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## Property—Real Covenants—Homeowners' Associations: A Lease Will Not Convey Rights in Common Properties

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PROPERTY—REAL COVENANTS—HOMEOWNERS' ASSOCIATIONS:  
A LEASE WILL NOT CONVEY RIGHTS IN COMMON PROPERTIES.  
*Hannum v. Bella Vista Village Property Owners Association*, 272  
Ark. 49, 611 S.W.2d 756 (1981).

Appellants, who were property owners in Bella Vista Village, took title to their property subject to restrictive covenants, one of which provided that "every member and associate member, so long as the associate membership shall continue, shall have a right and easement of enjoyment in and to the Common Properties and such easement shall be appurtenant to and shall pass with the title to every Lot or Living Unit."<sup>1</sup> The appellants sued the property owners' association and the members of its board of directors, who controlled the use of the common properties.<sup>2</sup> They contended that the appellees prevented them from transferring, by lease of their lots, the easement of enjoyment in the common properties acquired with the purchase of a lot in the development. They sought a declaratory judgment giving them the right to lease these interests along with the lease of a lot.

The lower court held that the right to use the common properties resides in the holder of the title. The Arkansas Supreme Court affirmed, holding that the easement for the use of common properties is determined by title only and does not pass with a lease of the land. The court held that the rules applicable to appurtenant easements for rights of way do not govern the rights of members or associate members in common properties in a development. *Hannum v. Bella Vista Village Property Owners Association*, 272 Ark. 49, 611 S.W.2d 756 (1981).

Either directly or by implication, the *Hannum* decision raises three distinct concepts in property law: appurtenant easements, easements in gross, and real covenants. Easements are similar to real covenants in that both represent limited interests in property belonging to another and that both may run with the land. They differ, however, in their origins, development, and enforcement.

An easement is a right held by one person which entitles him to

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1. *Hannum v. Bella Vista Village Property Owners Ass'n*, 272 Ark. 49, 611 S.W.2d 756, 756 (1981).

2. The common properties include tennis courts, lakes, golf courses, and the country club. *Id.* at 49, 611 S.W.2d at 756.

make limited use of land belonging to another.<sup>3</sup> Easements were first recognized in the law in 1607,<sup>4</sup> although they were not analyzed and categorized until direct access to and from markets became an issue important to nineteenth century industrialists.<sup>5</sup> As rights *in rem*, easements passed with possession of the land and were enforceable in courts of equity, attributes which they retain today.<sup>6</sup> An easement is a property right and is entitled to the full panoply of constitutional protections.<sup>7</sup> An easement may be affirmative, permitting its holder to use the land of another in given ways, or it may be negative, forbidding a property owner to make given uses of his own land.<sup>8</sup>

An appurtenant easement is annexed to specific lands.<sup>9</sup> It confers a benefit on one parcel of land, the dominant tenement, and places a burden on another, the servient tenement.<sup>10</sup> The dominant and servient tenements are usually adjacent.<sup>11</sup> Appurtenant easements run with the land, whether the conveyance refers to them or not.<sup>12</sup> An appurtenant easement may not be severed from the dominant estate<sup>13</sup> and may not be converted into an easement in gross.<sup>14</sup>

Like an appurtenant easement, an easement in gross creates a limited interest in one person in the property of another. In con-

3. *E.g.*, 5 RESTATEMENT OF PROPERTY, §§ 450-451 (1944).

4. First in *Gateward's Case*, 6 Co. Rep. 59b, 77 Eng. Rep. 344 (1607) and again shortly thereafter in *Peers v. Lucy*, 4 Mod. 355, 87 Eng. Rep. 441 (1695). Limited rights in the land of another were said to arise by grant or by prescription through actual use of the land for a way. These latter interests were customary rights in the nature of easements. They were distinguished in English law from true easements, which were firmly established as being appurtenant to a dominant estate. 13 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 316-26 (1952).

5. 13 W. HOLDSWORTH, *supra* note 4, at 323.

6. The person entitled to the easement may bring an action for an injunction where the injury complained of is irreparable, the interference is of a permanent and continuous character, or the remedy at law, in the form of damages, does not afford adequate relief. For equitable relief to be granted, the existence of the right must be clear and not at issue. *Compare* *McGill v. Miller*, 172 Ark. 390, 288 S.W. 932 (1926) with *Bridwell v. Arkansas Power & Light Co.*, 191 Ark. 227, 85 S.W.2d 712 (1935); *Annot.*, 47 A.L.R. 552, 557 (1927).

