. A bona fide purchaser of legal title took free of equitable servitudes. The obverse of this proposition is that equitable servitudes bound only purchasers with notice of them. In this respect, real covenants "adhered" to land to a greater extent than did equitable servitudes, for there was no notice prerequisite for a real covenant to

59. On "touch and concern" in equity, see *Mayor of Congleton v. Pattison*, 10 East 130, 103 Eng. Rep. 725 (Ch. 1808) and *Winfield v. Henning*, 21 N.J. Eq. 188 (1870). On intent that the agreement run, see *Barrow*, 8 Paige Ch. 351 (Vice-Chancellor's opinion) and *BEHAN*, *supra* note 2, at 115. On the need for a benefited estate, see 2 ALP, *supra* note 2, § 9.29 (relying largely on 19th century cases).

60. *Tallmadge v. East River Bank*, 26 N.Y. 105 (1862); *but see Heriot's Hosp. v. Gibson*, 2 Dow. 301, 3 Eng. Rep. 873, 875 (H.L. 1814). Lord Eldon, who was subsequently affirmed, wrote, "[I]t was perfectly wild to say that the mere exhibition of a plan was sufficient to form a binding contract." 2 ALP, *supra* note 2, § 9.25.

61. *E.g.*, *Barrow*, 8 Paige Ch. 351.

62. *Whatman v. Gibson*, 9 Sim. 196, 59 Eng. Rep. 333 (Ch. 1838); *Mann v. Stephens*, 15 Sim. 377, 60 Eng. Rep. 665 (Ch. 1846); and *Tulk v. Moxhay*, 2 Phillips 774, 41 Eng. Rep. 1143 (Ch. 1848); *Winfield*, 21 N.J. Eq. 188; *Fresno Canal & Irrigation Co. v. Rowell*, 80 Cal. 114, 22 P. 53 (1889); *Fresno Canal & Irrigation Co. v. Dunbar*, 80 Cal. 530, 22 P. 275 (1889); 2 ALP, *supra* note 2, § 9.26.

63. 2 ALP, *supra* note 2, §§ 9.27 & 9.31 (relying largely on 19th century cases).

run.⁶⁴

During the nineteenth century, most of the equitable servitude cases involved promises that were restrictive rather than affirmative in nature; litigation over building limitations was particularly common.⁶⁵ Equity chancellors enforced restrictive agreements by prohibitory injunction.

Chancellors also employed injunctions to enforce affirmative duties. Such injunctions were prohibitory in form but mandatory in fact.⁶⁶ Although English courts eventually adopted the rule that affirmative obligations were not enforceable in equity,⁶⁷ American courts at the time of codification recognized no such limitation.⁶⁸

The chancellors enforced affirmative obligations to pay money by employing the equitable lien. An illustrative case is *Fresno Canal & Irrigation Co. v. Dunbar*,⁶⁹ a decision cited by the Montana codifiers in their annotation to section 1983 of the 1895 code. In *Dunbar*, the plaintiff company entered into an agreement with Roeding wherein the plaintiff agreed to furnish Roeding with a certain amount of water for irrigating his land. Roeding, in turn, agreed to accept the water over an extended period and to pay a specified price for it. The contract further provided that "the water . . . is intended to form a part of the appurtenances to said . . . land, and the right thereto shall be transferable only with and run with said land, and [the company] is bound by this instrument to all subsequent owners of said land, but to no other person."⁷⁰ To the foregoing the provision was subjoined, "It is covenanted that this agreement and the covenants therein contained, on the part of

64. For examples of the notice requirement for equitable servitudes, see *Tulk*, 2 Phillips 774, 41 Eng. Rep. 1143 and *Winfield*, 21 N.J. Eq. 188. See also 2 POMEROY, *supra* note 2, at 959.

65. *E.g.*, *Rankin v. Huskisson*, 4 Sim. 13, 58 Eng. Rep. 6; *Whatman*, 9 Sim. 196, 59 Eng. Rep. 333; *Mann*, 15 Sim. 377, 60 Eng. Rep. 665; *Tulk*, 2 Phillips 774, 41 Eng. Rep. 1143; *Tallmadge v. East River Bank*, 26 N.Y. 105 (1862); *St. Andrew's Lutheran Church's Appeal*, 67 Pa. 512 (1871); *Barrow*, 8 Paige Ch. 351; *Winfield*, 21 N.J. Eq. 188.

66. *Cooke v. Chilcott*, 3 Ch. D. 694 (1876) (injunction issued restraining the defendant from keeping or leaving the plaintiff's house without a proper supply of water).

67. 2 ALP, *supra* note 2, § 9.36.

68. 3 POMEROY, *supra* note 2, at 1996-97. It is difficult, however, to find 19th century mandatory injunction cases. *Id.* at 2069. But see 2 ALP, *supra* note 2, § 9.36, at 438-39. In the 20th century the English view influenced the law in a few U.S. jurisdictions, notably New York and New Jersey. *Miller v. Clary*, 210 N.Y. 127, 103 N.E. 1114 (1913); *Furness v. Sinquett*, 60 N.J. Super. 410, 159 A.2d 455 (Ch. Div. 1960).

69. 80 Cal. 530, 22 P. 275 (1889). Cases involving the same company and similar agreements include *Fresno Canal & Irrigation Co. v. Rowell*, 80 Cal. 114, 22 P. 53 (1889); *Fresno Canal & Irrigation Co. v. Park*, 129 Cal. 437, 62 P. 87 (1900). For another equitable lien case of the era, see *Rohn v. Odenwelder*, 162 Pa. 364, 29 A. 899 (1894) (annual charge of \$250 placed in a deed).

70. *Dunbar*, 80 Cal. at 533; 22 P. at 276.

[Roeding], run with and bind the land.”⁷¹

Roeding subsequently conveyed his land to the defendant, who refused to pay for water furnished to him. The company sued both for a personal judgment against the defendant and for foreclosure of a lien against the property. The trial court granted both remedies.

The California Supreme Court reversed the personal judgment. The court observed that the agreement in question did not qualify as a covenant running with the land because the requirement of horizontal privity had not been met. Specifically, the covenant had not been contained in a grant of the burdened land. But the court afforded relief in equity:

There is an express agreement that it shall bind the land itself; therefore, it does not depend upon the question whether a covenant on the part of the then owner of the property would run with the land or not. The question is, whether the provision in the contract was such as to create a lien upon the land. We think it perfectly clear from the language used that this was the intention of the parties. . . . This, we think, created a lien upon the land, and as the complaint alleges that the contract was acknowledged and recorded, it was notice to the appellant of the existence of such lien. Under such a covenant the land is liable in the hands of a subsequent purchaser.⁷²

In sum, when a court imposed a lien to enforce an affirmative equitable servitude, the land became subject to the charge imposed. But the owner of the burdened land was personally liable on an agreement only if he was one of the original parties thereto, or if the agreement qualified as a real covenant.⁷³

Both equitable servitudes and real covenants were hybrid entities; they enlisted both contract principles and property principles. The courts, however, tended to grant property status more liberally to equitable servitudes than to real covenants. Equitable servitudes continued to bind the land even when the estate of the original promisor had been destroyed; they bound subtenants as well as assignees; and they persisted even when the possessor of the servient estate had no *personal liability* on the original promise. By the late nineteenth century, lawyers compared equitable servitudes to

71. *Id.*

72. *Id.* at 535, 22 P. at 277.

73. 2 ALP, *supra* note 2, § 9.17 at 387 (relying largely on 19th century cases). For a 20th century example of an equitable lien being imposed where the supporting covenant did not run with the land, see *Everett Factories & Terminal Corp. v. Oldetyme Distillers Corp.*, 300 Mass. 499, 15 N.E.2d 829 (1938).

easements as often as to covenants, often labelling them "equitable easements" or, incorrectly, as "negative easements." The affinity between equitable servitudes and easements was to have significant impact in the 20th century.⁷⁴

D. The Purely Restitutionary Equitable Lien

During the 20th century, the courts often have remedied defective, incomplete, or expired land restrictions by imposition of the purely restitutionary equitable lien.⁷⁵ Such a lien has no basis in contract; it is a device to prevent unjust enrichment of a property owner who, willingly (or under some circumstances unwillingly) accepts benefits but refuses to pay for them.

I have not been able to find any late nineteenth century cases in which the courts imposed purely restitutionary liens as servitudes upon land. Nevertheless, the judiciary of the time had already forged all of the legal tools necessary for the job. The era's leading commentator on equity, Dean Pomeroy, had the following to say on the subject:

In addition to the general doctrine that equitable liens are created by executory contracts which, in express terms, stipulate that property shall be held, assigned, or transferred as security for the promisor's debt or other obligation, there are some further instances where equity raises similar liens, without agreement therefor between the parties, based either upon general considerations of justice (*ex aequo et bono*), or upon the particular equitable principle that he who seeks the aid of equity in enforcing some claim must himself do equity⁷⁶

Pomeroy then proceeds to list a number of instances in which purely restitutionary liens have been imposed. One of these—the lien in favor of a joint owner who has made repairs upon the share of another joint owner—is particularly susceptible to extension to the case of defective or expired servitudes.⁷⁷

74. For a case cited by the Montana codifiers equating equitable servitudes with easements, see *Winfield v. Henning*, 21 N.J. Eq. 188 (1870). For the impact of the negative easement doctrine in Montana, see *infra* Part V(C), (D) & (E).

75. See *infra* note 77 and text accompanying notes 198-200.

76. 3 POMEROY, *supra* note 2, § 1239 at 1902.

77. *E.g.*, *Bina v. Bina*, 213 Iowa 432, 239 N.W. 68 (1931) (co-owner of easement entitled to contribution when no maintenance agreement existed); *Island Improvement Ass'n v. Ford*, 155 N.J. Super. 571, 383 A.2d 133 (1978) (property owners association owning roads entitled to contribution from users).

III. THE CIVIL CODE: ORIGIN AND THEORY

A. *Introduction*

The original New York Civil Code ("Field Code") was published in 1865. Its principal draftsman was the noted New York City practitioner and reformer, David Dudley Field (1805-1894).

Although never adopted in New York, the Field Code subsequently became the law of the Dakota Territory (1866), of California (1872), of the states of North and South Dakota (1890), and of Montana (1895). The language of the Field Code provisions on covenants running with the land was adopted almost verbatim into the California, Dakota, and Montana compilations. There have since been major amendments to these provisions in California and minor amendments in South Dakota. In North Dakota and Montana, those provisions remain unaltered to this day.⁷⁸

We are able to reconstruct fairly accurately the meaning and intent of the New York Civil Code provisions as Field drafted them. We can do so by taking into account what we know of the nineteenth century common law, the structure of the Code in general, the content of each section, Field's annotations to each section, and the Code Commissioners' statements on how their statute ought to be used.

We can also reconstruct, with a few unanswered questions, the meaning that the Montana codifiers placed upon the identical provisions. In most cases, that meaning is the same as Field's. When divergences between Field and the Montana drafters arise, they are traceable to two factors. First, the Montana drafters anticipated a different relationship between the Code and the common law than the relationship which Field anticipated. Second, the Montana drafters did not annotate their Code with all of Field's cases. They selected some he had omitted, and they adopted many California decisions construing the Code after its enactment in that state in 1872.

B. *Background and Construction of the Original Field Code*

In order to understand how the provisions of the original Field Code were to be interpreted, it is necessary to understand the background of its principal draftsman, David Dudley Field. Field

78. These statutes are currently found at MONT. CODE ANN. §§ 70-17-201 to -206 (1989); CAL. CIV. CODE §§ 1460 to -1467 (West 1982); N.D. CENT. CODE §§ 47-04-24 to -30 (Allen Smith 1978); S.D. CODIFIED LAWS ANN. §§ 43-12-1 to -6 (Allen Smith 1983). They were originally §§ 691 to -698 of the Field Code and §§ 1983 to -1990 of the MONT. CIV. CODE (1895).

was a disciple, although not an uncritical one, of Jeremy Bentham, the eccentric utilitarian who coined the word "codify."⁷⁹ Like Bentham, Field employed much of his long life tirelessly promoting the cause of codification. Arguably, Field's greatest achievement was his leadership of New York's Commission on Practice. This was the commission that issued the first modern rules of civil procedure under a merged system of law and equity. The New York legislature enacted Field's Code of Civil Procedure in 1848, and most American jurisdictions, including Montana, ultimately modeled their procedural rules on it.

Field, like Bentham before him, saw codification as the cure for many of the limitations in the common law: the *post hoc* imposition of rules upon parties who had already acted;⁸⁰ the extensive research necessary to squeeze a rule or principle out of voluminous case reports and the frequent uncertainty of the answer;⁸¹ the inaccessibility of law to the layman;⁸² the adherence of the courts to archaic and unjust determinations;⁸³ and the continuation, over years or even centuries, of certain disputed questions.⁸⁴ Moreover, as a positivist in the vein of John Austin, Field conceived of law as nothing more than the command of the sovereign.⁸⁵ Thus, when judges ventured beyond precedent, they *made* law, they did not discover or extrapolate it. A judge in that circumstance, Field argued, was a legislator—a role inconsistent with the American political theory of separation of powers. Field maintained that the

79. For Bentham's ideas and his influence in and contact with America, see Cook, *supra* note 2, at 74-78 & 97-103.

80. DDF, *Works supra* note 2, at 420.

81. *Id.* at 240, 255-56.

82. *Id.* at 233, 239, 253.

83. N.Y. CIV. CODE xxvi-xxvii (1865) (introduction):

In almost every instance where an improvement has been made in the laws, it has come from the Legislature. Had society been left to the discipline of the common law . . . , the most cruel and bloody of criminal systems would still have shamed us; feudal tenures with all their burdensome incidents would have remained; land would have been inalienable without livery of seizin, and wives would have had only the rights which a barbarous age conceded them.

Id.

84. *Id.* at xxix.

85. DDF, *Works, supra* note 2, at 250, 254. Section 2 of the Field Civil Code reads as follows: "Law is a rule of property and of conduct, prescribed by the sovereign power of the State." Field's chief antagonist, James Coolidge Carter, had been taught by a student of Friedrich Carl von Savigny, the most important figure in the German historical school of jurisprudence, and his view of the nature of law was accordingly different. Carter argued that private law was custom, and the function of judges was to *discover* the appropriate legal rules from custom and apply them to the facts of each case. The most complete, and today the most accessible, statement of Carter's views is to be found in CARTER, *supra* note 2, a series of lectures planned for delivery at the Harvard Law School, but never presented, due to their author's intervening death.

proper task of a judge was to apply the law to the facts, not to make law. Codification would serve as the method by which the legislature would dictate the rules to the judges, who would then submissively apply them.⁸⁶

In 1857, the New York legislature appointed Field and two other outstanding lawyers to codify the substantive law of the state. Over the next eight years, Field and his associates drafted a Political Code, a Penal Code, and a Civil Code. Field himself had primary responsibility for most of the Civil Code, including all of its sections on real property.

The Civil Code included among its provisions certain statutes then in force in New York.⁸⁷ Most of its sections, however, summarized the existing common law of New York. Where there was no authority in that state, Field borrowed rules from other jurisdictions, notably England. Pursuant to legislative authorization, the Code also contained suggested alterations in existing rules and resolutions of conflicting precedents. The Code Commissioners listed some, but not all, of these suggested alterations in the Introduction to the Civil Code.⁸⁸

As set forth in the Civil Code, the sections on running covenants embodied no existing statutes. Thus, the Field Code law of running covenants is mostly a summary of nineteenth century New York common law. In a few instances, Field proposed alterations in the existing rules.⁸⁹

The Field Civil Code was unlike modern American codification projects in that it was *not* designed merely to clarify pre-existing law or to operate in the context of pre-existing law. The Field Code was designed to *wholly displace* pre-existing law, and it was drafted with that purpose in mind. Upon its enactment, nearly all decided cases—the entire body of common law and equity—would be deported to the realm of history. Only when the codifiers had inadvertently overlooked a substantive area would prior cases survive. One goal of the codifiers was to enable New York lawyers to clear their shelves of thousands of superseded volumes.⁹⁰

86. DDF, *Works*, *supra* note 2, at 239. The need to restrain judicial legislation and judicial discretion was a recurring motif in arguments for codification. *See, e.g.*, COOK, *supra* note 2, at 138, 174 & 179.

87. For example, the provisions governing estates in land (N.Y. CIV. CODE §§ 218 - 239) (MONT. CIV. CODE §§ 1210-1230) relied heavily upon the NEW YORK REVISED STATUTES OF 1828, 1 N.Y. REV. STAT. 721-25, §§ 1-29. These provisions have long been repealed in New York, but continue in force in Montana. *See* MONT. CODE ANN. §§ 70-15-201 to -216 (1989).

88. N.Y. CIV. CODE xxvi-xxvii (1865) (introduction).

89. *See generally* Part IV, *infra*. None of these changes is listed among the 120 set forth in the Introduction to the Civil Code.

90. The purpose of the Code in displacing the common law is revealed in a few of its

Traditionally, Anglo-American courts had interpreted statutes strictly, when such statutes altered the common law. All doubts concerning a statute's coverage were resolved against the statute. The Code was not to be so construed.⁹¹ Field envisioned a method of judging analogous to the jurisprudence of the Code Napoleon. As outlined in the Introduction to the New York Civil Code, this method would be as follows:

First: One would turn to the Code to see if it controlled the case. All provisions would be broadly construed; that is, ambiguities would be resolved in favor of coverage.

Second: If the first step was not sufficient to solve the case, one would determine if the codifiers had (inadvertently) overlooked any applicable rules of common law. If so, those common law rules would control. Field believed, however, that his Code was substantially complete and that pre-existing common law would seldom control.⁹²

Third: If the answer was not found in the first or second steps, one would try to solve the case through reasoning by analogy from other parts of the Code.

Fourth: If an analogy could not be found, nor any rule that had been overlooked and omitted, then the courts would either have to leave the case undecided or resort to "the dictates of natural justice." There was no provision for returning to pre-existing law.⁹³

provisions. Section 3(3) of the Civil Code defined "common law" to include "the judgments of the tribunals enforcing those rules which, though not enacted, form what is known as customary or common law." This definition is broad enough to include equity. Section 6 stated, "In this state there is no common law in any case where the law is declared by the five Codes." See also the jurisprudential directions in the text immediately following this note.

The "five codes" were the CODE OF CIVIL PROCEDURE (adopted in New York in 1848), the CODE OF CRIMINAL PROCEDURE (adopted in 1881), the PENAL CODE (adopted in 1881), the POLITICAL CODE (generally a restatement of public law statutes existing as of 1860, but never adopted as a unity), and the CIVIL CODE (never adopted). Montana's four 1895 codes are based upon the foregoing, except that it was not believed necessary to replace the Montana criminal procedural statute, which was already based largely on Field concepts.

91. N.Y. CIV. CODE § 2032 (1865) ("The rule that statutes in derogation of the common law are to be strictly construed has no application to this Code.").

92. I believe Field admitted this loophole for pre-existing law merely to reduce the force of anticipated objections to adoption. In the introduction to the Civil Code, Field pointed out that he had inserted a similar provision in the Code of Civil Procedure, but as of 1865 it had never been used. N.Y. CIV. CODE xvii (1865) (introduction). See also N.Y. CIV. CODE xviii (the second step is deleted entirely).

93. In his reliance upon natural justice rather than the principle of utility, Field departed from Bentham. In his willingness to allow judges to move outside the Code, Field departed from the Code Napoleon.

These four steps are outlined in the Introduction to the N.Y. CIV. CODE xviii-xix (1865). This hierarchy may be compared to a different one proposed by Justice Story: (1) Code, (2)

To be sure, the Code commissioners annotated their work with citations to decided cases and published treatises as well as with their own comments. Those cases and treatises were cited only to illustrate the meaning of the Code, and were otherwise of no authority.

Because the Civil Code was to be an almost wholly self-contained system, the drafters composed its provisions differently than they would have if they had intended that common law survive. For example, sections 245 and 246 set forth the “servitudes” (burdens attached to land) that could be created under the statute. Section 245 stated, “The following land burdens, or servitudes upon land may be attached to other land as incidents or appurtenances and are then called easements.”⁹⁴ That wording was followed by a list of seventeen such easements. On the list were important, well-recognized easements such as the right of way as well as such minutiae as “the right of having public conveyances stopped or of stopping the same on land.”⁹⁵ Similarly, the intro-

reasoning by analogy from the Code, and (3) pre-existing common law. Cook, *supra* note 2, at 177.

