Covenants and Privity

Privity between original parties in context of a transfer of estate in land (known as “horizontal privity”) (e.g., B sells to A)

Promisor; burden on Blackacre

Promissor; benefit to Whiteacre

Privity between promisee and assignee (known as “vertical privity”) (e.g., A sells to D)

D

Privity between promisor and assignee (known as “vertical privity”) (e.g., B sells to C)

C

Real Covenants

1. Must be in writing to satisfy the Statute of Frauds.
2. Must be what the parties intended.
Real Covenants

3. Must touch and concern (T&C) the land with which it runs, that is—
   • it must have a logical connection to the use and enjoyment of land, or
   • it must physically affect the use and enjoyment of the land, or
   • the promisor’s legal interest as an owner must be rendered less valuable by the promise and the promisee’s legal interest as an owner must be made more valuable by the promise.

Real Covenants Cont’d

4. Must have horizontal privity of estate: the relationship among—
   (a) the original promisor (owner of burdened land),
   (b) the original promisee (owner of benefited land), and
   (c) the affected estate in land.
Real Covenants Cont’d

5. Must have *vertical privity of estate*: the relationship among—
   
   (a) the original promisor or promisee under a covenant,
   (b) the promisor’s or promisee’s successor in interest, and
   (c) the affected estate in land.

Equitable Servitudes

- To be enforceable against a successor in interest—
  - Intent
  - Notice (unless successor gave no consideration)
  - T&C
**Tulk v. Moxhay,**
41 Eng. Rep. 1145 (1848), Casebook p. 746

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**Tulk v. Moxhay Cont’d**

- Intent
- Notice
- T&C
- Other considerations
  - Fairness/Equity
  - Benefit of the bargain
  - Value of retained land

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Leicester Square Garden Through the Years

Wyld’s Monster Globe

1910


**Horizontal Privity**

The Deyers ← Neponsit Realty

Mesne Conveyances

Emigrant Bank

buys at judicial sale

Neponsit assigns right to enforce to HOA

**Vertical Privity**

Emigrant Bank

HOA

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Neponsit Cont’d

Does the Covenant Run with the Land?

• Writing
• Intent
• T&C
• Privity (horizontal and vertical)

Neponsit Cont’d

Does the Covenant Run with the Land?

• T&C
  • Negative Covenant
  • Affirmative Covenant
    • Old English Rule
    • Modified English Rule
    • Reluctance
    • Neponsit Rule
Neponsit Cont’d

Does the Covenant Run with the Land?

• Privity
  • Horizontal
  • Vertical


• “The grantors reserve the right to build or construct the original dwelling or building on said premises.”

• “covenants running with the land . . . [which] shall bind the purchasers, their heirs, executors, administrators, or assigns.”
Caullett v. Stanley Stilwell & Sons Cont’d

Real Covenant?

- Writing
- Intent
- Touch & Concern
- Horizontal Privity
- Vertical Privity

Caullett v. Stanley Stilwell & Sons Cont’d

Court’s Reasoning

- Ambiguous
- Touch & Concern
- In gross