7. *E.g.*, *Southwestern Bell Tel. Co. v. Davis*, 247 Ark. 381, 445 S.W.2d 505 (1969).

8. *E.g.*, 3 H. TIFFANY, THE LAW OF REAL PROPERTY § 756 (3rd ed. 1939).

9. *E.g.*, 2 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 321, 54 (Grimes ed. 1980): "If the prime beneficiary of the easement is another tract of land regardless of who owns such tract then the easement is 'appurtenant.'"

10. *E.g.*, 3 H. TIFFANY, *supra* note 8, § 758.

11. *E.g.*, *id.*, § 762.

12. *E.g.*, RESTATEMENT, *supra* note 3, § 487(e); *Warren v. Cudd*, 261 Ark. 690, 550 S.W.2d 773 (1977).

13. *E.g.*, 2 G. THOMPSON, *supra* note 9, § 322, at 63.

14. *E.g.*, *id.*, § 322, at 64; *Cadwalader v. Bailey*, 17 R.I. 495, 23 A. 20 (1891).

trast, however, an easement in gross is not bound to a dominant tenement, and does not run with the land.<sup>15</sup> It exists as a personal right of one of the parties.<sup>16</sup> Easements in gross are not favored in the law<sup>17</sup> and as a general rule, courts will construe an easement as appurtenant when there is ambiguity in the grant.<sup>18</sup> Arkansas courts, however, have been quick to construe easements as easements in gross when the facts would support such a holding.<sup>19</sup>

There is little disagreement about the law governing easements. However, the law governing real covenants, another method of creating limited interests in the property of another, is not so well settled. Scholars disagree about the origins of real covenants,<sup>20</sup> but they do agree that real covenants were recognized in the law as early as 1583.<sup>21</sup> The complex notions surrounding real covenants are a consequence of England's feudal system of land tenure.<sup>22</sup> The enforceability of promises made to lords of the manor was important to the maintenance of that system.<sup>23</sup> Adaptation of real covenants to American usage has added to the complexity.<sup>24</sup>

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15. *E.g.*, *Bank of Hoxie v. Meriwether*, 166 Ark. 39, 47, 265 S.W. 642, 645 (1924). An easement in gross may be either commercial or personal. The distinction is important because commercial easements in gross are viewed as assignable, *e.g.*, RESTATEMENT, *supra* note 7, § 489, but personal easements in gross are neither assignable nor inheritable unless the grant so specifies, *e.g.*, *Field v. Morris*, 88 Ark. 148, 114 S.W. 206 (1908).

16. *E.g.*, 3 H. TIFFANY, *supra* note 8, § 758, at 101 (Supp. 1981).

17. Use of an ordinary appurtenant easement is limited by the demands of the dominant tenement. Because there are no inherent natural limits to an easement in gross, it may easily impose a surcharge on the servient tenement, and it needlessly encumbers land titles. Sturley, *Easements in Gross*, 96 L.Q. REV. 557 (1980).

18. *E.g.*, *Houston v. Zahm*, 44 Or. 610, 76 P. 641 (1904).

19. *E.g.*, *Rose Lawn Cemetery Ass'n v. Scott*, 229 Ark. 639, 317 S.W.2d 265 (1958); *Ft. Smith Gas Co. v. Gean*, 186 Ark. 573, 55 S.W.2d 63 (1932); *Field v. Morris*, 88 Ark. 148, 114 S.W. 206 (1908).

20. Compare O. HOLMES, *THE COMMON LAW*, 395-401 (1923); with C. CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND"*, 122-24 (2d ed. 1947); and Stoebuck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 865 (1977). Judge Clark collects and analyzes American cases involving real covenants to the year 1938. Collected cases from 1938 to 1978 are analyzed in Note, *Covenants Running with the Land: Viable Doctrine or Common-Law Relic?*, 42 HOFSTRA U.L. REV. 139 (1978) [hereinafter cited as *Covenants*]. For an excellent brief review of the ancient case law relating to real covenants refer to Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute*, 30 CORN. L.Q. 1, 1-19 (1944).