94. N.Y. CIV. CODE § 245 (1865).

95. N.Y. CIV. CODE § 245 is now MONT. CODE ANN. § 70-17-101 (1989). Subsections (18) and (19) were added subsequently. The section as it exists today reads in its entirety as follows:

The following land burdens or servitudes upon land may be attached to other land as incidents or appurtenances and are then called easements:

- (1) the right of pasture;
- (2) the right of fishing;
- (3) the right of taking game;
- (4) the right-of-way;
- (5) the right of taking water, wood, minerals, and other things;
- (6) the right of transacting business upon land;
- (7) the right of conducting lawful sports upon land;
- (8) the right of receiving air, light, or heat from or over or discharging the same upon or over land;
- (9) the right of receiving water from or discharging the same upon land;
- (10) the right of flooding land;
- (11) the right of having water flow without diminution or disturbance of any kind;
- (12) the right of using a wall as a party wall;
- (13) the right of receiving more than natural support from adjacent land or things affixed thereto;
- (14) the right of having the whole of a division fence maintained by a coterminous owner;
- (15) the right of having public conveyances stopped or of stopping the same on land;
- (16) the right of a seat in church;
- (17) the right of burial;
- (18) the right of conserving open space to preserve park, recreational, historic, aesthetic, cultural, and natural values on or related to land;
- (19) the right of receiving sunlight or wind for recognized nonfossil forms of

ductory wording of section 246 stated, "The following land burdens or servitudes upon land, may be granted and held though not attached to land," and a list of five servitudes followed.⁹⁶ In a common law system, one might well read the phrases "may be attached" or "may be granted" as non-exclusive, i.e., other easements or servitudes in gross could be created by judicial decision. But this clearly is not what Field intended. Indeed, in his day the dominant view was that the number of permissible easements was limited, even at common law.⁹⁷ Field did not state that "these servitudes may be created and no others" because in an all-inclusive code such language was not necessary; he could create an exclusive list by employing the word "may" without further restriction. A great deal of judicial misunderstanding about the meaning of the Code has since arisen because judges and lawyers have forgotten the displacement premise of the drafters.⁹⁸

C. *Dakota Territory and the California Experiment*

The first adoption of the Field Civil Code was by the legislature of the Dakota territory in 1866. Although Dakota retained the Code's common law-displacement provisions, they do not seem to have had much effect.⁹⁹

California enacted the Code in 1872 at the urging of David

energy generation.

MONT. CODE ANN. § 70-17-101 (1989).

96. N.Y. CIV. CODE § 246 became MONT. CODE ANN. § 70-17-102 (1989), which is set forth below. Subsection (6) was added by the Montana codifiers in 1895, and subsection (7) was added subsequently.

The following land burdens or servitudes upon land may be granted and held though not attached to land:

- (1) the right of pasture and of fishing and taking game;
- (2) the right of a seat in church;
- (3) the right of burial;
- (4) the right of taking rents and tolls;
- (5) the right-of-way;
- (6) the right of taking water, wood, minerals, or other things;
- (7) the right of conserving open space to preserve park, recreational, historic, aesthetic, cultural, and natural values on or related to land.

MONT. CODE ANN. § 70-17-102 (1989).

97. BEHAN, *supra* note 2, at 45; GODDARD, *supra* note 2, at 29-30. See also *Norcross v. James*, 140 Mass. 188, 192, 2 N.E. 946, 949 (1885) (Holmes, J.). GALE, *supra* note 2, was more ambivalent. Cf. *id.* at 20 & 26. Actually, given the structure of these particular sections, the better reading, even when treated as a statute resting in the common law, is that the list is exclusive. See *infra* Part IV(A).

98. See *infra* Part V(C)-(E).

99. The history of the Code in the Dakotas and a short sketch of its history in California is contained in *Fisch*, *supra* note 2. I have been unable to find any comparable work for Montana.

Dudley Field's brother, Stephen Field.¹⁰⁰ Unlike the Dakotas, California rejected the original "displacement" approach. Instead, the California drafters specified that the Code should be "liberally construed with a view to effect its objects and to promote justice,"¹⁰¹ and that the common law, where not inconsistent with the Code, remained the rule of decision in all the courts of the state. In addition, Code provisions would be construed as continuations of any statutes or common law rules to which the Code provisions were substantially similar.¹⁰²

The California approach proved largely unworkable in practice. Field had designed his Code to be comprehensive, internally consistent, and self-contained—not to lie in a bed of common law. We have already seen, for example, how the language employed in the Code sections on servitudes made sense only on the supposition that the common law was being wholly superseded.¹⁰³

The difficulties inherent in forcing the Code and common law to co-exist were aggravated by the failure of the California courts to adopt a consistent code/common law methodology. California judges wandered between expansive construction and traditional strict construction, lingering at every point in between—sometimes all in the course of the same opinion.¹⁰⁴

100. This was the same Stephen Field who was later associate justice of the United States Supreme Court.

101. CAL. CIV. CODE § 4 (1872).

102. CAL. CIV. CODE § 5 (1872).

103. See *supra* Part III(B). Another illustration of the poor fit between the Code and the common law is the following: In constructing his code, Field borrowed many civil law terms and concepts — terms and concepts unknown in Anglo-American law and bound to create problems when employed in conjunction with the common law. See, e.g., § 162, providing an alternate definition of real property as "immovable" property. Field probably never should have borrowed from civilian jurisprudence at all, even given his displacement assumption. Moreover, his use of civilian terms was vague and imprecise. See AMOS, *supra* note 2, at 94-108, one of the more penetrating and lasting critiques of Field's work.

104. Fisch, *supra* note 2, at 25-37. If anything, I think the variation even is wider than conceded by Professor Fisch. Part of the problem may have been that Stephen Field did not understand his brother's common law displacement approach. See *id.* at 42 (citing *Northern Pac. Ry. v. Herbert*, 116 U.S. 642 (1886)(Field, J., construing the DAKOTA CIVIL CODE)). Although Dakota had retained the displacement approach, Justice Field began his analysis with a review of the common law.

In 1883, the dean of the law school at Hastings College, John Norton Pomeroy (whose treatise on equity is cited several times in this paper), contended in an influential series of articles that the California courts ought to, in effect, cashier the liberal construction rule and return to the rule of strict construction. This would enable the common law to govern in all cases of doubt. Dean Pomeroy offered his suggestion in the hope that it might encourage a consistent course of Code interpretation. The effect, however, was to agitate further the jurisprudential soup. Fisch at 32-37.

D. Adoption in Montana

In 1889, the Montana Bar Association petitioned for codification of state law, and in March of that year the territorial legislature, anticipating imminent statehood, established a three-man code commission. The chairman was former territorial Chief Justice Decius S. Wade. Its other two members were former territorial Governor B. Platt Carpenter and Frederick W. Cole, a Butte attorney who had served as a judge in Nevada.¹⁰⁵

The Montana codifiers had many of the same purposes that Field had adopted, and they borrowed many of his arguments: codification was possible and historically justified; the common law was unresponsive and cruel; codification would render the law more rational, more certain, more accessible, and more harmonious; and codification would place the people's elected representatives, rather than the judges, in control of legislation.¹⁰⁶

Because California was a source of recent cases decided under the Code, the Montana drafters relied heavily upon California cases in their annotations. They also included cases from other jurisdictions and selections from Mr. Field's original notes. These blended annotations are useful in elucidating the Code as the Montana drafters understood it. When the Montana annotations follow those of the original Field Code, they suggest that the understanding of the Montana and New York drafters was the same. When those annotations include authorities at variance with Field, they suggest a different intent. Sometimes this is an intent to follow California precedent, but that is not always so.

More ominous than the inclusion of California cases in the Code annotations was the decision to adopt the California methods of construction.¹⁰⁷ In view of the ideals and goals of the Montana

105. *Root*, *supra* note 2, at 592. Wade was a judge on the territorial supreme court from 1871 to 1887. *Id.* On Cole, see *infra* note 108.

106. See generally the speeches by William E. Cullen, Wilbur F. Sanders, and Decius S. Wade to the Montana Bar Association, in *Proceedings of the Montana Bar Association* 271-97 & 318-37 (1885-1902). See also *Report of the Code Committee 1-2* (1895) (pamphlet).

107. Of course, sometimes following a California case requires adopting California Code construction methods, but this is not always true.

The California construction rules appear in the following section of the MONTANA CIVIL CODE:

The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.

MONT. CIV. CODE § 4652 (1895).

The provisions of this code, so far as they are substantially the same as existing statutes, or the common law, must be construed as continuations thereof, and not

codifiers, they could not have done worse than to adopt the ill-fitting California approach.¹⁰⁸ In Montana, as in California, the un-

as new enactments.

MONT. CIV. CODE § 4653 (1895).

The MONTANA POLITICAL CODE provided as follows:

The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state, or of the codes, is the rule of decision in all the courts of this state.

MONT. POL. CODE § 5152 (1895).

108. Governor Preston H. Leslie, who proposed codification to the legislature, seems to have favored a plan closer to the displacement model than to the California co-existence model. He suggested that a code should, "when authoritatively prescribed, be the law and the only law of this commonwealth" except when inconsistent with the U.S. Constitution and subsequent statutes. 1889 Mont. Ter. Leg., H.J. 6, 26 (message from Governor Preston H. Leslie to 1889 Montana Territorial Legislature).

It is not clear why the Montana codifiers accepted the California approach. Perhaps it was due to the Montana Territorial Supreme Court's long-standing practice of looking to California precedent for assistance in interpreting the CIVIL PRACTICE ACT of 1864 and the CODE OF CIVIL PROCEDURE of 1877. See, e.g., *Creighton v. Hershfield*, 2 Mont. 386, 390 (1876); *Hershfield v. Aiken*, 3 Mont. 442, 449 (1880); *Lindley v. Davis*, 6 Mont. 453, 455, 13 P. 118, 120 (1887). It is inferable from the work of one scholar that the Montana codifiers followed California jurisprudence because of the failure of earlier attempts at indigenous codification. SPENCE, *supra* note 2, at 194.

Some Montanans have suggested to me that the influence of California in territorial days may have induced the Montana codifiers to adopt California methods. In 1889, however, it already had been a quarter of a century since disappointed '49ers, among others, had flooded the Montana gold fields. Perhaps there was an inertial influence. In any event, the biographies of the leading Montana codification advocates reveal only tenuous connections with California. Frederick W. Cole, a member of the commission, was a Virginian, who had been a judge in Nevada and who had practiced briefly (two years) in San Francisco. The Butte Miner, Dec. 21, 1895, at 5, col. 1. John E. Rickards, the governor who signed the Codes into law (but not otherwise an important codification figure) had spent four years in San Francisco—as a salesman. PROGRESSIVE MEN, *supra* note 2, at 385-86.

Most of the influential codifiers were from the East or Midwest, largely from New York and Ohio. These figures included the following:

(1) Wilbur F. Sanders—first president of the Montana Bar Association, a native of New York who had practiced law in Ohio. PROGRESSIVE MEN, *supra* note 2, at 33.

(2) William H. Hunt—primary sponsor of the code commission bill in the territorial house of representatives, and chairman of the judiciary committee, born in Louisiana, attended Yale (but did not graduate), territorial attorney general, 1885-87. RAYMER, *supra* note 2, at 399;

(3) Code Commissioner Decius S. Wade—justice of the territorial supreme court (1871-87), a native of Ohio, an Ohio practitioner (*Root*, *supra* note 2, at 592), and at the time of codification a Helena lawyer and businessman. SPENCE, *supra* note 2, at 245.

(4) Code Commissioner B. Platt Carpenter—a former Montana territorial governor, who was a native of New York, and who had practiced and held office there. RAYMER, *supra* note 2, at 273; SPENCE, *supra* note 2, at 234 & 245.

(5) Gov. Preston H. Leslie—the territorial governor who proposed codification had come from Kentucky, where he had also served as governor. RAYMER, *supra* note 2, at 275.

(6) William E. Cullen—Sanders' law partner in Helena, first treasurer of the Montana Bar Association and later president, Governor Leslie's attorney general, a native of Ohio who had practiced in Minnesota before coming to Montana. PROGRESSIVE MEN, *supra* note 2, at 118; Montana Territorial Council Journal 255 (1889); SPENCE, *supra* note 2, at 166.

(7) Rudolph Von Tobel—principal sponsor of the code bills in the state house of repre-

easy coexistence of Code and common law had the effect of rendering both statutory and case law difficult to interpret and apply. In contrast to the codifiers' aims of certainty, accessibility, harmony, and legislative supremacy, the Montana law, at least in the area of running covenants, has proved to be uncertain, inaccessible, and disharmonious. Nor has the Code proved much of a barrier to judicial legislation.¹⁰⁹

IV. THE LAW OF THE CODE

A. *The Exclusive Methods of Binding Land*

The Montana Civil Code provided two methods by which the interests of the possessor of one tract of land could be made subservient to the interests of the possessor of another tract: (1) the imposition of servitudes burdening *land*,¹¹⁰ and (2) the execution of covenants appurtenant to *estates in land*.¹¹¹

All servitudes burdened servient land, but some were appurtenant to dominant land and some were held in gross. Those appurtenant to dominant land were called easements and were listed by subject matter in one section of the Code. Field had enumerated 17 permissible easements, and the Montana codifiers adopted this list verbatim. Field provided that five of those 17 could be held in gross. The Montana codifiers retained this list and added one of the easements as a permissible servitude in gross: the right of taking water, wood, materials, or other things from the servient land.

These lists of permitted servitudes were detailed and specific. All indications are that Field intended these enumerations to be exclusive, i.e., no servitudes were permitted that were not on one of the two lists.¹¹²

Despite the Montana codifiers' adoption of the provisions of the common law not inconsistent with the Code, their intent in this respect was the same as Field's: the enumerated servitudes were exclusive. We can reconstruct this intent from several fragments of evidence. First, the Code was more of a restatement than

sentatives in 1895 and a native of New York who spent his young adulthood in Iowa. PROGRESSIVE MEN, *supra* note 2, at 466-67.

109. See generally *infra* Part V.

110. MONT. CIV. CODE §§ 1250, 1251 (1895) (currently MONT. CODE ANN. §§ 70-17-101, -102 (1989)). When reference is made to servitudes throughout this Part, these two sections are the source, unless indicated to the contrary.

111. MONT. CIV. CODE §§ 1983 to -1990 (1895) (currently MONT. CODE ANN. §§ 70-17-201 to -206 (1989)). The division between binding land and binding estates in land is essentially a civil law/common law distinction.

112. See *supra* Part III(B).

a revision of the common law, and the dominant view at the time was that the common law severely limited the number of permissible easements.¹¹³ Second, the Montana annotations to the servitude provisions made no reference to any servitudes outside the enumerated categories. Third, the enumerated servitudes included several so rare or of so little importance (such as the right of a seat in church or of stopping public conveyances) that their inclusion makes sense only if the lists were to be exclusive. Fourth, the fact that the Montana codifiers felt it necessary to add to the enumerated servitudes in gross suggests a belief that there would be no servitudes in gross other than those enumerated. Fifth, Field had integrated the common law of profits a prendre into the general servitude law, and the Montana codifiers retained this arrangement. Sixth, there would have been little point to having two separate lists—one of easements, the other of servitudes in gross—with one list shorter than the other, unless the drafters intended each enumeration to be exclusive.¹¹⁴ Seventh, the Montana codifiers retained the Field plan of providing an alternative mechanism for adopting land use regulations outside the scope of permissible easements: the creation of covenants running with estates in land.

The provisions of the Code dealing with covenants running with the land are contained in the Title "Transfer of Obligations." The structure of the Title indicates that the codifiers conceived of covenants running with the land as an exception to the usual rules governing transfer of obligations.¹¹⁵ Just as servitudes were appurtenant to land, so were covenants appurtenant to estates in land. The fact that they were appurtenant to estates justified alteration of the normal rules of obligation transfer.

The permissible subject matter of covenants was broader than that of servitudes. However, the New York and Montana codifiers imposed strictures on the creation and enforcement of covenants—strictures that did not apply to servitudes,¹¹⁶ and they expressly prohibited the running of covenants that did not comply

113. See *supra* note 97.

114. The Montana Legislature has recognized the exclusive nature of the two lists on several occasions by adding to the number of permissible servitudes. See MONT. CODE ANN. §§ 70-17-101(18)-(19) (1989); MONT. CODE ANN. § 70-17-102(7) (1989); and MONT. CODE ANN. § 70-17-301 (1989).

115. See, e.g., MONT. CIV. CODE § 1980 (1895) ("The burden of an obligation may be transferred with the consent of the party entitled to its benefits, but not otherwise except as provided by § 1989."). The latter section is part of the "covenants" scheme. It discharges one selling his interest in burdened property and not remaining in privity of contract with the obligee.

116. See *infra* Part IV(C)-(E) & (G).

with these statutory limitations.¹¹⁷ The drafters in New York clearly intended to abolish the equitable servitude as a separate entity. Parties would have to comply with the same formalities and would be subject to the same rules whether the relief sought for breach was legal or equitable.¹¹⁸

Whether the Montana codifiers wished to abolish equitable servitudes is less certain. Supporting the conclusion that they intended to retain equitable servitudes is their citation of two California cases holding that if an owner purchased land with notice of a covenant that did not run, the covenant would bind the land (although not the owner) in equity.¹¹⁹

On the other hand, there are important factors arguing for equitable servitude abolition in Montana, and if those factors are decisive, those two cases might have been cited for another of their propositions: That horizontal privity was necessary to the running of a covenant. Among the considerations militating for equitable servitude abolition in Montana are the clear language of the Code provisions themselves, the absence of any provision for equitable servitudes, the fact that equitable servitude doctrine did not rest comfortably within the Code scheme, and the Montana codifiers' stated distaste for judicial discretion. Additionally, the codifiers deleted an annotation in the California Civil Code preserving equitable servitudes from the Montana version.¹²⁰ Thus, although the matter is far from certain, the weight of the evidence is that the Montana code commissioners did intend to abolish equitable servitudes.

In two respects, the Montana drafters probably intended that their text be construed differently from the way Mr. Field would have construed it. The texts themselves are virtually identical, but the difference in understanding is apparent from a reading of two cases selected for the Montana annotations but absent from the

117. MONT. CIV. CODE § 1984 (1895) (currently MONT. CODE ANN. § 70-17-202 (1989)). Apparently, such rules represent an attempt to balance the freedom to encumber property with the policy of promoting unrestricted use of land.

118. In their annotation to § 692 of the Civil Code, the New York codifiers adopted the aberrant case of *Keppell v. Bailey*, 2 Myl. & K. 517, 39 Eng. Rep. 1042 (Ch. 1834), which denied equitable enforcement of covenants that did not run at law. The New York codifiers noted, only to reject, the equitable servitude cases of *Tulk v. Moxhay*, 2 Phillips 774, 41 Eng. Rep. 1143 (Ch. 1848) and *Tallmadge v. East River Bank*, 26 N.Y. 105 (1862).

119. *Fresno Canal & Irrigation Co. v. Rowell*, 80 Cal. 114, 22 P. 53 (1889); *Fresno Canal & Irrigation Co. v. Dunbar*, 80 Cal. 530, 22 P. 275 (1889). See also *supra* Part II.

120. The annotation to the CAL. CIV. CODE § 1461 (1872) contains a provision indicating that equitable servitudes were outside the scope of that section. The section limits running covenants to those that meet the prerequisites enumerated in the Code. The analogous Montana Provision, MONT. CIV. CODE § 1984 (1895), has no annotation.

New York annotations. The first of these cases is *Barrow v. Richard*,¹²¹ which adopted the rule that equitable servitudes can be inferred from a common plan of development. The citation of *Barrow* under section 1985 of their Code, the section that contains the rule that a covenant be “contained in a grant,” suggests that the phrase “contained in a grant” should be construed to permit inference from the circumstances in which the grant is made—in other words, that express wording in a deed or in a formal agreement is not necessary.

