

Property

- Module 23
- Restrictive Covenants

Restrictive Covenants

- **Background: Historical Skepticism**
 - Privity of Contract
 - Suspicion of Novel Burdens on Land
 - Fear of Unlimited or Disproportionate Liability

Negative Easements and Real Covenants

- Negative easements
 - Historical precursors to covenants
 - Types limited (see pg. 897)
 - At c/l: light, air, sublateral or adjacent support, water in artificial stream
- Covenants
 - Real covenant developed in America
 - Promise respecting the use of land that runs with the land at law
 - Benefit running to successors
 - Burden running to successors (more onerous test)
 - Horizontal and vertical privity

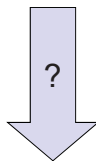
Restrictive Covenants

- The Turning Point: *Tulk v. Moxhay*



Equitable Servitudes (Real Covenants) – Tulk v. Moxhay

- Promises by Elms (to Tulk)
 - Maintain Leicester Square garden
 - Do not build over/on the garden
 - Allow Leicester Square inhabitants, upon payment, to have admission to the garden



- Moxhay

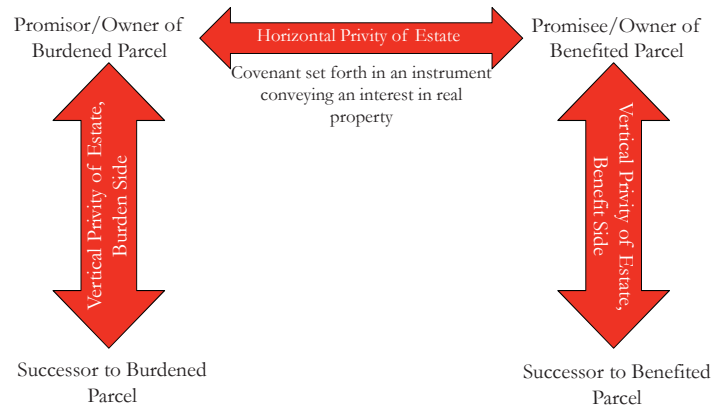


Restrictive Covenants

- Enforceability of Covenants: Relaxing Standards
 - Common Law Requirements:
 - For a covenant to “run with the land,” it must:
 1. Be in writing,
 2. Originate in an instrument between the covenanting parties conveying an interest in real property (horizontal privity of estate),
 3. Be intended by the parties to run with the land, and
 4. “Touch or concern” land.
 - For the covenant to bind a successor to the burdened parcel, there must be:
 1. Privity of estate between the original covenantors and the current owners (vertical privity of estate), and
 2. Notice of the covenant to the party against whom enforcement is sought.

Restrictive Covenants

- Enforceability of Covenants: Relaxing Standards
 - Common Law Requirements: Privity of Estate

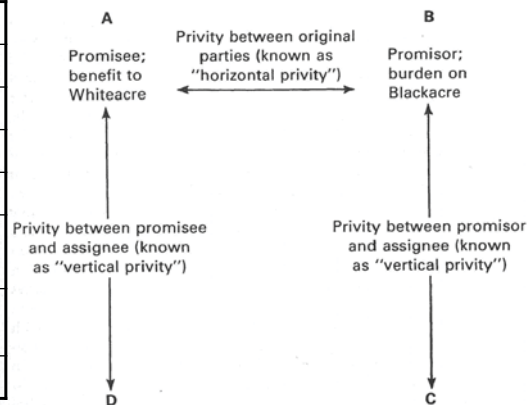


Real Covenants - Privity, Benefits and Burdens

- Horizontal privity requirement
 - Modern trend – not required
 - c/l – required

C/L
versus
RS 3rd Property View

Real Covenants		
	Benefit	Burden
1. Formalities	Yes	Yes
2. Intent	Yes	Yes
3. Notice	No	Yes
4. Touch & Concern	Yes	Yes
5. Horiz.Privity	See above	See above
6. Vert.Privity	yes	Yes



Restrictive Covenants

- Enforceability of Covenants: Relaxing Standards
 - Privity and “Touch and Concern”: *Neponsit Property Owners Association v. Emigrant Bank*



Source: USGS, National Assessment of Storm-Induced Coastal Change Hazards, Oblique aerial photographs of Neponsit, New York, <http://coastal.er.usgs.gov/hurricanes/sandy/photo-comparisons/>

Restrictive Covenants

- Enforceability of Covenants: Relaxing Standards
 - Privity and “Touch and Concern”: *Neponsit Property Owners Association v. Emigrant Bank*



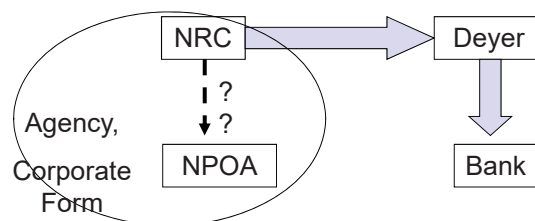
Source: USGS, National Assessment of Storm-Induced Coastal Change Hazards, Oblique aerial photographs of Neponsit, New York, <http://coastal.er.usgs.gov/hurricanes/sandy/photo-comparisons/>