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

22. *E.g.*, C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY*, 8-9, 27 (1962).

23. *E.g.*, *id.*

24. "[T]here has been little or no tendency to relax the technical requirements . . . in relation to the running of the burden of promises respecting the use of land." RESTATEMENT, *supra* note 3, Intr. Note, Part III, at 3160.

As rights *in personam*, real covenants are promises or agreements concerning an estate in land which will govern the covenanting parties in the use of the land and which is so connected with the land that heirs and assignees of either the promisee or promisor may enforce the agreement in an action at law.<sup>25</sup> Traditionally, there are four requirements<sup>26</sup> which must be met in order to create a covenant which will run<sup>27</sup> with an estate in land. First, an agreement or promise in writing is required.<sup>28</sup> Second, the parties to the covenant must intend, at the time the covenant is created, that it run with an estate in land.<sup>29</sup> Third, the covenant must "touch and concern" the land.<sup>30</sup> Fourth, the parties must be in privity of estate.<sup>31</sup>

25. *E.g.*, 3 H. TIFFANY, *supra* note 8, § 848.

26. *E.g.*, *Covenants*, *supra* note 20, at 141-46.

27. "[R]unningness" is connected with the acquisition of some sort of interest in land; the benefit or burden is said to "run with" land or with an estate in land. In the law of contracts, rights or benefits may be assigned and duties or burdens delegated by the original parties. In the branch of property law dealing with running covenants, express assignment or delegation does not occur. Rather, remote persons are benefited or burdened because they acquire an interest in land that carries the benefit or burden along with it, provided certain other conditions required by law are met.

Stoebuck, *supra* note 20, at 863-64.

28. The first requirement usually presents few problems because the Statute of Frauds requires that contracts for interests in land be in writing. *RESTATEMENT*, *supra* note 3, § 522.

29. The second requirement entails a subjective test. See *Covenants*, *supra* note 20, at 142. The court must determine whether at the time the parties entered their agreement, they each intended to bind their heirs and successors with the burdens or benefits of the covenant. A few courts have required that the covenant contain specific language, such as "heirs," "assigns," or "successors," which might indicate such intent. *E.g.*, 2 *AMERICAN LAW OF PROPERTY*, § 9.3 (A. J. Casner ed. 1974); *Ft. Smith Gas Co. v. Gean*, 186 Ark. 573, 55 S.W.2d 63 (1932) (absence of the word "assigns" indicated intent that covenant should not run). Arkansas, like most jurisdictions, has eliminated the need for specific language and holds that any words will suffice which demonstrate the intention of the parties. *Sabin v. Hamilton*, 2 Ark. 485 (1840); *e.g.*, 3 H. TIFFANY *supra* note 8, § 854, at 460; *Casebeer v. Beacon Realty, Inc.*, 248 Ark. 22, 449 S.W.2d 701 (1970) (doubts are construed against restrictions and in favor of free use of the land); *Shermer v. Haynes*, 248 Ark. 255, 451 S.W.2d 445 (1970) (impermissible uses of land must be clearly stated); *Faust v. Little Rock School Dist.*, 224 Ark. 761, 276 S.W.2d 59 (1955) (when there is uncertainty in the language, freedom from restraint will be decreed); *Linder Corp. v. Pyeat*, 222 Ark. 949, 264 S.W.2d 619 (1954) (improper to inquire into the purpose of the covenant if there is no ambiguity); *Vaughan v. Matlock*, 23 Ark. 9 (1861) (language of the instrument and surrounding circumstances if there is ambiguity).

Of the 4 requisites necessary to create a real covenant, Arkansas cases have tended to emphasize the intention of the parties. *E.g.*, *Hays v. Watson*, 250 Ark. 589, 466 S.W.2d 272 (1971); *Bank of Hoxie v. Meriwether*, 166 Ark. 39, 265 S.W. 642 (1924); *Field v. Morris*, 88 Ark. 148, 114 S.W. 206 (1908); *Gaster v. Ashley*, 1 Ark. 325 (1839).