The second case, *Winfield v. Henning*,¹²² also was cited under Section 1985. That section further contains the requirement that a covenant be for the “direct benefit” of the transferred property. *Winfield* sustained a covenant scheme in which lots owned in fee simple absolute were subject to reciprocal burdens and benefits. Thus, the inclusion of *Winfield* implies that under the Montana Code a tract conveyed in fee simple absolute may be subjected to a burden if it receives a benefit also.¹²³

B. Subject Matter of Covenants Under the Code

By recognizing covenants running with the land, the Civil Code offered parties the freedom to regulate land use in ways outside the scope of the permissible servitudes. The wide variety of permissible covenants is not obvious from a casual reading of the Code. The first section dealing with the subject matter of covenants is as follows:

The only covenants which run with the land are those specified in this part and those which are incidental thereto.¹²⁴

The annotations to the original Field Code indicate that “those [covenants] which are incidental thereto” does not mean “incidental” to the land; it means incidental to other authorized covenants. The example provided by the annotators is a promise to stand surety for a lessee’s performance of a covenant to pay rent.¹²⁵

121. 8 Paige 351 (N.Y. Ch. 1840). The evidence on whether Field himself favored inference from a common plan is not conclusive. In his annotation to § 692 he disapproves *Tallmadge v. East River Bank*, 26 N.Y. 105 (1862), which inferred a covenant from a common plan. But he also disapproved *Heriot’s Hosp. v. Gibson*, 2 Dow. 301, 3 Eng. Rep. 873 (H.L. 1814), in which the court refused to infer a covenant from a representation on a promotional map.

122. 21 N.J. Eq. 188 (1870).

123. See also *infra* Part IV(E).

124. MONT. CODE ANN. § 70-17-202 (1989). This wording is substantially identical to N.Y. CIV. CODE § 692 (the original Field Code) and MONT. CIV. CODE § 1984 (1895).

125. ANNOTATION, N.Y. CIV. CODE § 692 (1865). The case cited is *Allen v. Culver*, 3 Denio 284 (N.Y. Sup. Ct. 1846).

Following that section are two provisions itemizing those covenants that may run:

(1) Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property or some part of it then in existence, runs with the land.

(2) Subsection (1) includes covenants of warranty, for quiet enjoyment, or for further assurance on the part of the grantor and covenants for the payment of rent or of taxes or assessments upon the land on the part of a grantee.¹²⁶

Although subsection (2) as written appears to be an exclusive list—and, indeed, it does contain an exclusive list of running *title* covenants¹²⁷—the annotation suggests that the Code authorizes *any* covenant whose subject matter can serve “the direct benefit of the property.”¹²⁸ The annotation sets forth, by way of illustration, several cases in which covenants other than those in subsection (2) were found to run.¹²⁹

Thus, the statutory sections reproduced above did not limit the *subject matter* of enforceable running covenants, so long as the creators complied with required formalities and any covenants were made “for the direct benefit” of the transferred property.

C. Vertical Privity Under the Code

Under the Code, any person in possession of the servient estate was bound by the terms of a servitude. There were more restrictions on the enforcement of covenants. This was one way of compensating for the greater subject-matter flexibility of covenants.

The Code adopted a strict common law vertical privity standard for the running of the burden of a covenant:

A covenant running with the land binds only those who acquire the whole estate of the covenantor in some part of the

126. MONT. CODE ANN. § 70-17-203 (1989). This wording is substantially identical to N.Y. CIV. CODE §§ 693, 694 and MONT. CIV. CODE §§ 1985, 1986 (1895).

127. That is to say, the covenants of warranty, quiet enjoyment, and further assurance do run, but the covenants of seisin, against incumbrances, and right to convey do not. *Solberg v. Robinson*, 34 S.D. 55, 147 N.W. 87 (1914) (construing an identical section of the Field Code in South Dakota). This section codifies the common law rule. *See also* ANNOTATION, N.Y. CIV. CODE § 694 (the predecessor to subsection (2)).

128. N.Y. CIV. CODE § 693 (1).

129. ANNOTATION, N.Y. CIV. CODE § 693 (1865). Among the cases listed are *Denman v. Prince*, 40 Barb. 213 (N.Y. Sup. Ct. 1862) (covenants for first use of water power and to share dam maintenance expenses held to run); *Verplanck v. Wright*, 23 Wend. 506 (N.Y. Sup. Ct. 1840) (covenant not to cut timber); and *Norman v. Wells*, 17 Wend. 136 (N.Y. Sup. Ct. 1837) (covenant not to lease to other mahogany mills on stream).

property.¹³⁰

As has been noted earlier,¹³¹ the effect of the vertical privity rule is to bind purchasers of the fee simple and assignees of a leasehold and to make direct enforcement impossible against sublessees and adverse possessors, and perhaps impossible against buyers at foreclosure sales.¹³² If a party does not purchase the covenantor's "entire estate," that party is bound only if he has expressly assumed the burden of the covenant—and then on a privity of contract theory rather than by reason of privity of estate.

Another section codifying common law vertical privity rules is the following:

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.¹³³

The following illustrations demonstrate the operation of this section:

Illustration # 1: Landlord leases property to T-1. T-1 covenants to pay rent. T-1 assigns to T-2 who assigns to T-3. After the assignment to T-2, no one pays rent to Landlord. Landlord has not released anyone from paying rent and neither T-2 nor T-3 explicitly assumed the rent obligation to Landlord.

By operation of this section, Landlord has a contractual relationship with T-1 and may collect all the rent from T-1 if the latter is solvent. However, Landlord is no longer in privity of estate with T-1. Landlord was never in privity of contract with T-2 or T-3. During the period of T-2's and T-3's respective possessions, Landlord was in privity of estate with each and may collect from each the rent accruing during their possessions. But T-2 is not liable for rent accruing before the first assignment nor after the second, and T-3 is liable only for rent accruing after the assignment to him.

Illustration # 2: Able purchases a lot in a subdivision governed by a property owners association that collects monthly assessments. Able sells to Baker. Baker is not personally responsible for assessments accruing before or after the period of his

130. MONT. CIV. CODE § 1988 (1895) (currently MONT. CODE ANN. § 70-17-204 (1989)).

131. See *supra* Part II(B).

132. Yet this section had no Montana annotations, and the only references in the New York annotations were to sublessees.

133. N.Y. CIV. CODE § 697; MONT. CIV. CODE § 1989 (1895) (currently MONT. CODE ANN. § 70-17-205 (1989)).

ownership.¹³⁴

D. Horizontal Privity Under the Code

The Code required that all running covenants be "contained in grants of estates in real property." Estates in real property included both possessory estates and servitudes.¹³⁵ The Field Code's conformity with the horizontal privity requirement was consistent with the New York law at the time. As one commentator observed, "no state is more careful to require the covenants to accompany some kind of grant than New York."¹³⁶

The Field Code defined a "grant" as a transfer in writing,¹³⁷ so a good argument could be made that the Code drafters intended that in order to run, a covenant would have to be set forth in the instrument of conveyance. However, neither the New York nor the Montana drafters probably intended to be quite that strict. The common law permitted a covenant to be located in another document executed at the time of the grant, and although the Code changed the common law in some respects, there is little indication that a change was intended here. On the contrary, several cases cited in the New York annotations sustained the enforceability of covenants contained in separate instruments,¹³⁸ and there is even

134. This illustration disregards the effect of statutory law, contract liens, and equitable servitudes, where applicable.

135. The original MONT. CIV. CODE defined Title II of Part II of Division II as "Estates in Real Property." Chapter 1 of Title II set forth the estates in land by duration (fee, life estate, leasehold). Chapter 3 listed "Servitudes." See MONT. CIV. CODE §§ 1210 to -60 (1895). Cf. N.Y. CIV. CODE §§ 218-55 (1865). Thus, the codifiers adopted the generally recognized position that incorporeal hereditaments (which include easements and profits), as well as possessory interests, are estates in land and are held, according to their duration, in fee simple, for life, and for years. BLACKSTONE, *supra* note 2, at 852, 856-57, 861, 865 & 1142; 4 KENT, *supra* note 2, at 21-22; 2 ALP, *supra* note 2, § 8.22.

See also a case cited by the New York annotators, *Van Rensselaer v. Read*, 26 N.Y. 558 (1863), the court adopted, as an alternative ground for sustaining the covenant, that a covenant could accompany an incorporeal hereditament.

On occasion, the Montana Supreme Court has overlooked the rule that incorporeal hereditaments are estates in land and are subject to limitation as fee simple, life estate, or for years. See, e.g., *Park County Rod & Gun Club v. Montana*, 163 Mont. 372, 517 P.2d 352 (1973) (making false distinction between an "easement" and a "fee simple"); see also *infra* text accompanying notes 193-95.

136. SIMS, *supra* note 2, at 155.

137. N.Y. CIV. CODE § 464. Cf. MONT. CIV. CODE § 1451 (1895) (currently MONT. CODE ANN. § 70-1-507 (1989) ("A transfer in writing is called a grant or conveyance or bill of sale. The term 'grant,' in this part, and the next two articles, includes all these instruments, unless it is specifically applied to real property.")).

138. *Allen v. Culver*, 3 Denio 284 (N.Y. Sup. Ct. 1846); *Denman v. Prince*, 40 Barb. 213 (N.Y. Sup. Ct. 1862). But the parties themselves still had to be grantor and grantee of a simultaneous grant. Note that the grant requirement appears twice: first in MONT. CODE

some evidence the New York drafters intended to permit the courts to consider material extrinsic to the deed, lease, or covenant in determining the terms and scope of the covenantor's promise.¹³⁹ As noted earlier, the latter was certainly the intent of the Montana drafters.¹⁴⁰

E. The Requirement of a Benefit on Transferred Land

Under the terms of the New York Civil Code a covenant could not impose a burden upon land transferred in fee simple absolute. That was the effect of the following provision, now Montana Code Annotated section 70-17-203 (1):

Every covenant contained in a grant of an estate in real property, which is made for the *direct benefit of the property* or some part of it then in existence, runs with the land.¹⁴¹

To understand the meaning of this section, one must distinguish between conveyances of fees simple absolute and conveyances of lesser estates. If a leasehold or life estate is conveyed and no remainderman is named, the grantor retains a reversion. In that case, any covenant benefiting either the reversioner or the holder of the present possessory interest arguably benefits the land in which an estate is granted, for both parties simultaneously have interests in the same land. A similar analysis applies if the grantor conveys a defeasible fee and retains a possibility of reverter or a right of entry.

If, on the other hand, the grant is of property in fee simple absolute, the grantor retains no future interest in the conveyed property. In that event, because the Code requires that the *granted* land be a dominant tenement, a covenant that imposes only a burden upon the granted land does not run.

There are several pieces of evidence supporting this construction of the Field Code. The provision immediately following the one just quoted¹⁴² includes six illustrative covenants running with the land. Three of these—the covenants of warranty, quiet enjoy-

ANN. § 70-17-201 (1989) and again in MONT. CODE ANN. § 70-17-203(1) (1989).

139. Among the cases disapproved in the annotation to the N.Y. CIV. CODE § 692 is *Heriot's Hosp. v. Gibson*, 2 Dow. 301, 3 Eng. Rep. 873 (H.L. 1814), which held that a promise could not be implied from the seller's exhibition of plans at the time of the sale.

140. See *supra* Part IV(A).

141. *Id.* (emphasis added). In the Field Code "property" is the thing which is the subject of ownership—here, the land. MONT. CODE ANN. § 70-1-101 (1989). This is an example of unsatisfactory use of terminology in the Field Code. As I indicate in the text immediately following, what Mr. Field meant was "direct benefit of the *estate*."

142. MONT. CODE ANN. § 70-17-203(2) (1989).

ment, and further assurance—are covenants that benefit a fee simple estate. The other three—rent, taxes, and assessments—were imposed in Field's time either on leaseholds or (in the case of rents) on fees simple subject to conditions subsequent.¹⁴³ Moreover, of the ten cases cited in the annotation to this section, nine deal with leasehold conveyances. The only one dealing with a fee simple conveyance¹⁴⁴ involved a promise that benefited the grantee.

In addition, there is a colorable reason why Mr. Field should have prepared this section to prohibit covenants burdening estates granted in fee simple absolute: he had to resolve a conflict in the common law. In 1865 there was still some doubt in American law as to whether a burden imposed on a granted estate would run with the land when no tenurial relationship existed between the grantor and grantee. Although the majority rule was that either a burden or a benefit could run with the transferred land,¹⁴⁵ the New York courts were uncertain on the question and the English courts had adopted the contrary view.¹⁴⁶ In keeping with his restrictive policy toward the running of covenants, Mr. Field elected to resolve the dispute by adopting the English rule.

The annotation to the original Montana Civil Code provision suggests that with one alteration, the intent of the Montana codifiers was the same as that of the New York codifiers.¹⁴⁷ Of the eight cases in their annotation, three involve leaseholds¹⁴⁸ and two others involve fee simple conveyances in which the grantor promised to bear some burden for the benefit of the transferred land.¹⁴⁹ The remaining three cases suggest the difference between the in-

143. Only where the statute *Quia emptores* was no longer in effect and fee simple ownership was deemed still tenurial could rent be imposed on a fee simple absolute. This was the situation in Pennsylvania. SIMS, *supra* note 2, at 150-51. A series of New York cases had existed involving reservations of perpetual rents in fee simple land grants by Stephen Van Rensselaer, but in each case Mr. Van Rensselaer retained a right of entry. See, e.g., *Van Rensselaer v. Read*, 26 N.Y. 558 (1863) (cited by the New York annotators) (right of re-entry creates sufficient "tenurial" relationship to create privity of estate if tenurial relationship necessary). See *Tyler v. Heidorn*, 46 Barb. 439 (N.Y. App. Div. 1866), for a summary of the extensive Van Rensselaer litigation.

144. *Denman v. Prince*, 40 Barb. 213 (N.Y. App. Div. 1862).

145. See *supra* text accompanying notes 34-41.

146. For New York see cases cited *supra* note 42. For the English view see RAWLE, *supra* note 2, at 334-35. The English courts later decided that in absence of tenurial relationship neither the burden nor the benefit would run. SIMS, *supra* note 2, at 147-48.

147. ANNOTATIONS, MONT. CIV. CODE § 1985 (1895).

148. *Laffan v. Naglee*, 9 Cal. 663 (1858); *Spencer's Case*, 5 Co. Rep. 16a, 77 Eng. Rep. 72 (K.B. 1583); *Norman v. Wells*, 17 Wend. 136 (N.Y. Sup. Ct. 1837).

149. *Bronson v. Coffin*, 108 Mass. 175 (1871); *Easter v. Little Miami R.R.*, 14 Ohio St. 48 (1862).

tent of the New York drafters and the intent of the Montana drafters.¹⁵⁰ Each of these cases considered subdivision restrictions. All three validated restrictions burdening conveyed lots. But in all three the covenants were of the kind commonly held to *mutually* benefit both granted and reserved estates.¹⁵¹ Thus, the Montana codifiers would sustain a restriction burdening granted land if it were part of a scheme of covenants that benefited granted land as well.¹⁵²

To summarize, the effect of this section of the Code appears to be as follows:

1. If a covenant is in a lease or conveyance for life, the covenant may run if the benefit accrues to either the present interest (leasehold, life estate) or to the future interest (reversion, remainder). This rule probably also applies to covenants in grants of defeasible fees, in which the transferor retains or grants a future interest.

2. If the covenant is in a conveyance in which there is no future interest—that is, of a fee simple absolute—some benefit *must* accrue to the granted land. The covenant may benefit both the granted and retained land, but any promise that benefits only the retained land does not run.

F. The Requirement that the Burden "Touch and Concern"

The drafters did not codify explicitly the common law rule that the burden of a covenant had to "touch and concern" the servient estate in order to run.¹⁵³ Indeed, the failure to refer expressly to the common law doctrine is puzzling, and may have been an instance of inadvertent omission—just the sort of situation in which Mr. Field suggested recourse to the pre-Code law.

Whatever the reason for the omission, it is probable that the codifiers intended to retain the "touch and concern" requirement. Given their restrictive position on running covenants, it is unlikely

150. St. Andrew's Lutheran Church's Appeal, 67 Pa. 512 (1871); Barrow v. Richard, 8 Paige Ch. 351 (N.Y. Ch. 1840); Winfield v. Henning, 21 N.J. Eq. 188 (1870).

151. The mutual benefit is mentioned explicitly in *Winfield*, 21 N.J. Eq. at 190.

152. See also *supra* Part IV(A). If one subscribes to the theory that equitable servitudes were accepted by the Montana codifiers, all three cases could be dismissed as of no importance to real covenants because in all three equitable relief was sought. Moreover, in one of these cases, *Winfield*, both parties conceded that the covenant ran, thereby obviating any need for judicial determination on that point.

The interpretation adopted herein is supported by subsequent California decisions. *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 68 P. 308 (1902); *Marra v. Aetna Constr. Co.*, 15 Cal. 2d 375, 101 P.2d 490 (1940).

153. See *supra* Part II(B).

that they intended to validate burdens that had nothing to do with the use or enjoyment of servient land.¹⁵⁴ Furthermore, both the New York and Montana drafters annotated their codes with cases in which the touch and concern test or similar standards had been favorably noted or applied.¹⁵⁵

G. Designation of Assigns

Both the New York and Montana Civil Codes repeated the common law requirement that if the subject of the covenant was not in existence at the time of contracting, "assigns" had to be mentioned for the burden of a covenant to run.¹⁵⁶ Specifically, the Code stated that 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 . . . runs with the land so far as the assigns thus mentioned are concerned."¹⁵⁷

H. Apportionment of Burdens and Benefits

The Code contained the following provision:

Where several persons holding by several titles are subject to the burden or entitled to the benefits of a covenant running with the land, it must be apportioned among them according to the value of the property subject to it held by them respectively if such value can be ascertained and, if not, then according to their respective interests in point of quantity.¹⁵⁸

The original Field Code annotations indicate that this section

154. The covenants for title represent an exception to this rule, essentially for historical reasons.

155. *E.g.*, *Norman v. Wells*, 17 Wend. 136, 148 (1837) (cited by New York annotators) ("touch or concern"); *Jourdain v. Wilson*, 4 B. & Ald. 266, 106 Eng. Rep. 935 (K.B. 1821) (cited by New York annotators) ("a covenant which respects the premises demised and the manner of enjoyment"); *Van Rensselaer v. Smith*, 27 Barb. 104 at 146 (N.Y. App. Div. 1858) (cited by New York annotators) ("affects the land, although not directly to be performed on it, provided it tends to increase or diminish its value in the hands of the holder"); *Laffan v. Naglee*, 9 Cal. 663, 678 (1858) (cited by Montana annotators) ("touch or concern"); *Easter v. Little Miami R.R.*, 14 Ohio St. 48, 51 (1862) (cited by Montana annotators) ("if it affected the nature, quality or value of the thing demised . . . or if it affected the mode of enjoying it . . .").

Subsequent to adoption of the Code, at least one California case has applied the "touch and concern" test, but that case was decided under a later addition to the original Field Code provisions. *Anthony v. Brea Glenbrook Club*, 58 Cal. App. 3d 506, 130 Cal. Rptr. 32 (1976). Montana has no such addition.

156. See *supra* note 48 and accompanying text.

157. N.Y. CIV. CODE § 695; MONT. CIV. CODE § 1987 (1895) (currently MONT. CODE ANN. § 70-17-203(3) (1989)).

158. N.Y. CIV. CODE § 698; MONT. CIV. CODE § 1990 (1895) (currently MONT. CODE ANN. § 70-17-206 (1989)).

reflected the results of the Van Rensselaer land grant cases, in which the New York courts had held purchasers of portions of Van Rensselaer grants liable for their pro rata shares of reserved rent.¹⁵⁹ The Montana drafters did not annotate this section further.

V. THE LAW OF THE MONTANA SUPREME COURT

A. *Introduction to the Cases*

This Part V consists of a review of the relevant case law issued by the state supreme court in the years since the enactment of the Montana Civil Code of 1895. The organization follows that of Part IV. This organization was adopted in part to reflect the chronological development of one of the few consistent themes of the cases—the invention, growth, and corrosive power of the Montana “negative easement.”