Neponsit (NPOA) v. "Bank" (NY 1938)

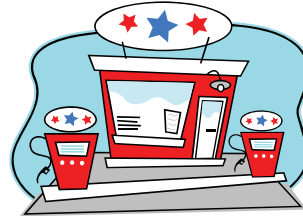
- T&C
 - Affect the quality or value of the property or its owner's interest in it
 - This requirement ensures that purely personal obligations unrelated to the ownership of the relevant estate are not enforced as property rights
 - Neponsit mentions that often a covenant to pay money is purely personal
 - Normally, covenants with a direct physical effect on the property touch and concern it
- Neponsit emphasizes that it is a facts and circumstances inquiry
 - NY holding to a general sort of inclination that affirmative covenants are likely to not T&C
- Even with new "test" – a question of degree
 - Lots have easements to use common areas
 - Thus, burden of paying the cost can be tied to the lot which enjoys the benefit

Neponsit (NPOA) v. "Bank" (NY 1938)

- What is the issue with respect to the privity requirement?
- How does the court get around it?



Sanborn v. McLean (Mich. 1925)



- Note 3, pg. 922
- Dispute
 - State of McLean's title?
- Common plan or scheme?
 - Common owner
 - Also incorporates concepts of (1) formalities, (2) intent, and the (4) touch and concern requirement
- Notice?
 - Actual?
 - Constructive?
 - Inquiry?
- Court holds: "implied reciprocal negative servitude " binds McLean

Restrictive Covenants

- Enforceability of Covenants: Relaxing Standards
 - The Modern View: Restatement § 3.1
 - A servitude ... is valid unless it is illegal or unconstitutional or violates public policy.**
 - Restatement "public policy" objections:
 - (1) arbitrary, spiteful, or capricious;
 - (2) unreasonably burdens a fundamental constitutional right;
 - (3) unreasonable restraint on alienation...;
 - (4) unreasonable restraint on trade or competition
 - (5) unconscionable....

Restrictive Covenants

- Enforceability of Covenants: Relaxing Standards
 - Cautionary Example: Private Fee Covenants (Page 924, Note 3)

Shelley v. Kraemer (1948)

- Shelley purchases a home in St. Louis unaware of the restrictive covenant prohibiting a person of color to occupy the house
- “It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property”
- The “Fourteenth Amendment is only [triggered by] such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful”
- State court enforcement is the state action

Restrictive Covenants



The Shelley House. Source: National Parks Service; Photo by Gerald L. Gilleard; <http://www.nps.gov/nr/travel/civilrights/mo1.htm>

Property, Spring 2017, Prof. Greg R. Vetter

191

Restrictive Covenants

● *El Di, Inc. v. Town of Bethany Beach*



Source: "Fish Fry" (undated); Delaware Public Archives, Purnell Collection, Box 1, Folder 7, Photo 54PN, available at http://archives.delaware.gov/usri/img/exhibits/photograph/pe/bethany_beach/bethanybethanynew61.gif

Property, Spring 2017, Prof. Greg R. Vetter

192

Restrictive Covenants

● *El Di, Inc. v. Town of Bethany Beach*



Source: PointsofNoReturn, *Downtown Bethany Beach, Delaware, where most commercial shopping takes place* (9 August 2015), CC-BY-SA-4.0, https://commons.wikimedia.org/wiki/File:Downtown_Bethany_Beach,_Delaware.jpg

El Di, Inc. v. Town of Bethany Beach 477 A.2d 1066 (Del. 1984)

- Permanent injunction against El Di's restaurant prohibiting sales of alcohol
- Covenants against non-residential use and against selling alcohol
 - Often not observed
- Should "changed conditions" render the covenants no longer enforceable?
- "Review of all the facts and circumstances convinces us that the change, since 1901, in the character of that area of the old-Town section now zoned C-1 is so substantial as to justify modification of the deed restriction. We need not determine a change in character of the entire restricted area in order to assess the continued applicability of the covenant to a portion thereof."
- Factors of change?
 - Tolerance of "brown bagging"? What else?
- Dissent?

"This covenant is made expressly subject to and upon the following conditions: viz, That no intoxicating liquors shall ever be sold on the said lot, that no other than dwelling or cottage shall be erected thereon and but one to each lot, which must be of full size according to the said plan ... a breach of which said conditions, or any of them, shall cause said lot to revert to and become again the property of the grantor, his heirs and assigns; and upon such breach of said conditions or restrictions, the same may be restrained or enjoined in equity by the grantor, his heirs or assigns, or by any co-lot owner in said plan or other party injured by such breach."

Restrictive Covenants

● *El Di, Inc. v. Town of Bethany Beach*

- Alternative tests for “changed conditions” (See Restatement § 7.10, cmt. c):
 - Perpetuation of the servitude would be of no substantial benefit to the dominant estate.
 - The servitude cannot continue to serve the purposes for which it was created.