30. The third requirement that the covenant "touch and concern" the land requires an objective determination by the court whether the covenant relates to the land itself or is merely personal to one or both of the parties. See *Covenants*, *supra* note 20, at 142. Judge Clark suggested that two questions are involved in making this determination. One is

Much of the disagreement surrounding real covenants has involved the concept of privity of estate. Enforcement of the burdens of real covenants has drawn opposition from some courts and scholars,<sup>32</sup> who think that the burdens imposed by real covenants are unnecessary encumbrances on land titles which inhibit free marketability.<sup>33</sup> For this reason, the courts have drawn careful distinctions between the running of the burden and the running of the benefit.<sup>34</sup> In making these distinctions, various types of privity of estate have been identified, and various jurisdictions require the existence of specific types of privity before they will permit the burden to run.<sup>35</sup> Few courts or scholars view the running of the benefit

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whether the value of the covenantor's interest is diminished by the burden of the covenant; if so, this means the covenant touches and concerns that land. The other is whether the value of the covenantee's interest is enhanced by the benefit of the covenant, which, if it is, would mean that the covenant touches and concerns that land. C. CLARK, *supra* note 20, at 97 (citing Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639 (1914)). This is the test applied in *Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938).

The Arkansas court also applies an objective test. The real covenant must confer some benefit on the land. *E.g.*, *Bank of Hoxie v. Meriwether*, 166 Ark. 39, 265 S.W. 642 (1924). The real covenant must increase the value of the land, or make it more beneficial or convenient to those who own it or live on it. *E.g.*, *Nordin v. May*, 188 F.2d 411 (8th Cir. 1951).

31. The requirement of privity of estate is complex. Judges of the early common law courts were understandably cautious about extending the rights and duties implicit in covenants to persons who had not made the contractual promises. The concept of privity of estate furnished a basis upon which subsequent grantees of the covenantor and covenantee might be required by the law courts to perform the covenants. C. CLARK, *supra* note 20, at 111-43; *Covenants*, *supra* note 20, at 145-52.

32. *E.g.*, Stoebuck, *supra* note 20, at 885.

33. *E.g.*, C. CLARK, *supra* note 20, at 132-33.

34. *E.g.*, Stoebuck, *supra* note 20, at 878-82.

35. Briefly, the types of privity of estate which have been held necessary to support the burden of a covenant running with an estate in land are (1) mutual privity, which exists when two persons hold separate interests in the same land at the same time; (2) horizontal privity, which exists when property is transferred from one person to another; and (3) vertical privity, which exists when one of the covenanting parties subsequently conveys his interest, or part of it, to a third person. C. CLARK, *supra* note 20, at 111-15; Stoebuck, *supra* note 20, at 876-82; *Covenants*, *supra* note 20, at 145-46.

Mutual privity is most restrictive, and was required by Justice Holmes during his tenure on the Massachusetts court. Vertical privity is least restrictive; the chief proponent of this type of privity was Judge Clark. The Restatement of Property requires a combination: vertical and horizontal or vertical and mutual. Further, the Restatement does not permit the burden to run unless some land is benefited. RESTATEMENT, *supra* note 3, § 537.

Many modern courts use the concept of privity of estate as a device to limit the running of real covenants because of their inhibiting effect on marketability. In England and in several American jurisdictions, the detrimental effects of encumbered land titles and interference with the free flow of the market are thought to outweigh the benefits which accrue from the use of real covenants. C. CLARK, *supra* note 20, at 132-33 nn.118, 119 & 120. Other courts think that subjecting the land to reasonable restrictions is an aid to planned

of a real covenant as problematical,<sup>36</sup> since the benefit of a promise either enhances or does not detract from the marketability of land.<sup>37</sup> "Few object to buying land entitled to the benefit of a promise."<sup>38</sup>

The Arkansas court seldom speaks of the requirement of privity of estate. The court has not specified the type of privity required, even in those cases in which privity of estate has been regarded as essential to the running of the burdens and benefits of real covenants.<sup>39</sup>

Arkansas has permitted successors in interest to enforce the benefit of covenants running with the land,<sup>40</sup> although prior to the *Hannum* case, Arkansas had apparently never ruled on the issue whether a lessee may enforce the benefit.<sup>41</sup> Other courts have held

development and orderly growth and that this benefit offsets any detrimental effect real covenants may have on marketability. *Id.* at 134-37. The stringency with which the privity requirement is imposed is frequently an index to the views of the particular court regarding ready marketability on the one hand and planned development on the other.

36. *E.g.*, Stoebeck, *supra* note 20, at 880-81.