B. *Subject Matter of Running Covenants*

In Part IV of this article, I observed that although the codifiers intended to constrict the subject matter of easements and servitudes in gross, they did not so limit the subject matter of running covenants. The Montana Supreme Court has never held squarely that covenants other than those listed in the statute may be created,¹⁶⁰ but its decisions have had that effect. Disregarding for the moment those cases that may be seen as equitable servitude decisions and (perhaps) outside the scope of the Code, we can list the following covenants as expressly or impliedly validated: agreements for oil and gas bonus payments,¹⁶¹ restrictions barring commercial use,¹⁶² agreements not to challenge a particular kind of use,¹⁶³ business non-competition covenants,¹⁶⁴ restrictions limiting

159. *Van Rensselaer v. Bradley*, 3 Denio 135 (N.Y. Sup. Ct. 1846); *Van Rensselaer's Ex'rs v. Gallup*, 5 Denio 454 (N.Y. Sup. Ct. 1848) (each cited in the Field Code annotation). See also *Van Rensselaer v. Bonesteel*, 24 Barb. 365 (N.Y. App. Div. 1855).

160. The North Dakota Supreme Court, construing an identical provision, has so held. *Northern Pac. Ry. v. McClure*, 9 N.D. 73, 81 N.W. 52 (1899).

161. *Herigstad v. Hardrock Oil Co.*, 101 Mont. 22, 52 P.2d 171 (1935).

162. *Kosel v. Stone*, 146 Mont. 218, 404 P.2d 894 (1965); *Haggerty v. Gallatin County*, 221 Mont. 109, 717 P.2d 550 (1986). See also *State ex rel. Region II Child & Family Servs., Inc. v. District Court*, 187 Mont. 126, 609 P.2d 245 (1980) and *Porter v. K & S Partnership*, ___ Mont. ___, 627 P.2d 836 (1981), each of which assumed that covenants restricting subdivision to single-family use were valid.

163. *Reichert v. Weeden*, 190 Mont. 95, 618 P.2d 1216 (1980).

164. *O'Neill v. Ferraro*, 182 Mont. 214, 596 P.2d 197 (1979) (competing restaurant on landlord's premises enjoined); *Haggerty*, 221 Mont. at 109, 717 P.2d at 550 (restaurant). In *Burgess v. Shiplet*, 230 Mont. 387, 750 P.2d 460 (1988), a covenant by a developer to estab-

the kind of improvements that can be placed on a lot¹⁶⁵ or subjecting proposed improvements to architectural review,¹⁶⁶ and covenants prohibiting livestock entirely¹⁶⁷ or when they would be a "nuisance."¹⁶⁸

C. Vertical Privity in the Cases

In the realm of leasehold conveyances, the Montana Supreme Court's vertical privity doctrine has been consistent and wholly orthodox. Generally, the court has held that the assignee of a lessee is in privity of estate with the lessor and that a subtenant is not. This has the effect of rendering an assignee, but not a subtenant, liable on running covenants in the absence of contractual privity.¹⁶⁹ If contractual privity exists between a landlord and an assignee or subtenant, liability may be predicated on that ground.¹⁷⁰ In addition, while privity of contract survives between a landlord and his original lessee, the lessee stands surety for the assignee.¹⁷¹

By virtue of the "whole estate" rule, it would seem that the purchaser under a contract for deed,¹⁷² who has only an equitable interest in the property, is not bound by covenants running with the land unless he has specifically assumed them. There have been at least two cases in which purchasers on contracts for deeds allegedly violated existing covenants.¹⁷³ However, the report of neither

lish a property owners association was assumed to be valid.

165. *Timmerman v. Gabriel*, 155 Mont. 294, 470 P.2d 528 (1970) (trailer); *Sheridan v. Martinsen*, 164 Mont. 383, 523 P.2d 1392 (1974) (roadway); *Higdem v. Whitham*, 167 Mont. 201, 536 P.2d 1185 (1975) (construction of garage allowed as permitted by covenants); *De-Laurentis v. Vainio*, 169 Mont. 520, 549 P.2d 461 (1976) (trailers and mobile homes).

166. *Gosnay v. Big Sky Owners Ass'n*, 205 Mont. 221, 666 P.2d 1247 (1983). The general principle was acknowledged in *Town & Country Estates Ass'n v. Slater*, 227 Mont. 489, 740 P.2d 668 (1987), although the specific application was invalidated.

167. *Kelly v. Lovejoy*, 172 Mont. 516, 565 P.2d 321 (1977) (court held, however, covenant had been waived).

168. *Gosnay*, 205 Mont. at 221, 666 P.2d at 1247.

169. For the dominant law in the United States, see 2 ALP, *supra* note 2, § 9.5. For the Montana law, see *Kintner v. Harr*, 146 Mont. 461, 408 P.2d 487 (1965); *Herigstad v. Hardrock Oil Co.*, 101 Mont. 22, 52 P.2d 171 (1935); MONT. CODE ANN. § 70-17-204 (1989). Cf. *O'Neill v. Ferraro*, 182 Mont. 214, 596 P.2d 197 (1979) (subtenant apparently had assumed the obligations of the lease).

170. *Herigstad*, 101 Mont. at 22, 52 P.2d at 171. See also MONT. CODE ANN. § 70-17-205 (1989).

171. *Kintner*, 146 Mont. at 461, 408 P.2d at 487.

172. MONT. CODE ANN. § 70-17-204 (1989). A "contract for deed" is known in other parts of the country as a long-term installment land contract.

173. *Reinke v. Biegel*, 185 Mont. 31, 604 P.2d 315 (1979); *VanUden v. Henricksen*, 189 Mont. 164, 615 P.2d 220 (1980). In *Burgess v. Shiplet*, 230 Mont. 387, 750 P.2d 460 (1988), the grantee claimed the benefit of the existing covenants, but the suit was against the original covenantor. The grantee lost on other grounds.

case gives any indication that the purchaser claimed the protection of the "whole estate" rule. At any rate, in each instance it was at least arguable that the purchaser had assumed the burden of the covenants, and was therefore in privity of contract with the person seeking to enforce them. The court ultimately decided both cases, however, on other grounds.

Vertical privity rules are also relevant when the burdened estate has been purchased at a foreclosure sale. At the time of codification the courts were split on whether the purchaser of a servient tenement at a foreclosure sale acquired a new title and took free of such covenants or acquired the prior owner's title and took subject to them.¹⁷⁴

The most important Montana vertical privity case arose in a foreclosure context. In *Northwestern Improvement Co. v. Lowry*,¹⁷⁵ the plaintiff was the developer of the town of Paradise. In the course of its sales campaign, the plaintiff conveyed a lot to Linden, who, along with many others, covenanted in his deed not to use the lot for the sale of alcoholic beverages. After the taxes fell into arrears the county foreclosed and sold the lot to one Hauge. Hauge later conveyed to the defendant, who opened a tavern on the premises.

Under the tax sale statute of the time, a tax deed conveyed "absolute title 'free from all incumbrances' "¹⁷⁶ and the defendant argued that the restrictive covenant did not survive the sale. There is no indication that the parties cited or the court considered the "whole estate" rule.

Because *Northwestern* was a case of first impression in Montana, the justices could have validated the covenant by following the line of authority holding that real covenants survive foreclosure. In other words, the court could have ruled that such a covenant was not an "incumbrance" within the meaning of the statute because the value of real covenants is taxed to their dominant rather than to their servient estates.¹⁷⁷ Instead, the justices first noted that under the common law easements survived a tax sale of

174. See *supra* Part II(B).

175. 104 Mont. 289, 66 P.2d 792 (1937).

176. *Id.* at 301, 66 P.2d at 794.

177. This has been the thrust of several important cases, often decided on the analogy of easements appurtenant. See, e.g., *Crane-Berkley Corp. v. Lavis*, 238 A.D. 124, 263 N.Y.S. 556 (1933); *Tualatin Dev. Co. v. Department of Revenue*, 256 Or. 323, 473 P.2d 660 (1970); *Waterville Estates Ass'n v. Town of Campton*, 122 N.H. 506, 446 A.2d 1167 (1982); *Locke Lake Colony Ass'n v. Town of Barnstead*, 126 N.H. 136, 489 A.2d 120 (1985); *Borough of Englewood Cliffs v. Estate of Allison*, 69 N.J. Super. 514, 174 A.2d 631 (App. Div. 1961). See also Payne, *Condominiums and the Ancient Estates in Land: New Context for Old Learning*, 14 REAL EST. L. J. 291, 298-301 (1986).

the servient estate and then proceeded to characterize the "no-alcohol" rule as a *negative easement*.

If Montana had been a pure common law jurisdiction, such creativity would have been understandable, perhaps laudable. But the effect of the *Northwestern* decision in Montana was to undermine the scheme of the Civil Code. It has already been observed that the Code's listing of easements is designed to be exhaustive,¹⁷⁸ and although the Code authorizes some negative easements,¹⁷⁹ it says nothing of negative easements prohibiting the sale of alcohol. To be sure, the court correctly observed that the Code permits the creation of easements allowing the "right of transacting business upon land,"¹⁸⁰ but it is a *non sequitur* to suggest, as the court did, that this justifies creation of an easement to *prevent* transaction of a particular business upon land. Thus, the Code's list of permissible servitudes thereupon ceased to be a reliable one.

It can be argued that the *Northwestern* court's "negative easement" doctrine is merely equitable servitude theory in another guise—indeed, equitable servitudes sometimes are equated with equitable or spurious easements.¹⁸¹ Moreover, there is some, although not decisive, historical justification for assuming that equitable servitudes survived the Montana codification.¹⁸² However, the supreme court did not rest negative easement doctrine on equitable servitude grounds, nor has it done so in any subsequent negative easement case.

The *Northwestern* court turned to the general common law for support for its negative easement theory, but found only Spartan comfort there—and with good reason, for at common law no such easement exists.¹⁸³ It appears, therefore, that the Montana nega-

178. See *supra* Part IV(A).

179. E.g., easements of air, light, and heat. MONT. CODE ANN. § 70-17-101(8) (1989).

180. *Northwestern*, 104 Mont. at 301, 66 P.2d at 794.

181. CUNNINGHAM, *supra* note 2, at 487.

182. See *supra* Part III(A).

183. The number of true negative easements is fairly limited, which, as noted above, is one reason equitable servitude principles were developed. See *supra* Part II(C). Compare 2 ALP, *supra* note 2, at 373 which reads as follows:

Whenever a covenant imposes purely negative duties upon the covenantor, it is possible for the court to construe the covenant as the grant of an easement, and thus avoid the necessity of privity of estate between the parties. This possibility seems to be limited to those covenants where the character of the negative duties fit into one of the recognized types of negative easements . . .

The *Northwestern* opinion is objectionable for another reason. An easement is an incorporeal hereditament, and as such should be created by grant or reservation, i.e., by deed rather than by contract. At the time of the *Northwestern* case this rule was better understood than it is now. BEHAN, *supra* note 2, at 45. In fact the misunderstanding of how easements are created is now so widespread that in *Kuhlman v. Rivera*, 216 Mont. 353, 701 P.2d

tive easement is purely a creation of local common law, and a creation entirely inconsistent with the Code.

The court could have redeemed itself in *Rist v. Toole County*,¹⁸⁴ but it failed to do so. In *Rist*, the court considered whether an oil royalty survived a sale for delinquent taxes. The dissenting judge argued that the royalty agreement was a covenant running with the land; he seemed to think that running covenants should survive foreclosure. Had he carried a majority with him, the *Northwestern* case would have been explainable as merely an adoption of the rule that covenants do survive foreclosure. However, the majority held that the royalty agreement did not rise to the level of a separately taxable interest in land, although the majority did not deny the dissent's contention that it was a running covenant.¹⁸⁵ The net effect of *Rist* was to place Montana among those states in which a covenant does not survive foreclosure—unless counsel can convince the court to construe the covenant as a negative easement.¹⁸⁶

982 (1985), Justice Sheehy had to remind counsel that an easement *could* be created by a naked grant in absence of a contract! See also *Burlingame v. Marjerrison*, 204 Mont. 464, 469, 665 P.2d 1136, 1139 (1983).

When the parties *purport* to create an easement by contract, the courts often effectuate their intent, especially if the contract contains words of grant. However, this should in fact be the intent of the parties. The *Northwestern* covenant is devoid of any evidence the parties intended to create an easement (although they did create a reversionary interest).

A good analogy to the process of finding a grant in a contract is afforded by those cases that, in determining whether a contract is also a lease, consider whether the document contains "words of demise" or other evidence of intent to convey. Annotation, *Farmland Cultivation Arrangement as Creating Status of Landlord-Tenant or Landowner-Cropper*, 95 A.L.R. 3d 1013, 1018 (1979); see also *White v. Saby*, 127 Mont. 241, 260 P.2d 1116 (1953).

184. 117 Mont. 426, 159 P.2d 340 (1945).

185. The dissent also relied on the common law to argue that the royalty was a profit a prendre, but did not mention MONT. CODE ANN. §§ 70-17-101 to -112 (1989), which govern profits and other servitudes. Actually, at common law a royalty is neither a profit nor a running covenant but a kind of incorporeal hereditament called a *rent*. Freehold rents, like easements and profits, are real property interests. One distinguished commentator has in fact criticized the *Rist* court for failing to identify a royalty as a rent, and therefore as a real property interest. Sullivan, *A Survey of Oil & Gas Law in Montana as it Relates to the Oil & Gas Lease*, 16 MONT. L. REV. 1, 11-12 (1955) [hereinafter *Sullivan*].

The matter is controlled, however, not by common law but by the Field Code statutes. MONT. CODE ANN. § 70-17-203(2) (1989) classifies a rent (and therefore a royalty) as a covenant running with the land. MONT. CODE ANN. §70-17-102(4) indicates that a rent also can be a "servitude." It is symptomatic that neither the *Rist* court, nor the dissent, nor the commentator, identified the applicable statutes.

186. Counsel may have an easier time of this if the covenant at issue is restrictive rather than affirmative in nature. For another example of different treatment of affirmative and restrictive covenants, see *infra* Part V(E).

D. Horizontal Privity in the Cases

Unlike California, which has amended its Civil Code largely to abolish the horizontal privity doctrine, Montana still retains the rule that covenants must be contained in grants of estates in land.¹⁸⁷ The history of the Montana case law in this area is the story of one attempt after another to avoid the effect of the horizontal privity rule.

Much of this evasion can be justified from the legislative history of the Code. For example, the codifiers themselves probably intended that the term "grants" be construed to include documents outside the deed or lease itself.¹⁸⁸ From this point of view, the Montana Supreme Court has acted properly in holding that recorded covenants are incorporated in a deed by reference¹⁸⁹ and that the terms of the covenants can be gleaned from all the circumstances surrounding the grant.¹⁹⁰ Moreover, because the codifiers considered "estates in land" to include servitudes,¹⁹¹ it was proper for the court to construe a covenant between neighbors creating access rights as an easement of way—one of the easements authorized by the Code. In that case, the covenant was "contained in a grant" because it was itself a grant.¹⁹²

In a similar vein is *Herigstad v. Hardrock Oil Co.*,¹⁹³ in which

187. The California legislature felt the need to do so, despite judicial adoption of the equitable servitude doctrine. CAL. CIV. CODE § 1468 (West 1982). It initially adopted its amendment in 1905. The language has since been altered and now reads in part as follows:

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 . . . benefit or be binding upon each successive owner

Id.

There are a few restrictions on operation of this provision, so the horizontal privity requirement may survive in some constricted areas.

188. See *supra* Part IV(D).

189. *Kosel v. Stone*, 146 Mont. 218, 404 P.2d 894 (1965). The doctrine has been followed consistently. See, e.g., *Sheridan v. Martinsen*, 164 Mont. 383, 523 P.2d 1392 (1974).

190. E.g., *Thisted v. Country Club Tower Corp.*, 146 Mont. 87, 405 P.2d 432 (1965) (architectural plans, floor plans, brochures, form contracts, a description and outline of specifications, the architect's drawing, an informational pamphlet, oral representations, and the deed were all taken into account). See also *Goeres v. Lindsey's, Inc.*, 619 Mont. 1194, 619 P.2d 1194 (1980).

191. See *supra* Part IV(D). See also *Hill v. City of Huron*, 39 S.D. 530, 165 N.W. 534 (1917) (the horizontal privity requirement of the SOUTH DAKOTA FIELD CODE was satisfied by construing a party wall covenant creating a party wall easement authorized by the servitude portion of the Code).

192. *Johnson v. Meiers*, 118 Mont. 258, 164 P.2d 1012 (1946).

193. 101 Mont. 22, 52 P.2d 171 (1935).

the Montana bench was faced with the fact that a bonus term in an oil operating agreement did not appear to accompany the grant of an estate in real property. The court ruled, nevertheless, that there was horizontal privity and the bonus term was a covenant running with the land. The court reasoned that a federal prospecting permit (the basis of the covenantor's rights) was the functional equivalent of an oil or gas lease and an operating agreement was the functional equivalent of an assignment. Because an oil and gas lease was an incorporeal hereditament—presumably a profit a prendre—the transfer of such a lease was a grant.¹⁹⁴

Although the foregoing reasoning seems sound, the justices confused matters by stating that an oil and gas lease is not an estate in land.¹⁹⁵ Because the “grant” required by the Code is a grant of an “estate in land,” a statement that an oil and gas lease is not an estate in land undermines the court's *ratio decidendi*. But the court's errors cancelled each other out; as we have seen, under the Code transfer of a servitude is in fact a grant of an estate in land.¹⁹⁶

In most jurisdictions, the traditional way of avoiding the horizontal privity requirement is by recourse to the equitable servitude doctrine.¹⁹⁷ However, the only horizontal privity decision in which the court was to adopt equitable servitude principles was *Orchard Homes Ditch Co. v. Snively*,¹⁹⁸ which, technically, was not an equitable servitude case at all.

In *Orchard Homes* the plaintiff ditch company had agreed to supply water at a certain price to the lot of one Beagles. Beagles conveyed to the defendant Snively who in turn conveyed to the defendant Noland who conveyed to the defendant-appellant Saulter. Because neither Snively nor Noland nor Saulter had paid their water bills, plaintiff sued all three.

The water-supply contract was not a covenant that ran with the land, for it was not contained in a grant. It did not provide that the water was to be an appurtenance to the land nor that the

194. MONT. CODE ANN. § 70-17-101(5) (1989). For the status of the oil and gas lease in Montana as a profit a prendre, see *Sullivan*, *supra* note 185, at 5-7.

195. The opinion refers to an oil or gas lease as a “so-called ‘lease’” that “does not vest in the lessee an estate in the land or in the oil and gas therein.” *Herigstad*, 101 Mont. at 33-34, 52 P.2d at 174.

196. See *supra* Part IV(D).

197. The (indecisive) authority for survival of equitable servitudes after the 1895 Code is set forth *supra* Part IV(A). In a number of other cases, notably *Thisted v. Country Club Tower Corp.*, 146 Mont. 87, 405 P.2d 432 (1965), the court referred to the covenants involved as equitable servitudes, but they were in fact valid covenants running with the land at law. In none of the foregoing cases had the court employed equitable servitude principles.

198. 117 Mont. 484, 159 P.2d 521 (1945).

land was to serve as security for payment for the water. Because the covenant did not run with the land and because none of the defendants was a covenanting party, properly speaking, none of the defendants was personally liable.¹⁹⁹

The supply of water to the defendants' lot had increased the value of that lot enormously—from \$100 to \$1500. The case was a perfect opportunity for the court to impose a purely restitutionary equitable lien, and that is exactly what occurred in the trial court. The result of the trial court's order was a charge upon the lot for the full amount due, including the amounts unpaid by Snively and Noland, who no longer had an interest in the property. Saulter, then in possession, agreed to pay her share, but objected to imposition of a lien on her property for her predecessors' debts.

Saulter appealed, but the supreme court affirmed. In doing so, it relied upon three California water-supply decisions, two of which had been cited as illustrative by the Montana codifiers.²⁰⁰ Each case was distinguishable from *Orchard Homes* because in each there was a contract (albeit not in a grant) explicitly binding the land in question, a contract that justified a finding that an equitable servitude had been affixed to the property.

