

Covenants

- Requirements under common law:
- Writing
- “Touch and Concern”
- Intent
- Horizontal Privity
 - privity of estate between original covenanting parties
- Vertical Privity
 - privity of estate between one of the covenanting parties and a successor in interest
- Notice

Neponsit Property Owners' Assocs. v. Emigrant Indus. Savings Bank

- 1917 – Neponsit conveys LOT to Deyer by deed containing following:
 - *“ . . . the heirs, successors and assigns . . . shall be subject to an annual charge . . . not, however exceeding in any year the sum of four (\$4.00) Dollars per lot 20x100 feet. . . . Such charge . . . shall be devoted to the maintenance of the roads, paths, parks, beach, sewers”*
- 1930 -- LOT sold to bank in judicial sale
 - Deed says subject to 1917 covenant
- Bank refuses to pay; Association is assignee of Realty

*Neponsit Property Owners' Assocs. v. Emigrant Indus.
Savings Bank*



Touch and Concern Requirement

- English Rule:
 - Affirmative covenant DOES NOT T&C
 - Negative does T&C
- New Test Formulated in *Neponsit*:
 - “Does the covenant impose, on the one hand, a burden upon an interest in land, which on the other hand increases the value of a different interest in the same or related land?”
 - “[I]t still remains true that whether a particular covenant is sufficiently connected with the use of land to run with the land, must be in many cases a question of degree”

Touch and Concern Requirement

• 3rd Restatement – Servitude “is valid unless it is illegal or unconstitutional or [in violation of] public policy.” These include:

- (1) a servitude that is arbitrary, spiteful, or capricious;
- (2) a servitude that unreasonably burdens a fundamental constitutional right;
- (3) a servitude that imposes an unreasonable restraint on alienation . . . ;
- (4) a servitude that imposes an unreasonable restraint on trade or competition . . . ;
- and (5) a servitude that is unconscionable

Vertical Privity Requirement

- Neponsit Realty transferred enforcement to Neponsit Property Owner's Association
- What is the covenant enforcement problem?
 - Vertical Privity
 - In Gross Benefit
- How does court get around this?

3rd Restatement's Changes to Other Covenant Requirements

- No Horizontal Privity Required
- Exception to Writing Requirement
 - Imply from common scheme or plan
 - Implied reciprocal covenant

Common Scheme or Plan

- Developer owns 91 lots, conveys 10 of them with following language:
 - *No residence shall be erected upon said premises, which shall cost less than \$2,500 and nothing but residences shall be erected upon said premises. Said residences shall front Helene (now Collingwood) avenue and be placed no nearer than 20 feet from the front street line.*
- Then conveys lot A with no language
- In the end, of all conveyed:
 - 53 with express language, 38 without
- Lot A wants to open a gas station

Covenants -- *Summary*

	1 st Restatement	3 rd Restatement
Horizontal Privity	Required	None Required
Vertical Privity	Required	Flexible (<i>Neponsit</i>)
Writing/Notice	Writing	ImPLY Common Scheme
Intent	Needed	Needed
Touch & Concern	English Rule or <i>Neponsit</i>	Factors