37. *E.g.*, RESTATEMENT, *supra* note 3, § 548. Benefits run more readily than burdens because they are said to enhance marketability. Further, enforcement of the benefits of real covenants poses few theoretical problems because "it seems clear that the same result can ordinarily be reached by an assignment of the covenantee's rights or under the contract doctrine of third-party beneficiaries." Annot., 68 A.L.R.2d 1022, at 1024 (1959). Some authorities state that there is dual liability in the covenantor when real covenants are contained in a conveyance in fee. The covenantee has both contract rights based on privity of contract and rights as the owner of the fee based on privity of estate. While he retains the benefited land, the covenantee may sue based upon either privity of contract or privity of estate. Assignees of the covenantee may sue based upon privity of contract. 2 AMERICAN LAW OF PROPERTY, *supra* note 29, § 9.19.

38. *Covenants*, *supra* note 20, at 142. "This difficulty [permitting a man to bind another who subsequently succeeds to land held by the first] . . . would seem more imagined than real when we are dealing with the benefits, and not the burdens, of such covenants." *City of Reno v. Matley*, 79 Nev. 49, 56, 378 P.2d 256, 259-60 (1963).

39. *Kell v. Bella Vista Village Property Owners Ass'n*, 258 Ark. 757, 528 S.W.2d 651 (1975); *St. Louis, Iron Mountain & S. Ry. v. Sanders*, 91 Ark. 153, 121 S.W. 337 (1909); *St. L., I.M. & S. Ry. v. O'Baugh*, 49 Ark. 418, 5 S.W. 711 (1887). (In *Kell*, there is horizontal privity; in *Sanders*, vertical; in *O'Baugh*, vertical.)

40. *St. L., I.M. & S. Ry. v. O'Baugh*, 49 Ark. 418, 5 S.W. 711 (1887) (covenantee's grantee); *St. Louis, Iron Mountain & S. Ry. v. Sanders*, 91 Ark. 153, 121 S.W. 337 (1909) (life tenant).

41. Some authorities state that the *in personam* rights conferred by real covenants attach only to successors to fee simple estates, and that since a lessee takes a lesser interest, he does not succeed to the *in personam* covenant appended to the title. Compare 3 H. TIFFANY, *supra* note 8, § 851 (concluding that authorities are divided on the question) with 2 AMERICAN LAW OF PROPERTY, *supra* note 29, § 9.20 (concluding that life tenants and lessees of the covenantee may enforce the benefit).

Insofar as privity of estate has been recognized and required in Arkansas, no distinction has been made between those cases in which the grantee has taken the exact estate of his grantor and those in which he has succeeded to some lesser estate. Arkansas has permitted enforcement of the benefit of a real covenant by a tenant holding a legal life estate and in

that lessees may do so, however. The Supreme Court of Virginia held that the phrase "successors in title" in a deed was not a limitation on the class of the covenantee's successors entitled to enforce the covenant, but indicated the parties' intent that the covenant run with the land, and therefore, lessees of the covenantee were entitled to the benefit of the covenant.<sup>42</sup>

In *Hannum*, the real covenants governing property in Bella Vista Village<sup>43</sup> were construed for the second time by the Arkansas Supreme Court. The first case, decided in 1975, was *Kell v. Bella Vista Village Property Owners Association*,<sup>44</sup> in which the Kells challenged a provision in the bill of assurance which said that unpaid assessments for maintenance and improvements would be a continuing lien on the property. The Kells contended that the covenants were not real covenants which would run with the land<sup>45</sup> because they did not "touch and concern" the land<sup>46</sup> and because there was no privity of estate.<sup>47</sup> The Arkansas Supreme Court found these contentions to have "no merit,"<sup>48</sup> citing the holding of the New York Court of Appeals in *Neponsit Property Owners' Association v.*

doing so, cited for authority a case in which the tenant succeeded to the fee simple of her grantor. *Compare* St. Louis, Iron Mountain & S. Ry. v. Sanders, 91 Ark. 153, 121 S.W. 337 (1909) (life tenant) *with* St. L., I.M. & S. Ry. v. O'Baugh, 49 Ark. 418, 5 S.W. 711 (1887) (grantee).

42. *Old Dominion Iron and Steel Corp. v. Virginia Elec. and Power Co.*, 215 Va. 658, 212 S.E.2d 715 (1975).