In *Orchard Homes* the lack of a contract term binding the lot disqualified the agreement as a valid equitable servitude, but the court was on firm jurisprudential ground in imposing a purely restitutionary equitable lien. Without horizontal privity such a lien binds the land only and does not justify imposing personal liability on the current landowner, but a charge on the land alone usually is sufficient to effectuate payment of a debt.²⁰¹

Reichert v. Weeden was the decision that inflicted the greatest damage upon the Code's horizontal privity rule.²⁰² In *Reichert*, the plaintiffs owned property on which they operated a restaurant. In 1969, the plaintiffs applied for a liquor license to which the defendants, neighboring landowners, objected. In the midst of legal proceedings on the subject, the parties entered into a stipulation in which the defendants consented to judgment against them and plaintiffs covenanted not to sell beer or liquor after January 1, 1981. The stipulation provided that it would run with the land, but no grant accompanied it.

199. The trial court did issue judgments against all three. If these imposed personal liability, the judgments against Snively and Noland must have proved uncollectible.

200. *Fresno Canal & Irrigation Co. v. Rowell*, 80 Cal. 114, 22 P. 53 (1889); *Fresno Canal & Irrigation Co. v. Dunbar*, 80 Cal. 530, 22 P. 275 (1889); *Fresno Canal & Irrigation Co. v. Park*, 129 Cal. 437, 62 P. 87 (1900). *Dunbar* is discussed *supra* Part II(C).

201. *Supra* Part II(C).

202. 190 Mont. 95, 618 P.2d 1216 (1980).

In 1979, the plaintiffs sued to have the agreement declared void and unenforceable. The court probably could have employed its equitable powers to dismiss the action, for certainly it could have justified a finding of estoppel. Instead, however, the court decided the case on its merits. The court held that the stipulation ran with the land by virtue of the "negative easement" doctrine, first adopted in *Northwestern Improvement Co. v. Lowry*²⁰³ and now roused from a well-deserved sleep of 42 years.

A thorough reading of *Reichert* is a disappointing exercise for those of us who admire the Montana Supreme Court.²⁰⁴ Yet I must excerpt enough of the opinion to afford the flavor of it, for *Reichert* demonstrates, as much as any other decision, both the corrosive power of the negative easement doctrine and the inventiveness of judges who feel compelled to disregard a clear statutory mandate. *Reichert* also suggests how out-of-place that statutory mandate, based on New York common law, is in the courts of Montana.²⁰⁵

The opinion characterized the plaintiffs' argument thus:

[P]laintiffs . . . contends [*sic*] that a "grant" of an estate is a statutory requirement for the creation of a covenant running with the land, and since defendant did not grant an interest of the land to plaintiffs, the agreement is not enforceable.²⁰⁶

The court then quoted the statutes on point. As this article has demonstrated, those statutes indicate that the plaintiffs were absolutely correct: the covenant did not run with the land. Nevertheless, the court avoided the obvious by trivializing plaintiffs' contention that formalities governed the case:

Plaintiffs insist that no covenant runs with the land and will not be binding unless certain words are contained in the document. Since those words are not found in this document, they maintain that no grant of an estate in real property took place. . . . We disagree.²⁰⁷

The opinion then proceeded to a *non sequitur* argument, and one in which the conclusion assumed what had not been proven:

Plaintiffs were aware of their actions, and their intent was clear.

203. 104 Mont. 289, 66 P.2d 792 (1937).

204. Past events compel me to state the obvious: However presumptuous it may be for one who has never been a judge to scrutinize judicial performance, such scrutiny is part of a law professor's job. Even when the conclusions are rejected, judges and lawyers often find critical analysis useful in subsequent cases.

205. For some conclusions on the inappropriateness of imposing a New York code on Montana, see *infra* Part VI.

206. *Reichert*, 190 Mont. at 99, 618 P.2d at 1219.

207. *Id.*

Not only did they grant away a present interest, but also a future interest that will bind their heirs and assigns.²⁰⁸

Having thus revealed that it did not understand the definition of "future interest," the court proceeded:

This interest in the land is the right to sell liquor or operate a bar on the land after a particular date. Plaintiffs . . . gave away an interest in the land by creating a negative easement binding not only themselves, but their heirs and assigns.²⁰⁹

The court's circularity of reasoning reminds one of *Bronson v. Coffin*,²¹⁰ decided many years before—a case that also served to weaken the horizontal privity rule. The circle is as follows: (1) This is a valid covenant, (2) a valid covenant grants an interest in the servient land, (3) this covenant grants an interest in the servient land, (4) therefore this covenant is a grant, (5) therefore this covenant is "contained in a grant," and therefore, (6) the covenant is valid.²¹¹

The court then went on to cite the negative easement holding in *Northwestern Improvement Co. v. Lowry*, failing to mention however that in that case, the covenant had been contained in a grant;²¹² noted the irrelevant point that the Code authorized easements to conduct business on land; confused the definition of "conveyance" in the recording statute with the term "grant" in the covenant statute;²¹³ and capped its effort by lifting out of context a quotation from *Orchard Homes Ditch Co. v. Snavely*.²¹⁴

208. *Id.* at 99-100, 618 P.2d at 1219.

209. *Id.* at 100, 618 P.2d at 1219.

210. 108 Mass. 175 (1871).

211. *Bronson* is discussed *supra* Part II(B).

In addition to the circularity of this argument, another problem is the leap from Step (4) to Step (5): It does not follow that because a covenant is a grant, it is therefore contained in a grant.

Cf. Hill v. City of Huron, 39 S.D. 530, 165 N.W. 534 (1917). In *Hill*, the South Dakota Supreme Court, construing its Field Code horizontal privity requirement, held that the requirement was met when adjoining landowners covenanted to erect and maintain a party wall. The court held that one effect of the covenant was to create a party wall easement, and the creation of the easement was a sufficient grant to support the remainder of the covenant. Note, however, that (1) unlike the Montana negative easement, party wall easements are recognized explicitly in the Code, (2) the creation of easements by covenant without words of grant, while irregular, is supported by extensive precedent, and (3) there was more to the covenant in *Hill* than the mere creation of the easement, so it was arguable that the remainder of the covenant was "contained in" the grant.

For the party wall provision in Montana, see MONT. CODE ANN. § 70-17-101(12) (1987). See also MONT. CODE ANN. § 70-17-101(13) (1989).

212. See *supra* Part V(C).

213. Misapplying *Kosel v. Stone*, 146 Mont. 218, 404 P.2d 894 (1965) in the process.

214. 190 Mont. at 101, 618 P.2d at 1220. The part of the *Orchard Homes* decision

Reichert is currently the last word on the subject of horizontal privity. At the present time, therefore, the surviving force of the doctrine in Montana is *at most* as follows:

1. Horizontal privity is no longer a requirement for purely restrictive covenants to run with the land.
2. Horizontal privity may or may not be a requirement for affirmative covenants to run with the land.²¹⁵
3. The courts may or may not impose personal liability upon other assets of landowners who disregard covenants made between predecessors in interest who were not in horizontal privity.

E. The Requirement of a Benefit on Transferred Land and the "Common Plan or Scheme"

I have observed already that the original Field Code prohibited the running of covenants that imposed burdens on estates conveyed in fee simple absolute. I have also noted that the annotators of the Montana Civil Code apparently accepted covenants that burdened conveyed land if the covenants benefited both that land and the grantor's retained property.²¹⁶ The classic example of the latter situation is the conveyance of lots in a subdivision pursuant to a common plan.²¹⁷

When it was decided in 1986, *Haggerty v. Gallatin County*²¹⁸ seemed to largely eliminate the rule that covenants must benefit transferred fees simple absolute. In *Haggerty*, the supreme court validated a promise not to sell beer or wine on transferred land by characterizing the promise as a negative easement:

There is additional authority and precedent for not voiding the commercial use restriction. Montana statutes allow for the creation of covenants and easements governing the right to transact business on land. [Montana Code Annotated section 70-17-101(6) (1985)]. Montana recognizes negative easements. A properly created negative easement can be utilized to restrain the right to do

excerpted implies that covenants will be enforced fully without horizontal privity. In fact, that decision imposed only a lien, not personal liability, upon the defendant. See *Orchard Homes Ditch Co.*, 117 Mont. 484, 159 P.2d 521 (1945). See also *supra* Part V(D).

215. The distinction between restrictive and affirmative covenants in this respect draws force from the differing treatment of the two in *Northwestern Improvement Co. v. Lowry*, 104 Mont. 289, 66 P.2d 792 (1937), and *Rist v. Toole County*, 117 Mont. 426, 159 P.2d 340 (1945). See also *infra* Part V(E).

216. Part IV(E), *supra*.

217. *Kosel v. Stone*, 146 Mont. 218, 222-23, 404 P.2d 894, 897 (1965). Examples of other cases sustaining subdivision covenants, include *Sheridan v. Martinsen*, 164 Mont. 383, 523 P.2d 1392 (1974); *Higdem v. Whitham*, 167 Mont. 201, 536 P.2d 1185 (1975); *Gosnay v. Big Sky Owners Ass'n*, 205 Mont. 221, 666 P.2d 1247 (1983).

218. 221 Mont. 109, 717 P.2d 550 (1986).

business on a piece of property and such easements are not automatically void.²¹⁹

Just when it appeared that the negative easement had devoured another statutory barrier, however, the court called it back to its cage. It did so only a year after *Haggerty*, in *Town & Country Estates Association v. Slater*.²²⁰

Town & Country was a small residential subdivision in Billings in which the Slaters had purchased a lot. The Slaters decided to construct a house on their land and, pursuant to the recorded covenants, they sought architectural approval for their plans from the Design Review Committee of the governing property owners association. The committee disapproved the plans, finding that the proposed dwelling was not, in the words of the covenants, in "harmony of external design." The Slaters began construction anyway. The property owners association successfully sought an injunction in district court and the Slaters appealed.

The facts of the case indicate that among the 16 *existing* homes in the subdivision there was no "harmony of external design," for that portion of the restrictions requiring architectural consistency had never been enforced. Arguably, the high court's best course would have been to vacate the injunction on the grounds that the restrictions had been waived or were impossible to realize.²²¹

The court did vacate the injunction, but elected to offer several alternative grounds for reversal.²²² One of those grounds was, in effect, the mutual benefit rule:

Each purchaser in a restricted subdivision is both subjected to the burden and entitled to the benefit of a restrictive covenant. Generally, these covenants are valid if they tend to maintain or enhance the character of a particular residential subdivision. However, such covenants are enforceable only when used in connection with some general plan or scheme. . . .

. . . In view of the wide variety of designs, no one seemed bur-

219. *Id.* at 119, 717 P.2d at 556 (citing *Reichert v. Weeden*, 190 Mont. 95, 618 P.2d 1216 (1980)).

220. 227 Mont. 489, 740 P.2d 668 (1987).

221. A court will not enforce a covenant if conditions in or around the subdivision have so changed that the original purpose of the servitude cannot be realized. Similarly, the covenant will not be enforced if it has been waived by non-enforcement. The doctrine of estoppel is employed to similar effect. See *infra* Part V(L).

222. For further discussion of the opinion in *Town & Country Estates Ass'n v. Slater*, 227 Mont. 489, 740 P.2d 671 (1987), see *infra* Part V(K).

dened by the covenant except the *Slaters*.²²³

One way to reconcile *Haggerty* and *Slater* is on the basis that *Haggerty* involved a purely restrictive covenant of the kind that can be characterized as a “negative easement” while *Slater* construed covenants that imposed certain (contingent) affirmative obligations—specifically the need to apply to a committee for design approval. Two of the vertical privity cases discussed earlier—*Northwestern* and *Rist*—can be reconciled by a similar analysis.²²⁴

The *Slater* court stated that mutual benefit covenants “are enforceable only when used in connection with some general plan or scheme.”²²⁵ It will be necessary to examine the common scheme concept before proceeding further.

The common plan or scheme is a recurring motif in covenant cases. It refers to the developer’s “original intent”—his initial idea of what the completed subdivision will look like, an idea conceived before any lot is sold. Most subdivisions are constructed in accordance with such a plan, but a common plan is by no means a prerequisite to the enforcement of all covenants—or even to the enforcement of all subdivision “mutual benefit” covenants. On this point, the language of the *Slater* court was misleading.

There are several types of cases in which judges must determine whether the developer had a common scheme and, if so, what the nature of that scheme was. One type of common scheme case arises when the terms and scope of the governing covenants are not expressed fully in one set of documents. In those circumstances, a judge may examine extrinsic evidence of the developer’s plan—evidence such as that found in maps, documents, oral representations, and the physical layout of the property—in order to piece together the terms and scope of the covenants.²²⁶

In another type of common scheme case the scheme may assist in determining whether a property purchaser had notice of existing covenants. For example, the physical appearance of a well-planned residential community may, when coupled with other factors, serve as notice to purchasers of lots that their lots were restricted to residential purposes.²²⁷ Similarly, the presence in a subdivision of ex-

223. *Slater*, 227 Mont. at 492, 740 P.2d at 671.

224. See *supra* Part V(C). Of course, any distinction may have been unintentional on the part of the supreme court.

225. *Slater*, 227 Mont. at 492, 740 P.2d at 671.

226. See, e.g., *Thisted v. Country Club Tower Corp.*, 146 Mont. 87, 405 P.2d 432 (1965).

227. This was unsuccessfully maintained in *Goeres v. Lindsey’s, Inc.*, 190 Mont. 172,

tensive and well-manicured common grounds may suggest to a prospective property buyer that the developer's plan is for a property owners association to collect assessments for the upkeep of those grounds.²²⁸

A third type of common scheme case arises when the identity of the dominant estate is not certain. Only the owners of benefited land have standing to sue for breach of a covenant. Moreover, in most jurisdictions all covenants must benefit some land: a covenant whose benefit is held in gross is invalid.²²⁹ In Montana, property conveyed in fee simple absolute must derive some advantage for a covenant to be valid;²³⁰ the common plan can help determine whether this requirement has been met.

For example, in *Slater* the covenants burdened all the lots in the subdivision. If the covenants had not also benefited those lots, all of the covenants—and not just the particular architectural provision at issue—would have been void. The common scheme provided evidence that the subdivision was a mutual benefit community.

It does not follow that an initial common scheme is always necessary to the validity of burdens on granted lots. Consider the following illustration.

Illustration # 3: Builder subdivides a tract of land into 30 parcels. He sells Lots 1-10 without restrictions. He sells Lots 11-20

619 P.2d 1194 (1980). See *infra* Part V(J). See also *Guillette v. Daly Dry Wall, Inc.*, 367 Mass. 355, 325 N.E.2d 572 (1975); *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925).

228. See, e.g., *Sea Gate Ass'n v. Fleischer*, 211 N.Y.S.2d 767 (N.Y. Sup. Ct. 1960).

229. See *supra* note 28. On use of a scheme to determine the dominant estate, see also *Petersen v. Beekmere, Inc.*, 117 N.J. Super. 155, 283 A.2d 911 (Ch. Div. 1971) (no scheme found); *Snow v. Van Dam*, 291 Mass. 477, 197 N.E. 224 (1935) (scheme found); *Chimney Hill Owners' Ass'n v. Antignani*, 136 Vt. 446, 392 A.2d 423 (1978) (no scheme found). See also *Winfield v. Henning*, 21 N.J. Eq. 188 (1870) (cited by the drafters under the MONT. CIV. CODE § 1985 (1895)).

230. Outside of the three Field Code states that have not amended the relevant covenant rule (Montana and the Dakotas), a pure burden may run on property conveyed in fee simple absolute. Thus, in most states it is necessary only that the covenant benefit *some* dominant estate. See *generally* 2 ALP, *supra* note 2, § 9.8nn (recognizing no distinction between cases in which the grantor has the sole burden and cases in which the grantee has the sole burden). California has amended its Civil Code to adopt the majority rule for most purposes. CAL. CIV. CODE § 1468 (West 1982).

And yet Professor Krasnowiecki would argue that mutual benefit can be important outside of Montana and the Dakotas:

When several landowners expect to share equally in the benefits and burdens of a covenant and that expectation is disappointed, so that some have the benefits but not the burdens whereas others have to carry an extra burden, the courts are apt to find that the covenants are not enforceable, at least if the majority of those who have the unexpected burdens so desire.

Krasnowiecki, *Townhouses with Homes Associations: A New Perspective*, 123 U. PA. L. REV. 711, 720 (1975).

with affirmative covenants imposing an assessment to maintain a common area. These covenants are purportedly for the benefit of all lots in the subdivision. He sells Lots 21-30 with restrictive covenants against any but residential use. These restrictions also are purportedly for the benefit of all parcels in the subdivision.

In the foregoing example, it is evident that Builder did not establish a common plan at the outset—at least not one to which he adhered. In many jurisdictions, moreover, the courts would not grant Lots 1-10 the benefit of either the restrictive or the affirmative covenants and would not concede to Lots 1-20 the benefit of the residential restrictions. Granting a benefit to a parcel already conveyed out is seen as a violation of the “no reservation of an easement in a stranger” rule.²³¹

Even if the benefit of subsequent covenants cannot be attached to earlier conveyed lots, however, there is not one burdened parcel in this subdivision that does not also benefit from those covenants. Lots 1-10 are not burdened at all. Lots 11-20 can enforce the assessment restriction against each other. Lots 21-30 can enforce the residential restriction against each other and the assessment covenants against Lots 11-20.

The Supreme Court of Montana says it follows the “no reservation in a stranger” rule, although it makes exceptions when the intent to reserve in a stranger is clearly shown.²³² But the court has overlooked a statute that explicitly abolishes the rule in most instances:

A present interest and the benefit of a condition or covenant respecting property may be taken by any natural person under a grant although not named a party thereto.²³³

By virtue of that provision, all lots purchased by natural persons are benefited by subsequently-restricted parcels if the developer so intends.

Despite the language of *Slater*, therefore, in Montana it is not a prerequisite to covenant validity that a developer have an initial plan or scheme. The proof required is that the covenant meets the

231. *Snow*, 291 Mass. 477, 197 N.E. 224.

232. *Medhus v. Dutter*, 184 Mont. 437, 603 P.2d 669 (1979).

233. MONT. CODE ANN. § 70-1-521 (1989) (formerly MONT. CIV. CODE § 1492 (1895), and originally developed as the N.Y. CIV. CODE § 482). There are a substantial number of Montana cases on “reservation in a stranger,” but to my knowledge none has ever mentioned the statute. It is probable most lawyers are unaware of it.

The statute was designed expressly to change the common law rule. See N.Y. CIV. CODE at 144 (1865). It also reflected the results of cases such as *Barrow v. Richard*, 8 Paige Ch. 351 (N.Y. Ch. 1840), cited by the Montana annotators.

requirements of the statute, and it is an indifferent question whether this proof is made by reference to a scheme or in some other manner.

From the foregoing, it appears that at the present time the law on the benefit and burden of Montana covenants is as follows:

1. Covenants running with the land may benefit or burden either the granted or retained estate when the conveyance is of an estate less than fee simple absolute.

2. Purely restrictive covenants ("negative easements") may benefit or burden estates held in fee simple absolute, whether granted, retained, or, after *Reichert v. Weeden*, owned concurrently.

3. Affirmative covenants may burden land retained when estates are granted in fee simple absolute, but affirmative covenants may burden conveyed land only when they also benefit the conveyed land.

4. A common plan or scheme is a permissible, although not a required, method of demonstrating which properties receive benefits from a particular covenant or set of covenants.

F. The Requirement that the Burden "Touch and Concern"

As far as I have been able to determine, the Montana bench has not treated, and *a fortiori* not altered, the common law rule that the burden of covenants must "touch and concern" the land. As indicated in Section A of this Part V, the subjects of covenants sustained are all within the common law tradition.