43. For a discussion of the purpose and intent of real covenants like those adopted by Bella Vista Village *see* R. POWELL & P. ROHAN, 4A POWELL ON REAL PROPERTY ¶ 630.3151 (1979). In regard to establishing covenants that run with the land and make assessments enforceable against the owner of the fee, Powell states that inclusion of the words, "or Living Unit" will not extend membership in the Association to tenants in rental property, "but it will make it clear that the landlord has membership rights with respect to each unit which he can delegate to his tenants under the leases. . . ." *Id.* ¶ 630.3151 n.14.

In his explanation of the language of the real covenants governing Bella Vista Village which was at issue in *Hannum*, "[E]very Member shall have a right and easement of enjoyment in and to the Common Properties and such easement shall be appurtenant to and pass with the title to every Lot [or Living Unit]," Powell refers to *Maranatha Settlement Ass'n v. Evans*, 385 Pa. 208, 122 A.2d 679 (1956). 4A POWELL, *supra*, ¶ 630.3151 n.24. This case holds that the language, "The Grantee and his immediate family only, shall enjoy the free use of the swimming pool," created an appurtenant easement. *Maranatha Settlement Ass'n v. Evans*, 385 Pa. 208, 209, 122 A.2d 679, 680 (1956).

44. 258 Ark. 757, 528 S.W.2d 651 (1975).

45. Brief for Appellants, 47-56, *Kell v. Bella Vista Village Property Owners Ass'n*, 258 Ark. 757, 528 S.W.2d 651 (1975).

46. *Id.* at 48-52.

47. *Id.* at 52-56.

48. *Kell v. Bella Vista Village Property Owners Ass'n*, 258 Ark. 757, 760, 528 S.W.2d 651, 653 (1975).

*Emigrant Industrial Savings Bank*,<sup>49</sup> and held that the declarations and covenants constituted real covenants running with the land at law. The holding in *Kell* enforced the burden side of the real covenants governing property in Bella Vista Village. Since *Kell* was founded on the authority of *Neponsit*,<sup>50</sup> it is worth noting that *Neponsit* permitted assignees of the covenantee to enforce the burden of that covenant.<sup>51</sup>

The *Hannum* case relies heavily upon the protective covenants of the Bella Vista Village Property Owners Association to define the rights of the appellants. The court noted that the covenants "describe a member as the developer or a record owner of a fee interest, and an associate member as one purchasing under a contract with the developer."<sup>52</sup> The court reasoned that a lessee falls into neither of the foregoing categories and concluded that the easement of enjoyment in the common properties may not be transferred with a lease of the land.<sup>53</sup>

Appellants argued that the language of the declaration and covenants granted an appurtenant easement rather than a personal

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49. 278 N.Y. 248, 15 N.E.2d 793 (1938). In this, the leading case in the enforcement of the burdens of real covenants by homeowners' associations, assignees of the grantor of lots in a subdivision brought suit to foreclose a lien created by a covenant in a deed. The covenant provided that unpaid annual charges for maintenance of common areas would create a lien on the land which would be enforceable by a property owners' association to be created thereafter. The covenant further provided that it would run with the land. The grantor assigned the benefit of this covenant to the homeowners' association, which owned no land in the subdivision. The defendant, a remote grantee of the original covenantor, took title subject to restrictions and covenants in the deed. In its decision, the New York Supreme Court stated that to create a covenant which would run with an estate in land, (1) it must appear that the covenanting parties intended the covenant to run, (2) the covenant must "touch and concern" the land, and (3) there must be privity of estate between the assignee of the covenantee and the assignee of the covenantor. The court found the first requirement stated in the covenant. The "touch and concern" requirement was tested by the questions suggested by Judge Clark (Note 30 *supra*) and the court held that the defendant's land was benefited by the required maintenance and that the burden should rest upon the land benefited. The court, having said that privity of estate was necessary to the running of the burden of the covenant, avoided the problem of lack of privity of estate by looking through the corporate form of the plaintiff. It is not clear which type of privity was required, but there was horizontal privity between the original covenanting parties and there was vertical privity between the covenantor and his successive grantees, the defendants. However, there was no privity of estate between the original covenantee and the plaintiff homeowners' association. Nonetheless, the court found that in substance if not in form, the association and the defendant were in privity of estate, and enforced the covenant.

50. 258 Ark. at 760, 528 S.W.2d at 653.

51. 278 N.Y. at 262, 15 N.E.2d at 797.

52. *Hannum v. Bella Vista Village Property Owners Ass'n*, 272 Ark. 49, 49, 611 S.W.2d 756, 756 (1981).

53. *Id.* at 50, 611 S.W.2d at 757.

right in the title holder,<sup>54</sup> and that the easement, being appurtenant, necessarily ran with the land.<sup>55</sup> They further argued that the lease of a lot gave the lessee the right to use the easement because an appurtenant easement may not be severed from the dominant estate.<sup>56</sup> The court dismissed these arguments as inapplicable,<sup>57</sup> distinguishing ordinary appurtenant easements for rights of way and access to property from an easement of enjoyment in the common properties in a development.<sup>58</sup> The court held that the right to use the common properties is determined by title, as defined in the covenants,<sup>59</sup> and therefore, a lease would not pass the right to use the common properties.<sup>60</sup> The court ruled that because appellants remained free to lease their houses and lots without the easement to anyone they chose, no restraint on alienation was created.<sup>61</sup>

Arkansas has, in dictum, recognized real covenants as property rights. In *Arkansas State Highway Commission v. McNeill*,<sup>62</sup> the court said that it did "not deny the existence of a property right in the appellees," and that the restrictive covenant may have given added value to the land when they bought it.<sup>63</sup> If the criterion for designation of real covenants as property rights is that the covenants must add value to the land, then the real covenants at issue in *Hannum* would qualify. In the *Kell* opinion, the Arkansas court stated that the evidence proved that the common properties added value to

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54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 51.

58. *Id.*

59. *Id.*

60. *Id.* Cf. *Town of Kearny v. Municipal Sanitary Landfill Auth.*, 143 N.J. Super. 449, 459, 363 A.2d 390, 396 (1976) (holding that because of the nonpossessory character of the interest in land which was in the possession of another, the interest created was an easement in gross. The court said that, "by definition, an easement is placed outside the scope of the concept designated by the term 'lease' and, concomitantly, outside the scope of a restriction against subletting.")

61. *Hannum v. Bella Vista Village Property Owners Ass'n*, 272 Ark. 49, 51, 611 S.W.2d 756, 757 (1981).

62. 238 Ark. 244, 381 S.W.2d 425 (1964).

63. *Id.* at 248, 381 S.W.2d at 427. And see the dissent, stating that, "A restrictive covenant such as we have here is a property right. Such was impliedly recognized in *Linder Corp. v. Pyeatt*, 222 Ark. 249, 264 S.W.2d 619." *Id.* at 250, 381 S.W.2d at 428 (McFaddin, J., dissenting). The dissent collects cases and citations to support its position. Federal law holds that restrictive covenants are property rights. *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621 (1950). The decisions are split, but most courts seem to recognize real covenants as property rights. 17 A.L.R. 554 (1922); 67 A.L.R. 385 (1930).

each lot or living unit subject to the real covenants.<sup>64</sup> Ownership of property, by definition, encompasses the right to dispose of it, and attempts to restrain alienation are void if they are unreasonable.<sup>65</sup> Based on the foregoing, it would appear that real covenants are rights in property acquired at the time the property is purchased; that exercise of the rights of ownership may not be restrained or diminished by the grantor; and that the benefit of the covenants should be enforceable at law.

The *Hannum* case leaves a number of questions unanswered. Given the existence of *Kell* as precedent for construction of the real covenants governing Bella Vista Village, it would have been most logical for the appellants to argue that the decision in *Kell* required an affirmative decision in *Hannum*. Because the *Kell* decision construed these to be covenants which run with the land and because that decision enforced the burden of the covenants, it would have been logical for the appellants to argue that the benefit of the covenants should be enforced in *Hannum*. Inexplicably, appellants did not make this argument.<sup>66</sup> Although the appurtenant easement represents only one of several benefits conferred by the real covenants, the appellants argued only that the covenants granted an appurtenant easement and that the easement ran with the land.<sup>67</sup> The Arkansas court rejected this argument by its holding in *Hannum*; however, the court did not specify the type of interest the property owners now have in the common properties. It may be inferred that they hold only an easement in gross, which is inalienable. As for the real covenants recognized in *Kell*, the court did not state under what conditions these would run. By inference, they do not run with the land unless a freehold estate is conveyed.