G. Designation of Assigns and Intent that the Covenant Run

Like other English and American tribunals, the Montana Supreme Court looks to the intent of the parties in determining whether a covenant runs with the land.²³⁴ When the covenant is in a lease, does not concern a thing not *in esse*, and is of the type that normally would run, the court may presume that the parties intended that the covenant would bind and benefit their assigns. This presumption is rebuttable by evidence to the contrary.²³⁵

H. Apportionment of Burdens and Benefits in the Cases

The most significant Montana apportionment case is *Weintz*

234. *Reichert v. Weeden*, 190 Mont. 95, 618 P.2d 1216 (1980); *Weintz v. Bumgarner*, 150 Mont. 306, 434 P.2d 712 (1967).

235. *Weintz*, 150 Mont. at 315-16, 434 P.2d at 717-18.

v. Bumgarner,²³⁶ in which a tenant for years sought to enforce a pre-emptive right against the heirs of the lessor. The heirs argued that the tenant's pre-emptive right was never triggered, because all of them had not formed a simultaneous intent to sell. The court's response:

Upon the death of the owner and lessor . . . title to the property . . . passed immediately to his heirs as tenants in common. The purchase provision in the lease, being a "covenant that runs with the land," is apportioned among the heirs according to their respective interests in the whole of the property and binds them in the same manner as if they had personally entered into the covenant. . . .

Thus the burden of the purchase provision of the lease passed by operation of law to the heirs as owners of undivided interests in the whole of the property who became individually and separately bound to the extent of their respective interests. Upon formation of a specific intention by each heir to sell the whole of his individual interest in the property, plaintiff's right of purchase according to the terms of the lease vested and accrued as to the interest of each such heir without regard to the interests of other heirs.²³⁷

To the apportionment rule, the court has recognized an exception: when a plaintiff is only one of several beneficiaries of a scheme of covenants running with the land and the only way to afford the plaintiff complete relief is to enjoin the defendant to honor the entire scheme, the injunction will be granted even if other potential claimants are benefited incidentally.²³⁸

I. Notice

There are two reasons why notice is important in cases involving covenants and other burdens upon land: Notice may result in

236. 150 Mont. 306, 434 P.2d 712 (1967).

237. *Id.* at 316-17, 434 P.2d at 718.

238. *Thisted v. Country Club Tower Corp.*, 146 Mont. 87, 405 P.2d 432 (1965) (a property owners association case). In *Thisted*, the court stated:

It appears clear that if any one of the apartment owners (here being Mrs. Roberts) who is in privity, under the facts and circumstances here, with the corporate defendant and has a right to relief, it would bind the defendants as to the whole building, because it would be impossible to segregate the use of the building or apportion its use among the apartment owners.

Id. at 99, 405 P.2d at 438.

The same is not true when the relief sought is for damages. See Natelson, *Mending the Social Compact: Expectancy Damages for Common Property Defects in Condominiums and Other Planned Communities*, 66 OR. L. REV. 109, 130-49 (1987).

the creation of such burdens²³⁹ and notice may result in the survival of previously-existing burdens after the servient tenement has changed ownership.²⁴⁰

In cases of this nature, notice arises in one of three contexts: (1) mere filing pursuant to the provisions of the recording act;²⁴¹ (2) circumstances suggesting the existence of unrecorded interests—circumstances such as the property's physical condition,²⁴² the existence of documents, the making of representations, or some combination thereof;²⁴³ and (3) recording coupled with other events that impress upon a person the existence of the public record.²⁴⁴

The Montana Supreme Court seems reluctant to bind purchasers of real estate to land burdens by reason of constructive notice alone. The Montana court insists that there be the kind of evidence that would alert even a careless purchaser to the existence of the covenants.

The recording statutes provide that proper filing in the office of the county clerk and recorder constitutes constructive notice to subsequent land purchasers. Yet there is no reported covenant case in which the court held a landowner liable by reason of the public record alone.²⁴⁵ In *Kosel v. Stone*,²⁴⁶ several grantors had conveyed

239. *E.g.*, *Pioneer Mining Co. v. Bannack Gold Mining Co.*, 60 Mont. 254, 198 P. 748 (1921) (easement); *Spaeth v. Emmett*, 142 Mont. 231, 383 P.2d 812 (1963) (easement); *Thisted*, 146 Mont. 87, 405 P.2d 432 (easements and covenants); *Majors v. Shining Mountains*, 219 Mont. 366, 711 P.2d 1375 (1986) (easements); *Town & Country Estates Ass'n v. Slater*, 227 Mont. 489, 740 P.2d 668 (1987) (covenants).

240. *Kosel v. Stone*, 146 Mont. 218, 404 P.2d 894 (1965) (survival of covenants binding predecessor in title); *Goeres v. Lindsey's, Inc.*, 190 Mont. 172, 619 P.2d 1194 (1980) (implied covenants held not to survive).

241. MONT. CODE ANN. § 70-21-302 (1989).

242. *Pioneer*, 60 Mont. 254, 198 P. 748; *Spaeth*, 142 Mont. 231, 383 P.2d 812; *Graham v. Mack*, 216 Mont. 165, 699 P.2d 590 (1985).

243. *Thisted*, 146 Mont. 87, 405 P.2d 432. This is a rule for proof of the "common plan or scheme." See *supra* Part V(E).

244. *Kosel*, 146 Mont. 218, 404 P.2d 894 (1965); *Sheridan v. Martinsen*, 164 Mont. 383, 523 P.2d 1392 (1974); *Majors v. Shining Mountains*, 219 Mont. 366, 711 P.2d 1375 (1986); *Town & Country Estates Ass'n v. Slater*, 227 Mont. 489, 740 P.2d 668 (1987); *VanUden v. Hendricksen*, 189 Mont. 164, 615 P.2d 220 (1980); *Goeres*, 190 Mont. 172, 619 P.2d 1194 (1980).

The subject of notice, even notice in real estate transactions alone, ranges well beyond the realm of covenants running with the land. Unfortunately, a definitive treatment of Montana notice law has not been written, and such a treatment is outside the scope of this article. The general observation that follows is based solely upon the covenant cases and a few closely-allied easement cases.

245. See *Goeres v. Lindsey's, Inc.*, 190 Mont. 172, 619 P.2d 1194 (1980), in which the plaintiffs claimed the defendant's lot was restricted. The court passed over the first recorded deed from the common grantor, despite the fact that it purported to restrict the defendant's lot. The court took more seriously a later deed that restricted another lot but that did *not*

land to a corporation developing a residential subdivision, and in the course of doing so had filed a "declaration of restrictions" governing the subdivision. The court concluded that the declaration was a "conveyance" within the meaning of the applicable statute²⁴⁷ and therefore a recordable document, and that it had been filed in a timely manner. But the court also observed that the deed to the defendant's predecessor in interest referred to the declaration, that the defendant's deed referred to a filed subdivision plat, and that the recorder's notation of the plat (presumably in the index) referred to the declaration of restrictions.

Similarly, in *Sheridan v. Martinsen*,²⁴⁸ the court's decision emphasized that the defendant had knowledge of the recorded restrictions. In several other cases the justices took pains to observe that the defendant's deed or contract had referenced the restrictions involved.²⁴⁹

Even when the circumstances provide a mixture of record and inquiry notice, the Montana court is more hesitant to bind a servient landowner than are the tribunals of other jurisdictions. For example, the Supreme Judicial Court of Massachusetts has held that a purchaser in a planned subdivision who has no covenants in his deed is on notice of covenants between the common grantor and prior grantees of other lots, even though those covenants are set forth only in the deeds to other lots.²⁵⁰ The Michigan Supreme Court has ruled that a purchaser without covenants in his own deed can be placed on notice of "reciprocal negative easements" by the condition of the neighborhood.²⁵¹ This position has been adopted in other states as well.²⁵² Cases of this nature should be contrasted with the Montana Supreme Court's holding in *Goeres v. Lindsey's, Inc.*²⁵³

In *Goeres*, the defendant had purchased Lot #3 in a subdivision in which most of the other lots were restricted to residential purposes. There were no restrictions in prior deeds to Lot #3, however; and on that basis the defendant proceeded to construct a res-

purport to bind the defendant's property. But the later restricted deed had appeared in the defendant's title commitment; the former had not.

246. 146 Mont. 218, 404 P.2d 894 (1965).

247. MONT. CODE ANN. § 70-21-301 (1989).

248. 164 Mont. 383, 523 P.2d 1392 (1974).

249. *Town & Country Estates Ass'n v. Slater*, 227 Mont. 489, 740 P.2d 668 (1987) (covenants incorporated by reference in deed); *VanUden v. Hendricksen*, 189 Mont. 164, 615 P.2d 220 (1980) (earnest money contract and contract for deed).

250. *Guillette v. Daly Dry Wall, Inc.*, 367 Mass. 355, 325 N.E.2d 572 (1975).

251. *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925).

252. CUNNINGHAM, *supra* note 2, at 495.

253. 190 Mont. 172, 619 P.2d 1194 (1980).

taurant on the property. The plaintiffs sued to enjoin construction.

The general common law afforded the plaintiffs at least two grounds for arguing that Lot #3 was subject to the same covenants that bound most of the rest of the subdivision. In the common grantor's first deed (which conveyed seven other parcels, but not Lot #3) the grantor had agreed to restrictions on most of its retained land, including Lot #3. Under the Massachusetts rule, this would have the effect of binding Lot #3. Moreover, the common grantor later conveyed 51 lots (including Lots #3 and 42) to its corporate principals, who sold Lot 42 subject to restrictions. Under the Michigan rule, this would create a reciprocal covenant on their retained land, including Lot #3. To complement the foregoing, the plaintiffs introduced evidence that the subdivision had a uniform residential appearance, a decisive fact in states such as Massachusetts and Michigan. The trial judge held this evidence afforded the defendant adequate notice of the restrictions upon Lot #3 and enjoined further construction.

The opinion of the supreme court suggested several reasons for reversing the trial judge, but ultimately only one was important:

By holding that appellant is not bound by the restrictive covenant as to commercial use, we do not also find that said covenant does not exist at all as to the subdivision at issue. We merely hold that to enforce these implied restrictions so as to be applicable to a particular transfer of land it is necessary to show *knowledge* of the restrictions by the transferee at the time of purchase and that enforcement of the implied restrictions will not be inequitable.²⁵⁴

One way to explain the decision in *Goeres* is to conclude that Montana has joined the group of states that hold that the chain of title to one parcel of land does not include deeds to other parcels of land, even from a common grantor.²⁵⁵ The knowledge of a servient owner, however, is a common theme of Montana cases in this area, even when the covenants at issue clearly are within the servient owner's chain of title.²⁵⁶ *Goeres* stands, then, as another example of the Montana court's unwillingness to bind the grantees of

254. 190 Mont. at 179, 619 P.2d at 1198 (emphasis added).

255. 4 ALP, *supra* note 2, § 17.24.

256. *Sheridan v. Martinsen*, 164 Mont. 383, 388, 523 P.2d 1392, 1394-95 (1974) (court emphasizes servient owner's knowledge of covenants); *O'Neill v. Ferraro*, 182 Mont. 214, 216, 596 P.2d 197, 198 (1979) (restriction in top lease reported to sublessees); *Porter v. K & S Partnership*, ___ Mont. ___, ___, 627 P.2d 836, 838, 843 (1981) (majority and dissent split on whether servient owners knew of restrictions).

servient land to covenants unless prior to the transfer those grantees had unmistakable evidence that the land was subject to those covenants.

J. Implied Covenants

When a court “implies” an easement or a contract,²⁵⁷ it infers an intention not directly expressed. The inference may be drawn from the words of the parties (employed to express some intention other than the creation of the easement or contract), from their acts, from other circumstances or from some combination of all of these.²⁵⁸ The parties’ testimony on their own intent as it existed at the time the easement or contract was created is admissible evidence of these circumstances, but it is by no means conclusive.²⁵⁹ Further, the intention inferred is not necessarily the actual intention of the parties. Quite often it is not. Frequently the parties themselves never considered the subject-matter at all. Frequently one or both of them were in ignorance of important facts. Frequently, too, a party acts unreasonably or in bad faith—giving indications that induce the other party to form expectations that he does not mean to fulfill.²⁶⁰ In such cases the court inferring an intention does not find a matter of fact. Instead it considers the parties’ acts, words, and the surrounding circumstances and extrapolates a hypothetical intention that the parties would have formed had they thought about the matter reasonably and in good faith. The Montana Supreme Court calls this extrapolated, hypothetical intention *presumed intent*.²⁶¹

The Montana codifiers, and perhaps Mr. Field as well, expected a court to be able to consider various extrinsic facts and circumstances in deciding whether a contract had been created, what the contract’s terms were, and whether or not it ran with the

257. The use of the word imply for “infer” is odd to modern ears. Like many other legal terms, it is apparently a survival of an archaic usage once more general. In property law, compare *livery*, *determine*, *covenant*, words of *limitation*. To imply once meant “to involve, to wrap up in.” An implied intent is one wrapped up in facts and circumstances. Cf. the Latin *implicare*. Webster’s New International Dictionary of the English Language 1250 (Neilson 2d ed. 1955).

258. *Pioneer Mining Co. v. Bannack Gold Mining Co.*, 60 Mont. 254, 198 P. 748 (1921); 2 ALP, *supra* note 2, § 8.31 (discussing implied easements). The other implied easement cases are instructive on the factors considered. See, e.g., *Spaeth v. Emmett*, 142 Mont. 231, 383 P.2d 812 (1963) (easement by pre-existing use); *Graham v. Mack*, 216 Mont. 165, 699 P.2d 590 (1985) (same).

259. *Graham*, 216 Mont. 165, 699 P.2d 590.

260. *Thisted v. Country Club Tower Corp.*, 146 Mont. 87, 405 P.2d 432 (1965).

261. *Graham*, 216 Mont. at 173, 699 P.2d at 595.

land.²⁶² The Montana Supreme Court has performed this task well: Indeed, it is within the area of implied covenants that the court has performed some of its finest work.

*Thisted v. Country Club Tower Corp.*²⁶³ was a particularly difficult case, both because it involved one of the first horizontal property regimes in the United States and because the documents that had created the regime were incomplete. A developer named Julius Peters constructed an 11-story building in Great Falls. His development company transferred the building to a corporation but reserved fee simple ownership of 20 of the 21 apartments in the building. He then marketed the 20 reserved apartments to the general public. The corporation owning the rest of the building (including one apartment for the manager) issued 20 shares of stock, one for each apartment owner.²⁶⁴

Peters' development company was able to sell only 10 of the 20 marketed units to the general public. His company retained seven and conveyed one to him, one to his daughter, and a third to another corporation controlled by him. At some point he conceived the idea of converting at least some of the retained units to commercial and transient use. Several other apartment owners, including Roberts and Thisted, sued to enjoin the conversion.

Perhaps because Peters' attorney had used cooperative rather than condominium documents as a model, in the conveyance of the building-without-apartments from the development company to the management corporation, no express covenants had been imposed on the property and no easements of access had been reserved.²⁶⁵ The plaintiffs argued, however, that under the circumstances of the case, covenants restricting the building to residential use should be implied.

The court agreed. It rejected the defendant-developer's contention that any prior agreements were merged in the deeds to the unit purchasers. In effect, the court inferred the parties' presumed

262. See *supra* Part IV(D). See also the statutory quotations in *Thisted*, 146 Mont. at 102-03, 405 P.2d at 440.

263. 146 Mont. 87, 405 P.2d 432 (1965).

264. The court variously characterized the building as a condominium and "in the nature of a co-operative apartment." *Id.* at 88, 405 P.2d at 433. Actually it was neither. In a condominium, the common elements are titled to all owners in common, not to the association. In a cooperative, the entire building is titled to a corporation and individual apartments are leased to the shareholders. For details, see NATELSON, POA, *supra* note 2, § 1.2.

265. I have not seen the documents, but condominiums either did not exist or were exceedingly rare in the United States in 1957, the date of the conveyance. See Natelson, *Comments on the Historiography of Condominium: The Myth of Roman Origin*, 12 OKLA. CITY. U.L. REV. 17, 28-31 (1987).

intention from the developer's initial common plan.²⁶⁶ In doing so, it considered a wide range of documents and circumstances to arrive at its determination. Among the documents were architectural plans and floor plans, sales pamphlets, the developer's form contract, a description and outline of specifications, and the deeds themselves. To the extent that these documents suggested a use at all, it was a residential use. They spoke in terms of "apartments," "gracious living," standards of selection, and so forth. The court also considered certain oral representations made to the purchasers.

Most telling was the physical condition of the building and the defendant's failure to reserve easements of access to the apartments. The court noted,

Such rights, if any are to exist at all, must be implied. By this deed it is quite clear that there was created a separate ownership . . . of twenty cubicles of air located within the outer confines of the apartment building, and with all the structural portions of the building owned by Management. A perfectly legal situation arose from this transfer, but if we do not imply the additional use of the structural portions of the building owned by Management the owners of the apartments would not be able to get to them, heat them, get lights, water and other utilities to them.²⁶⁷

In other words, the necessity for implying easements not set forth in the individual deeds suggested that those deeds did not, as the developers claimed, memorialize all the terms of the transactions.

Throughout the opinion, the court referred to the restrictions implied by the circumstances as "equitable servitudes." Historically and within the context of the *Thisted* case (the plaintiffs sought injunctive relief), that was correct. Under the Montana version of the Field Code, however, implication is an acceptable way of ascertaining the existence and terms of all running covenants. Moreover, on the *Thisted* facts there were horizontal and vertical privity, benefited and burdened estates, and intent that the promises run. These "equitable servitudes" qualified fully as covenants running with the land.

In *Goeres v. Lindsey's, Inc.*,²⁶⁸ the plaintiffs' counsel claimed

266. On the use of the common plan or scheme to prove the existence and terms of covenants, see *supra* Part V(E).

267. *Thisted*, 146 Mont. at 100, 405 P.2d at 438. The court overruled *Simonson v. McDonald*, 131 Mont. 494, 311 P.2d 982 (1957), which had held that 40 years of Montana implied easement law was all wrong. A bizarre case in its conclusion, *Simonson* was also one of the few attempts to apply genuine "displacement" style Code jurisprudence of the kind Field advocated.

268. 190 Mont. 172, 619 P.2d 1194 (1980). Additional discussion on this case appears

that *Thisted* had adopted the doctrine of "reciprocal negative easements" (i.e., reciprocal restrictive covenants). The court in *Goeres* correctly rejected that contention. Reciprocal negative covenants arise when a court infers from a common plan a grantor's willingness to be bound by the same covenants that restrict the grantees. There were no covenants inserted in the deeds in *Thisted*, and the only representations in writing were by the developer, not the grantees.

But the *Goeres* court still was faced with the issue of whether there should be reciprocal negative covenants in Montana. Although the plaintiffs ultimately lost on notice grounds, the *Goeres* opinion intimated that the court might very well recognize reciprocal negative covenants in a future case. The court suggested, however, that the future case should involve stronger facts than *Goeres*: that there ought to be more than one or two restricted deeds, that the restricted deeds ought to come from the common grantor, and that the physical nature of the subdivision should be such as to suggest clearly its controlled nature.²⁶⁹

The latest pronouncement involving implied covenants is *Majers v. Shining Mountains*.²⁷⁰ A subdivision developer had filed a plat showing a proposed street. The developer failed to pave the street, and the lot purchasers sued to enforce what they claimed was an implied covenant to pave. The district court granted summary judgment to the plaintiffs and the developer appealed. The high court reversed.

The opinion acknowledged that presentation of a map to a purchaser creates an implied promise that what is shown in the map will be done. Thus, a map designating an area as a road creates an easement in favor of the lot purchasers.²⁷¹ However, indication of an easement does not of itself demonstrate a promise to improve the easement:

[T]he purchasers acquired an easement for the designated use. Whether there is any legally enforceable right to have the roads

supra Part V(I).

269. Actually in *Goeres* there was a restricted deed from the common grantor. This deed was the first from the common grantor, and it had conveyed seven lots. Moreover, the deed expressly bound the defendant's lot. The court never explained satisfactorily why that deed did not create restrictions on defendant's lot. The reasons may be two: (1) The initial deed was "out of the defendant's chain of title," i.e., did not convey the defendant's lot and (2) the Montana Supreme Court rarely holds parties liable based on deed recording alone. See *supra* Part V(I).

270. 219 Mont. 366, 711 P.2d 1375 (1986).

271. *Contra Heriot's Hosp. v. Gibson*, 2 Dow. 301, 3 Eng. Rep. 873 (H.L. 1814) (disapproved in a Field annotation).

constructed depends not on the designation in the plats but on the use of those plats in inducing purchases. The instruments alone do not give rise to a promise to open or construct the roads. Factual issues remain on the use made of the plats and what representations were made in the sale of lots.²⁷²

To summarize the court's point: the trial judge must consider all the circumstances giving rise to the alleged covenant, and in this case he had not yet done so.

K. Construction of Covenants

The Montana Supreme Court has been interpreting land covenants on a regular basis for only a few years, and has not as yet developed a principled method of interpretation. There is general agreement that, although covenants are interests in land,²⁷³ they are also contractual, and should be interpreted as contracts.²⁷⁴ Yet the court seems uncertain of how it should apply the contract standard.

Most judges across the nation agree that when a valid covenant is clear and unambiguous, it ought to be applied as written. The Montana court subscribes to that position.²⁷⁵ However, there are two major schools of thought on the construction of terms with uncertain meanings. One school maintains that ambiguities should, if possible, be construed in accordance with the intent of the drafters or of the grantors and grantees—that the covenants should be interpreted to further the purposes of those parties.²⁷⁶ When the

272. *Majers*, 219 Mont. at 371-72, 711 P.2d at 1378.

273. *Schara v. Anaconda Co.*, 187 Mont. 377, 610 P.2d 132 (1980). The more common American view is that real covenants are contractual obligations only and not property interests in the covenantor's land. Equitable servitudes sometimes are treated as property interests and sometimes are not. 2 ALP, *supra* note 2, §§ 9.8 & 9.24.

274. *Timmerman v. Gabriel*, 155 Mont. 294, 470 P.2d 528 (1970); *Sheridan v. Martinsen*, 164 Mont. 383, 523 P.2d 1392 (1974); *Reinke v. Biegel*, 185 Mont. 31, 604 P.2d 315 (1979); *Gosnay v. Big Sky Owners Ass'n*, 205 Mont. 221, 666 P.2d 1247 (1983).

275. *Timmerman*, 155 Mont. 294, 470 P.2d 528; *Higdem v. Whitham*, 167 Mont. 201, 536 P.2d 1185 (1975); *Cieri v. Gorton*, 179 Mont. 167, 587 P.2d 14 (1978). *See also* *Kelly v. Lovejoy*, 172 Mont. 516, 565 P.2d 321 (1977) (interpreting "livestock" to include horses — perhaps more unambiguous in Montana than in the East, where horses are more often pets).

276. Cases that apply the "pure intent" standard, without a presumption in favor of free use of property include *Highbaugh Enters., Inc. v. Deatrack & James Constr. Co.*, 554 S.W.2d 878 (Ky. Ct. App. 1977); *Piechowski v. Case*, 255 N.W.2d 72, 75 (S.D. 1977); *Thodos v. Shirk*, 248 Iowa 172, 79 N.W.2d 733 (1956); *Joslin v. Pine River Dev. Corp.*, 116 N.H. 814, 367 A.2d 599, 601 (1976). *See also* *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 640 (Fla. Dist. Ct. App. 1981); *Constellation Condominium Ass'n, Inc. v. Harrington*, 467 So. 2d 378 (Fla. Dist. Ct. App. 1985); *Preston Tower Condominium Ass'n v. S.B. Realty, Inc.*, 685 S.W.2d 98 (Tex. Ct. App. 1985) (all of which apply the principles of "intent validation" to substantive validity) and *Perry v. Bridgetown Community Ass'n, Inc.*, 486 So. 2d 1230 (Miss. 1986) (apparently moving away from strict construction rule in a non-condominium

intent and purposes are uncertain, the adherents of this position maintain that the court can consider parol evidence²⁷⁷ and/or that it may consider the circumstances and pertinent facts surrounding the execution of the documents and known to the parties.²⁷⁸

The other school of thought maintains that courts ought to construe covenants strictly to further the public policy of the free use of land. Under this precept, ambiguities are resolved against the restriction of the burdened land. A New York trial court has formulated the principle in this manner:

[T]he general policy of the law is toward the free and unrestricted use of real property. The right of restricting property is granted by law, but the restriction must be clearly and sharply defined. Covenants will not be enlarged by construction.²⁷⁹

An Illinois tribunal has adopted an intermediate position: A judge ought to apply the intent test as far as it can carry him,

covenanted subdivision).

The importance of subdivision purpose is emphasized in *Rhue v. Cheyenne Homes, Inc.*, 168 Colo. 6, 449 P.2d 361 (1969); *Joslin*, 116 N.H. at 817, 367 A.2d at 601; *Fairwood Greens Homeowners Ass'n, Inc. v. Young*, 26 Wash. App. 758, 614 P.2d 219, 221 (1980); and *Streams Sports Club, Ltd. v. Richmond*, 109 Ill. App. 3d 689, 65 Ill. Dec. 248, 440 N.E.2d 1264 (Ill. App. 1982), *aff'd*, 99 Ill. 2d 182, 75 Ill. Dec. 667, 457 N.E.2d 1226 (1983).

277. *Goldenfarb v. Land Design, Inc.*, 409 A.2d 662 (Me. 1979); *Warren v. Detlefsen*, 281 Ark. 196, 663 S.W.2d 710 (1984); *Tropicana Club, Inc. v. James H. Topping, Inc.*, 502 So. 2d 29 (Fla. Dist. Ct. App. 1987).

278. *Riley v. Stoves*, 22 Ariz. App. 223, 526 P.2d 747 (1974). The reconstruction of intent can be shown by demonstration of a "common plan or scheme." *See supra* Part V(E).

279. *Baxendale v. Property Owners Ass'n of North Shore Acres*, 138 N.Y.S.2d 76, 78 (N.Y. Sup. Ct. 1954), *aff'd*, 285 A.D. 1148, 140 N.Y.S.2d 176 (N.Y. App. Div. 1955), *aff'd*, 309 N.Y. 871, 131 N.E.2d 287 (1955). Compare the dissent at the Appellate Division level, arguing that the trial judge should have been reversed. The dissent would have applied pure intent validation standards:

Reading these covenants together, their spirit, intent and context clearly prohibit the use of plaintiffs' lot in North Shore Acres for a public highway. Any other interpretation, in our opinion, would defeat the basic purpose and intent of the restrictive covenants.

Baxendale, 285 A.D. at 1149, 140 N.Y.S.2d at 178 (Murphy, J., dissenting).

Other out-of-state cases applying (or at least acknowledging) the strict construction rule include *Crawford v. Senosky*, 128 Or. 229, 274 P. 306 (1929); *Carranor Woods Property Owners' Ass'n v. Driscoll*, 106 Ohio App. 95, 153 N.E.2d 681 (1957); *Watts v. Fritz*, 29 Ill. 2d 517, 194 N.E.2d 276 (1963); *Riley v. Stoves*, 22 Ariz. App. 223, 526 P.2d 747 (1974); *Johnson v. Keith*, 368 Mass. 316, 331 N.E.2d 879 (1975); *Dickstein v. Williams*, 93 Nev. 605, 571 P.2d 1169 (1977); *Beech Mountain Property Owners' Ass'n v. Current*, 35 N.C. App. 135, 240 S.E.2d 503 (1978); *Le Febvre v. Osterndorf*, 87 Wis. 2d 525, 275 N.W.2d 154, 159 (1979); *Arthur v. Lake Tansi Village, Inc.*, 590 S.W.2d 923, 927 (Tenn. 1979); *Fairwood Greens Homeowners Ass'n, Inc. v. Young*, 26 Wash. App. 758, 614 P.2d 219, 221-22 (1980); *Beech Mountain Property Owners' Ass'n v. Seifart*, 48 N.C. App. 286, 269 S.E.2d 178 (1980); *Snug Harbor Property Owners Ass'n v. Curran*, 55 N.C. App. 199, 284 S.E.2d 752 (1981), *review denied*, 305 N.C. 302, 291 S.E.2d 151 (1982).

turning to strict construction only as a last resort.²⁸⁰

The Montana Supreme Court has not adopted any of these positions with consistency. In the first modern decision on the subject, *Timmerman v. Gabriel*,²⁸¹ the court had to determine whether a mobile home was a "trailer" banned from a subdivision by the covenants. The court determined that it was.

The result of *Timmerman* was the same as would have been achieved if the court had construed the covenants liberally to effectuate their purpose. In *Timmerman*, that purpose was to regulate the appearance of structures within the subdivision, and the mobile home was not consistent with the prevailing architecture. The court's apparent methodology, however, was not that of liberal construction. Rather than consider structural appearance, the court searched for the essence of "trailerness"—which it determined to be mobility.

In another decision four years later, the court upheld a trial judge's determination that a proposed use violated the "spirit" (meaning, presumably, the purpose) of the restrictions.²⁸² But a year later, in 1975, the bench switched to the strict construction rule, reversing an order for the removal of a garage.²⁸³

Only 11 months later, the court determined that a "modular" home was a "mobile" home, and therefore prohibited by the covenants. The court mentioned neither the strict construction rule nor the purpose of the subdivision; instead it relied upon a statutory definition of "mobile home" enacted for an entirely different purpose.²⁸⁴ The cases have continued to vary among themselves in subsequent years.²⁸⁵

280. *E.g.*, *Amoco Realty Co. v. Montalbano*, 133 Ill. App. 3d 327, 478 N.E.2d 860 (1985):

The paramount rule for the interpretation of covenants is to expound them so as to give effect to the actual intent of the parties as determined from the whole document construed in connection with the circumstances surrounding its execution. (citations omitted) The rule of strict construction in favor of the free use of property will not be applied to defeat the obvious purpose of a restriction, even if not precisely expressed; before giving effect to the rule of strict construction, courts will have recourse to every aid, rule or canon of construction so as to ascertain the parties' intention.

Id. at 331-32, 478 N.E.2d at 863.

281. 155 Mont. 294, 470 P.2d 528 (1970).

282. *Sheridan v. Martinsen*, 164 Mont. 383, 523 P.2d 1392 (1974).

283. *Higdem v. Whitham*, 167 Mont. 201, 536 P.2d 1185 (1975).

284. *DeLaurentis v. Vainio*, 169 Mont. 520, 549 P.2d 461 (1976).

285. *O'Neill v. Ferraro*, 182 Mont. 214, 596 P.2d 197 (1979) (upholding trial court inquiry into intent behind an ambiguous term); *State ex rel. Region II Child & Family Servs., Inc. v. District Court*, 187 Mont. 126, 609 P.2d 245 (1980) (setting forth strict construction test but mixing it with the "intent" and "spirit" of the restrictions); *Town & Country Estates Ass'n v. Slater*, 227 Mont. 489, 740 P.2d 668 (1987) (mixing strict construction rule

One of the court's best decisions in this area is former Justice Morrison's opinion in *Gosnay v. Big Sky Owners Association*.²⁸⁶ The Gosnays had purchased a lot in a covenanted subdivision. Under the terms of the covenants, they needed architectural committee approval before constructing improvements on their lots. The Gosnays wished to construct a stable, but the committee denied approval because their lot was one in which the covenants prohibited stables. They also wished to construct a fence and to introduce horses onto their lot. The committee deemed the Gosnays' lot unsuitable for both. In reviewing the committee's determination, the court applied a reasonableness standard:

The Committee's discretion to approve or disapprove a fence must be governed by the prohibitive covenants and must be reasonably exercised. To do otherwise would be an abuse of discretion by the Committee. . . . The Architectural Committee did not abuse its discretion when it refused Gosnays [sic] permission to build their fence. Gosnays' fence is contrary to Big Sky's overall plan for "openness." No other tract or lot in the subdivision is totally enclosed by a fence. . . .

. . . Stables are not allowed on tracts which are limited by the covenants to single family residences and garages. . . .

. . . .
. . . Certainly we are unable to say that the Committee, in finding unhoused horses to be a nuisance, abused its discretion as a matter of law.²⁸⁷

By adopting the reasonableness standard for the review of a property owners association's decision, the court acted consistently with the overwhelming bulk of American common law authority. It also adopted a standard of judicial review of association actions that has worked with great success in other jurisdictions for over 50 years.²⁸⁸

with a balancing test).

286. 205 Mont. 221, 666 P.2d 1247 (1983).

287. *Id.* at 228-29, 666 P.2d at 1250-51.

288. The reasonableness test originated in Judge Lehman's brilliant opinion in *Drabinsky v. Sea Gate Ass'n*, 239 N.Y. 321, 146 N.E. 614 (1925). Today, courts throughout the country review *ad hoc* decisions, and other association actions, by employing a system I call the "Fourfold Standard of Validity." See generally, NATELSON, POA, *supra* note 2, chs. 4-5.

Under the Fourfold Standard, an association that imposes a special assessment, considers a plan of architectural change, enforces a use restriction, or makes any other kind of *ad hoc* decision must do so in compliance with the following:

(1) The decision must be made in good faith to further a purpose of the subdivision (generally reflected in the declaration, bylaws, or other rules promulgated pursuant thereto). *Rhue v. Cheyenne Homes, Inc.*, 168 Colo. 6, 449 P.2d 361 (1969) (application of architectural restriction); *Laguna Royale Owners Ass'n v. Darger*, 119 Cal. App. 3d 670, 174 Cal. Rptr. 136

The court's opinion in the earlier-discussed case of *Town & Country Estates Ass'n v. Slater*,²⁸⁹ is somewhat less helpful. The result is correct, but the reasons given are multitudinous and unclear. The court "recognize[d] that aesthetic considerations have a place in prior approval covenants, and that there are no absolute standards to guide a committee's judgment and taste," but that "[t]he approval or disapproval of plans . . . must be based upon an objective design standard."²⁹⁰ The court held that the standards at issue were "vague" and therefore denied "*substantive* due process" to the Slaters.²⁹¹ Additionally, the opinion stated that ambiguities in covenants "are to be construed to allow free use of the property"²⁹² but that "the free use of the property must be balanced against the rights of the other purchasers. . . ."²⁹³ Perhaps what the court meant is that the variety of architectural styles in the subdi-

(1981) (disapproval of proposed purchasers); *Cohen v. Kite Hill Community Ass'n*, 142 Cal. App. 3d 642, 191 Cal. Rptr. 209 (1983) (application of architectural restriction).

(2) The decision must be a reasonable means of accomplishing that purpose. When the requirements of good faith purpose and reasonableness are stated in the negative, it is said that the decision cannot be arbitrary and capricious. *Rhue*, 168 Colo. 6, 449 P.2d 361 (application of architectural restriction); *Kell v. Bella Vista Village Property Owners Ass'n*, 258 Ark. 757, 528 S.W.2d 651 (1975) (regular assessments); *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637 (Fla. Dist. Ct. App. 1981) (application of architectural restriction); *Lyons v. King*, 397 So. 2d 964 (Fla. Dist. Ct. App. 1981) (disapproval of prospective purchasers); *Laguna Royale*, 119 Cal. App. 3d 670, 174 Cal. Rptr. 136 (disapproval of prospective purchasers); *Chateau Village North Condominium Ass'n v. Jordan*, 643 P.2d 791 (Colo. Ct. App. 1982) (pet approval); *Cohan v. Riverside Park Place Condominium Ass'n, Inc.*, 123 Mich. App. 743, 333 N.W.2d 574 (1983) (application of architectural restriction); *Cohen*, 142 Cal. App. 3d 642, 191 Cal. Rptr. 209 (1983) (application of architectural restriction); *Amoco Realty Co. v. Montalbano*, 133 Ill. App. 3d 327, 478 N.E.2d 860, 864-65 (1985) (application of architectural restriction); *Ironwood Owners Ass'n IX v. Solomon*, 178 Cal. App. 3d 765, 224 Cal. Rptr. 18 (1986) (application of architectural restriction). For a detailed analysis of the "reasonableness" requirement, see Natelson, *Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. — (1990).

(3) The decision must be consistent with the POA's governing regulations. *Rywalt v. Writer Corp.*, 34 Colo. App. 334, 526 P.2d 316 (1974); *Papalexio v. Tower West Condominium*, 167 N.J. Super. 516, 401 A.2d 280 (N.J. Super. Ct. Ch. Div. 1979) (special assessment); *Lyons v. King*, 397 So. 2d 964, 969 (Fla. Dist. Ct. App. 1981) (Hurley, J., dissenting) (approval of prospective purchasers); *Chateau Village*, 643 P.2d 791 (Colo. Ct. App. 1982) (pet approval); *Davis v. Huey*, 620 S.W.2d 561 (Tex. 1981) (architectural review decision exceeded scope of servitudes).

(4) The decision must be consistent with public policy.

If an association decision violates any of the foregoing requirements, it is held to be unenforceable.

289. 227 Mont. 489, 740 P.2d 668 (1987). See *supra* Part V(E).

290. *Id.* at 492-93, 740 P.2d at 671.

291. *Id.* at 493, 740 P.2d at 671 (emphasis added).

292. *Id.* at 492, 740 P.2d at 671 (quoting *State ex rel. Region II Child & Family Services, Inc. v. District Court*, 187 Mont. 126, 130, 609 P.2d 245, 248 (1980)).

293. *Id.* at 492, 740 P.2d at 671.

vision made compliance with architectural standards impossible, and that the application of impossible standards imposed rules of which the Slaters had received no notice before purchasing their property.

L. Termination and Amendment of Covenants

The Field Code had nothing to say on how land covenants are terminated. This may be the sort of inadvertent omission which Field suggested ought to be cured by reference to pre-existing common law.²⁹⁴

There have been very few cases on termination of covenants in Montana. It appears, however, that the court will be moving consistently with the courts of the other states on the question—that is, that termination may occur through waiver, estoppel, or changed conditions.

Waiver is the voluntary and intentional relinquishment of a known right.²⁹⁵ Unlike estoppel, which requires reliance by the party claiming it,²⁹⁶ waiver is essentially unilateral in character—the only behavior required is that of the person waiving. Despite the distinction, in *Kelly v. Lovejoy*²⁹⁷ the Montana Supreme Court held that a couple purchasing land in a subdivision with knowledge that the defendants were violating the covenants “acquiesced” in the violations, and that this acquiescence “constituted a waiver and [the couple were] therefore estopped from asserting the restrictive covenant against” the defendants.²⁹⁸

The *Kelly* case not only confounds the waiver and estoppel doctrines, it raises another unanswered question: Is a person who purchases a lot in a subdivision knowing that a neighbor is engaging in an unpermitted use, *automatically* barred from seeking relief from the use? Despite the language of *Kelly*, the answer to this question may be “no,” for in *Kelly* one of the plaintiffs specifically testified that he had “acquiesced” in the violation before suing.²⁹⁹

294. See *supra* text accompanying note 92. See also MONT. CODE ANN. § 1-1-109 (1989).

295. *Kelly v. Lovejoy*, 172 Mont. 516, 565 P.2d 321 (1977).

296. See generally *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970), and in the setting of covenants, *Arthur v. Lake Tansi Village, Inc.*, 590 S.W.2d 923, 930 (Tenn. 1979); RESTATEMENT OF PROPERTY, *supra* note 2, § 559. Compare the “selective and arbitrary enforcement” doctrine applied by the Florida courts, e.g., *White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346 (Fla. 1979), which may or may not be a version of estoppel.

297. 172 Mont. 516, 565 P.2d 321 (1977).

298. *Id.* at 520, 565 P.2d at 323-24.

299. *Id.* at 519, 565 P.2d at 323.

Moreover, there was evidence that the action was brought primarily for spite.

The "changed conditions" ground for covenant termination appears in instructions to the trial court in *Porter v. K & S Partnership*.³⁰⁰ There the supreme court stated:

The authorities agree, however, that where the restricted area has changed so radically over the years such that the purpose and intent of the restrictions are totally defeated, then equity cannot enforce the restrictions. The change must be so radical and permanent as to neutralize the benefits of the restrictions. . . .