It is difficult to assess the impact the decision may have on Ar-

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64. *Kell v. Bella Vista Village Property Owners Ass'n*, 258 Ark. 757, 760, 528 S.W.2d 651, 653 (1973).

65. In *Potter v. Couch*, 141 U.S. 296, 317-18 (1890), the Court said:

[U]pon the absolute transfer of an estate, the grantor cannot, by any restrictions or limitations contained in the instrument of transfer, defeat or annul the consequences which the law annexes to the estate thus transferred. If, for instance, upon the transfer of an estate in fee, the conveyance should provide . . . that the grantee should have no power of disposition over it, the provision, in either of these cases, would clearly be inoperative and void, because the act or thing forbidden is a right or incident which the law annexes to every estate in fee. . . .

An attempt to preclude the mortgage or lease of property is void as a restraint on alienation. *E.g.*, RESTATEMENT, *supra* note 3, § 406(f) 111.7.

66. Brief for Appellants, 94-117, *Hannum v. Bella Vista Property Owners' Ass'n*, 272 Ark. 49, 611 S.W.2d 756 (1981).

67. *Id.* at 96-106.

kansas' property law. The past several years have brought widespread development of horizontal property regimes, popularly known as condominiums.<sup>68</sup> These developments are typically governed by statutes,<sup>69</sup> the provisions of the master deed,<sup>70</sup> and the by-laws adopted by the property owners.<sup>71</sup> The Arkansas statutes provide that individuals shall own the interior walls of their allotted spaces, and that all other structures and amenities, such as entrances, exits, hallways, elevators, and other installations for common use<sup>72</sup> shall be held as common elements.<sup>73</sup> The apartment owner holds a pro-rata share in the common elements<sup>74</sup> and is permitted to use them.<sup>75</sup> The statutes also provide that individual apartments may be conveyed as if independent of the other apartments in the building.<sup>76</sup> However, the question whether a lease will pass the right of entry to the common elements will inevitably arise. If a lease will not pass the right of entry to the common elements, *Hannum* may make ownership of this kind of property less advantageous than is popularly believed.

The legal problems posed by planned communities, cooperative apartments, and condominiums, with their combinations of privately and commonly held properties, challenge the ingenuity of lawyers and the courts. If the protection of common rights in property is secured by sacrificing private property rights, however, buyers may avoid developments incorporating common elements at a time when more compact communities are socially desirable. In order to make the informed decisions necessary to protect their respective interests, it is essential that buyers and developers know under what circumstances Arkansas courts will, and will not, enforce real covenants.

Modern variations in property ownership will generate other cases raising the issues controverted in *Hannum*. Consequently, an admonition delivered almost a decade ago is still apt: "The court

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68. See, e.g., Nagin, *The Condo Conversion Craze: What's Happening in Florida?* 55 FLA. B.J. 74 (1981); Woods, *Time Sharing Comes to Fairfield Bay*, ARK. GAZETTE, Aug. 30, 1981 § C.

69. See, e.g., ARK. STAT. ANN. §§ 50-1001 to -1023 (1971); N.C. GEN. STAT. §§ 47A1-A28 (1966); OHIO REV. CODE ANN. §§ 5311.01-.27 (Page 1970).

70. E.g., ARK. STAT. ANN. § 50-1009 (d) (1971).

71. E.g., ARK. STAT. ANN. §§ 50-1014 to -1015 (1971).

72. E.g., ARK. STAT. ANN. § 50-1002 (d) (1971).

73. E.g., ARK. STAT. ANN. § 50-1006 (1971).

74. *Id.*

75. ARK. STAT. ANN. § 50-1008 (1971).

76. ARK. STAT. ANN. § 50-1011 (1971).

must be precise so as not to confuse the related though distinct areas of easements and covenants. . . . Proper use of the covenants depends on precise statements of the rights and liabilities which accompany particular designations and restrictions in land transfers."<sup>77</sup>

*Virginia R. Williams*

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77. Comment, *Judicial Handling of Restrictive Covenants in Arkansas Residential Subdivisions*, 28 ARK. L. REV. 245, 261 (1974).