At the trial on the merits, the District Court should consider the effect on the subdivision of changes inside and outside the specific restricted area. . . . The above-cited authorities do state, however, that greater weight should be given to changes inside the boundary of the restricted area than to changes in neighboring areas.³⁰¹

This is essentially a correct statement of the rule, except that I would maintain that the last sentence is true only if conditions inside the boundary in fact have had a greater disruptive effect than those outside.³⁰²

The justification for the "changed conditions" doctrine may be summarized as follows:

(1) A covenant has as its purpose the benefit of a dominant estate;

(2) a covenant that does not benefit a dominant estate is unenforceable; and therefore

(3) if conditions change in such a way that the servitude is no longer of substantial benefit to a dominant estate, then the servitude is unenforceable.³⁰³

The remaining case to be considered on this subject is *Cieri v. Gorton*.³⁰⁴ This case involved the construction of covenants providing, "These covenants may be changed in whole or in part at any time by an instrument in writing signed by a majority of the then owners of the lots affected thereby" ³⁰⁵ The defendants owned 69 of 110 lots, but they constituted but two of 41 owners. The defendants wished to terminate the covenants. The plaintiffs sought an injunction preventing this action. The question for decision was:

300. — Mont. —, 627 P.2d 836 (1981).

301. *Id.* at —, 627 P.2d at 841.

302. For out-of-state cases on the rule, see *Wolff v. Fallon*, 44 Cal. 2d 695, 284 P.2d 802 (1955); *El Di, Inc. v. Town of Bethany Beach*, 477 A.2d 1066 (Del. 1984).

303. NATELSON, POA, *supra* note 2, § 5.5.3.

304. 179 Mont. 167, 587 P.2d 14 (1978).

305. *Id.* at 168, 587 P.2d at 15.

Who constituted a majority?

In covenants of this kind, a "majority" usually is interpreted as the owners of a majority of the lots, but this is not an invariable rule. In fact, the *Cieri* court declined to follow a California precedent interpreting a majority as the owners of most of the lots.³⁰⁶

In part, the *Cieri* court's decision was based on differences in wording, and on that ground the determination might well have been correct. As it does sometimes, however, the court then offered additional reasons for granting the injunction against the amendment. Now, one lesson of the cases—at least in this area—is that the court often commits legal error when it chooses to expound at greater length than is strictly necessary. *Cieri* is a good example.

Three additional reasons proffered by the court were, first, that the defendants constituted but a small number of lot owners; second, that the proposed amendment would completely abolish the covenants; and third, that the "equities of this situation, economic and otherwise, favor the respondents."³⁰⁷

Apparently the court was attempting to introduce into consideration certain equitable factors bearing upon a petition for an injunction. All three are arguably proper reasons for *denying* injunctive relief to a plaintiff who is otherwise entitled to it.³⁰⁸ But, here they were listed as reasons for *granting* injunctive relief to a plaintiff who might not otherwise be entitled to it—certainly an unprecedented position as far as this writer is aware.

In his opinion, Justice Sheehy stated that the defendants had pleaded economic hardship as a reason for not granting the injunction. He then discussed the plaintiffs' investments and suggested that "the argument of economic hardship is a two-edged sword cutting both ways."³⁰⁹

However, a characteristic of equity practice is that economic hardship does *not* cut two ways in this sort of situation. When a defendant has breached a contractual obligation or other duty, potential hardship on the defendant may nevertheless induce a court to deny the plaintiff equitable relief and thereby limit the plaintiff to remedies at law. If, however, the defendant has not breached a contractual obligation or other duty, the plaintiff's hardship does

306. The precedent was *Diamond Bar Dev. Corp. v. Superior Court*, 60 Cal. App. 3d 330, 131 Cal. Rptr. 458 (1976).

307. *Cieri*, 179 Mont. at 172, 587 P.2d at 17.

308. It is important to note that in this context injunctive relief was specific relief. MONT. CODE ANN. §§ 27-19-102, 27-1-402(3) (1989). See also MONT. CODE ANN. § 27-1-411(2) (1989). For oppression as a bar to relief, see MONT. CODE ANN. § 27-1-413 (1989) and DOBBS, *supra* note 2, at 108. For hardship as a bar, see WALSH, *supra* note 2, at 481-89.

309. 179 Mont. at 172, 587 P.2d at 17.

not justify imposition of liability on an innocent defendant.³¹⁰ The time has long passed, if it ever really existed, when chancellors could treat their offices as a "roving commission to do good."³¹¹

VI. TOWARD A NEW MONTANA JURISPRUDENCE

In the preceding pages, I have examined the substantive original intent behind the Field Code provisions pertaining to servitudes and running covenants. I have examined also the Montana Supreme Court's divergence from that intent. In this Part, I evaluate reasons for the divergence. I conclude that the most convincing explanations support a jurisprudential observation central to the American political system, but largely forgotten of late, and that we ought to put that observation to work for us by repealing the Field Code covenant statutes.

Nineteenth century codification advocates believed that codes would render the law more stable, more predictable, more accessible, and more fair. They relied upon the judges to defer to the legislature on matters governed by the code. This reliance may have been reasonable in the nineteenth century, but twentieth century jurisprudence has not been as mature; this century is more contemptuous of limits. The result of judicial disregard for clear statutory meaning has been that the law as applied is more unstable, unpredictable, inaccessible, and, perhaps, more unfair than it would have been in a pure common law system.³¹²

Such are the costs of judicial activism. But it is not sufficient to assail judicial activism. We also should determine why the Montana courts elected to disregard the rules of the Field Code.

One possible explanation is that the judiciary has decided that

310. This is one of those points that the law takes so much for granted that it is difficult to obtain citation of authority on the point. *But see*, WALSH, *supra* note 2, at 309 ("Where a valid contract exists which has been broken by the defendant, so that plaintiff's right to recover damages is clear, specific relief will be given . . ." (emphasis added)). *See also id.* at 300.

311. This might have been true before the chancellorship of Sir Thomas More in the reign of Henry VIII, but it has not been true since then. On the change from a "conscience" based equity to a more sophisticated jurisprudential system, see Keigwin, *The Origin of Equity: Part III*, 18 GEO. L.J. 215, 233-34 (1930).

312. Of course, one could argue that the Field Code has not proved unsuccessful because the existence of statutory provisions prevented many cases from being litigated and answered many questions otherwise unanswerable. This is a negative proposition of the kind difficult to prove or disprove. I did, however, undertake a search of appellate cases on the subject in Colorado, an otherwise comparable jurisdiction with a larger population. Not only has the volume of Colorado litigation been smaller, but as a former Colorado practitioner, I can testify that Colorado's law of running covenants, embodied exclusively in the cases, is at least as clear and predictable as that of Montana. Thus, we return to the fact that the present state of Montana covenant law is not at all what the codifiers had in mind.

the Field Code has outlived its usefulness. Certainly the legislature has supplanted most of the provisions dealing with other subjects.³¹³ The cases, however, do not support the explanation that the Code covenant provisions are merely out-of-date. The judges have never said so, never even hinted so. Virtually all Montana cases inconsistent with the Code could have arisen in 1895 without variation in the relevant circumstances and no changes in Montana society have rendered the Code's covenant rules less desirable than they were in 1895.³¹⁴

A more convincing explanation for the state of code jurisprudence is a purely mechanical one. Professor Gibson of Oklahoma City University points out that the Montana codifiers' decision to adopt both the Field Code and existing common law contributed to uncertainty and judicial usurpation. Language in a Code designed to *displace* common law could not operate comfortably within an environment of common law.³¹⁵ Moreover, the continued authority of the common law has encouraged Montana judges and lawyers to look first for relevant cases, even from other states, before searching for applicable statutes.

Additional insight comes from Professor Fisch, formerly a member of the faculty at the University of North Dakota, who has suggested a partial explanation for disregard of the Code rules in that state.³¹⁶ He notes that outside of Louisiana, law schools in the United States do not teach Code jurisprudence. The tool of choice among virtually all law professors has been the case method, a method developed in a common law jurisdiction (Massachusetts) at a time when the only law that really mattered lay in cases from England and from a handful of states along the Atlantic seaboard.

313. The most recent repeal is found in 1989 Mont. Laws 685 which revised the law pertaining to trusts and trustees.

314. If anything, societal changes should have made compliance with the Code technicalities easier. For example, due to an increase in the number of lawyers, Montanans probably have greater access to inexpensive legal services than they did in 1895.

315. After reviewing an earlier draft of this article, Professor Gibson wrote to me as follows:

Nor do I see prematurity as a real problem. It seems to me that the more basic problem is that Montana codifiers wanted to have their cake and eat it too. They wanted a Code (with all of the attendant advantages), but they also wanted the common law. I suppose neither California nor Montana ever understood that you can't have both. Once, however, Montana borrowed California's incorporation/use of the common law idea, the concept of a pure Code (which is required for most of a code's claimed advantages) was destroyed.

Letter to the author at 2 (Jan. 23, 1989) (letter on file at the MONTANA LAW REVIEW Office).

316. *Fisch, supra* note 2, at 54. Professor Fisch was writing of the experience of North and South Dakota, but his observation is equally valid for Montana. Professor Fisch is currently Isidor Loeb Professor at the University of Missouri (Columbia).

For many years the case method dominated law teaching in Montana as it dominated law teaching in North Dakota and almost everywhere else. In this statutory era, the case method is now under attack even in non-code jurisdictions. It probably was always unequal to the needs of jurisprudence in Montana. Indeed, Professor Fisch's educational explanation is supported by the only generalization possible about the overall quality of Montana Supreme Court easement and covenant opinions: When the court applies pure common law reasoning, those opinions can be coherent and thoughtful;³¹⁷ when the court construes the Field Code, they can be quite the opposite.³¹⁸

James Coolidge Carter, Field's perennial antagonist on the subject of codification, would ascribe the unsatisfactory condition of Montana covenant law to problems inherent in any private law codification. Carter maintained that the only proper source of private law is the custom of the country, and that as customs change and grow, so does private law. According to Carter, it is the duty of the judge in each case to ascertain the relevant customs, partially embodied in prior cases, and apply those customs to the facts before the court. Carter would argue that the Montana Supreme Court performs common law judging well because the justices are practical men and Montanans: They know and understand local customs and can apply them confidently and competently. They have no such advantage in construing or implementing the Code.³¹⁹

Yet the most compelling explanation for the state of the Field Code covenant rules is not that codification was wrong *per se*, but that the Code adopted was the product of a jurisdiction in many

317. *Thisted v. Country Club Tower Corp.*, 146 Mont. 87, 405 P.2d 432 (1965), and *Gosnay v. Big Sky Owners Ass'n*, 205 Mont. 221, 666 P.2d 1247 (1983) are examples.

The good quality of the common law reasoning is marred by the court's occasional, but jarring, practice of forgetting later precedents while recognizing earlier ones. There are examples of this in the law of implied easements. In *Graham v. Mack*, 216 Mont. 165, 699 P.2d 590 (1985), the court said that the law of implied easements was relatively new to Montana. *Id.* at 174, 699 P.2d at 595 (citing *Thisted*, 146 Mont. 87, 405 P.2d 432 and *Simonson v. McDonald*, 131 Mont. 494, 311 P.2d 982 (1957)). Yet Montana implied easement cases date at least as far back as *Pioneer Mining Co. v. Bannack Gold Mining Co.*, 60 Mont. 254, 198 P. 748 (1921). In *Spaeth v. Emmett*, 142 Mont. 231, 383 P.2d 812 (1963), the court applied the doctrine of implied easements and cited *Pioneer*, but ignored the fact that it had abolished implied easements only six years earlier in *Simonson*. Justice Adair, who dissented in part in *Simonson* because it overruled precedent, dissented from the opposite result in *Spaeth*. His reason in the latter case was unstated, but presumably was the same.

318. *Simonson v. McDonald*, 131 Mont. 494, 311 P.2d 982 (1957) and *Reichert v. Weeden*, 190 Mont. 95, 618 P.2d 1216 (1980) are examples.

319. For his views, see generally, CARTER, *supra* note 2. On the futility of codification, he quotes Horace at one point without attribution: "*Naturam expellas furca, tamen usque recurret.*" The quotation is from Epodes 1.10.24.

ways foreign to Montana. Friedrich Carl von Savigny, arguably the greatest jurist of the nineteenth century, contended that a country's jurisprudence, like its language, was an extension of its culture, and that imposition of a foreign code would lead to cultural rejection of that code.³²⁰ If Savigny was right, then the fundamental problem with the Field Code is not that it is a code, nor that it is old, nor merely that it has been insufficiently taught, but that *it did not develop in Montana*.

I believe that Montana's rejection of the covenant statutes is a cultural rejection. New York, upon whose law these statutes are based, is a state whose cultural conditions (and within that term I include economic and social conditions) were, and remain, dramatically different from those in Montana. The land covenant rules of New York were designed, at least in part, to protect long-standing quasi-feudal arrangements.³²¹ Furthermore, they reflect an environment in which legal formalities receive much greater respect than in Montana,³²² in which the ratio of cost of prevention to cost of cure is lower than in Montana,³²³ and in which the fact patterns that justify a finding of legal notice are different in several respects.³²⁴

320. For Savigny's views, see SAVIGNY, *supra* note 2.

321. Much New York covenant law arose out of the extensive Van Rensselaer litigation, in which the plaintiffs were representatives of an old family of *poltroons* protecting vested interests such as fee simple rents. See, e.g., *supra* notes 42, 143 & 159. This litigation is prominent in the Field Code annotations to the sections governing land covenants. A useful summary of the *Van Rensselaer* proceedings up to 1866 appears in *Tyler v. Heidorn*, 46 Barb. 439 (N.Y. App. Div. 1866).

322. To one, such as I, who has practiced property law in both the East (New York) and the West (Colorado), the differences in the degree of respect for formality are striking. Professors Dukeminier and Krier, in the first edition of their property case book, cite two cases illustrative of the difference. These are *Shepard v. Purvine*, 196 Or. 348, 248 P.2d 352 (1952), in which the Oregon Supreme Court converted an oral license into an easement, and *Henry v. Dalton*, 89 R.I. 150, 151 A.2d 362 (1959), in which the Rhode Island Supreme Court, quoting New York authority, denied relief because the plaintiff had not complied with the statutory requirement of a writing. J. DUKEMINIER & J. KRIER, *PROPERTY* 974-75 (1981). For an illustration of the Montana Supreme Court's contempt for formal requirements in the covenant area, see *Reichert v. Weeden*, 190 Mont. 95, 618 P.2d 1216 (1980), discussed *supra* Part V(D).

323. Unlike in the East, in much of the West (and, of course, there are distinctions between Western states also), cost avoidance is perceived as expensive while cure historically has been inexpensive. In Montana, for example, the sparse and largely homogeneous population is remarkably non-confrontational, despite a tradition of perceived individualism. Title disputes are likely to be resolved without litigation. For a study of social conduct in a setting comparable to most of Montana, see *Ellickson, Of Coase & Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986).

324. See discussion of notice in Part V(I). In Montana, where inspection of the physical condition of land and face-to-face negotiation are both customary and inexpensive and where recording systems are disorganized and little understood, the courts correctly attach greater legal consequence to the presence or absence of actual knowledge than to the docu-

The Montana codifiers failed to sense the difficulties inherent in importing foreign law.³²⁵ Codification seemed attractive because Montana had few law libraries and little developed common law. Codification seemed to provide a shelter of certainty in a legal environment of uncertainty. But the shelter proved a mirage.

All of the principal Montana codification proponents were Easterners without substantial Code practice experience.³²⁶ Instead of rushing into codification, they might have heeded the experience of other states. All of the other Rocky Mountain states shared the same legal conditions as Montana, but all were able to build effective legal systems without comprehensive codification. California had codified, but careful study of that state's experience with the Field Code between 1872 and 1895 would have revealed that a process of Code rejection already was under way there. By 1895, there was a significant gap between California court decisions and statutory text; one example was the persistence of equitable servitudes despite the Field Code's effort to abolish them. Indeed, only a few years after 1895, the California legislature completed the process of gutting the Code's more important covenant rules.³²⁷

None of this is to say that Montana should not have borrowed from elsewhere. Savigny himself studied the national law of Rome so as to better understand the national law of Germany. Eclecticism of juristic sources is a virtue. But newly-borrowed concepts must be kept within common law containers, from which those concepts can be readily returned if they fail to meet local needs. During the early years of a state's juristic development, locking borrowed ideas in statutory strongboxes seems most unwise.

From the unhappy results of clamping New York common law and California interpretation on the people of Montana, we learn anew the lesson so often forgotten: That American federalism is the sound response, not merely to past inclination, but to present necessity; for the component parts of these United States remain diverse entities. One should not be misled by the fact that *The Cosby Show* plays every Thursday night in Helena as well as Yon-

ments filed in the recording system.

325. Indeed, they compounded the difficulties by annotating the New York code with ill-fitting California decisions.

326. *Supra* note 108.

327. As noted at various points in this article, California's abandonment of the original Code has been effectuated by legislative amendment and judicial departure. The latter has assumed the form of an extra-Code jurisprudence of equitable servitudes. In the realm of tort law, the California Supreme Court has resorted to statutory demolition under the guise of expansive construction. See, e.g., *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

kers. This is merely appearance. The distinctions between Montana and New York, or between either of these states and most other members of the federal union, are subtle but profound.³²⁸ These distinctions are cultural and in proportion of cultural mix; they appear in manners, history, religion, self-image, identity, and mode of thought. In most states (although there are differences even here) we may use the same words; we do not always speak the same language.³²⁹

Like the other social sciences, jurisprudence (and, as we have seen, legal education also) must take full account of such differences. Jurists can, and should, look elsewhere for sources and ideas. But Montana private law is best grown by Montana judges and by Montana legislators, in Montana and over time.

The growth of covenant principles in this state remains constricted by a statutory shell of foreign law, cracked in places but still confining. To the extent the old Field statutes are effective they inhibit maturation; to the extent they are cracked they are not really law. At least in the area of servitudes and land covenants, the rest of the shell needs to be pulled away, leaving a new Montana jurisprudence free to grow.

The state legislature should respond by repealing the statutes on servitudes and covenants running with the land. The bill repealing those statutes should validate (1) all instruments drafted under and in compliance with the old law and (2) within a statutory window, all future instruments that would have been good under the old law.

What would be the form of the new covenant jurisprudence? The cracks in the statutory shell afford a basis for speculation. There would be few strictures on the express creation of covenants and servitudes. The original parties would have much freedom in selecting the form and subject matter. Judges would be reluctant to imply land burdens unless the words and conduct of the parties made their presumed intent unmistakable. It would be easy to im-

328. These observations of variation among the states rests partly on the experience of having spent considerable amounts of time in each of seven states: Colorado, Maryland, Montana, New York, Oklahoma, Pennsylvania, and Utah. For the conditions in New York (most unlike those in Montana) that formed the basis for the Field codification, see COOK, *supra* note 2, at 131-34 & 184-87.

329. To the centralizers and the advocates of uniformity for the sake of uniformity, such differences are frightening or irritating. Professor Friedman, for example, employs the phrase "maddening complexity" (along with expressions less kind) to describe the legal differences among the states in the late 19th century. The remark is part of a larger diatribe against local diversity contained in his treatment of the codification movement. FRIEDMAN, *supra* note 2, at 351-58.

My own belief is that local diversity is invigorating and liberating.

pose covenants expressly, but difficult to do so by implication.

Flexibility of express creation would be complemented by flexibility of termination. A covenant would not bind a transferee unless the court found strong reason to believe that the transferee had agreed to its terms—that the transferee purchased the land with knowledge of the covenant or with more than merely formal notice. Thus, in both the creation of covenants and in their survival after transfer, there would be much emphasis on effectuating the intent of the benefited land owner and of the owner currently in possession of the burdened property.

A corollary to the foregoing is that a covenant would not long survive transfer of the burdened land to an owner who had not signified an intent to be bound. Covenants would expire quickly. In many cases, only 20 or 30 years after a covenant's creation a landowner accused of a non-conforming use would prove lack of notice (or lack of knowledge), acquiescence, waiver or changed conditions. Covenants readily made would be covenants readily broken.

Thus may we speculate and trace pictures of what might be. The precise forms of those pictures remain of secondary importance. Of primary importance is the following: When left to a developing common law, the rules on running covenants would be home-grown. They would meet the needs and ideals of justice, not of somewhere else, but of Montana.