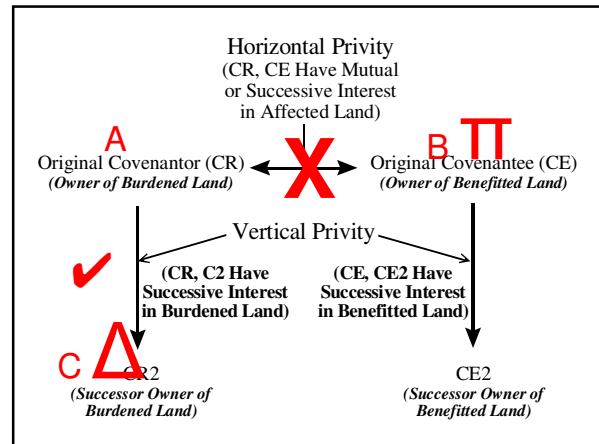




Negative Covenants: Note 3(b)

- A and B (neighbors) enter agreement that neither they, nor their successors, will operate a business on their lots
- A later sells to C, who opens a restaurant
- Can B recover damages from C?

A. Yes B. No



Note 3(b)

- Traditional result (First Restatement, §§ 534-535): B can't recover damages vs. C
 - No horizontal privity between A and B
- This result makes no sense
 - This restriction is a useful land use control device (protecting suitability for residential use)
 - This restriction should thus be neutral or even positive in its impact on alienability (many buyers would actually **value** having the restriction in place)



Negative Covenants: Note 3(c)

- A and B (neighbors) enter agreement that neither they, nor their successors, will operate a business on their lots
- A later sells to C, who opens a restaurant
- Can B get injunction vs. C's operation?

A. Yes B. No

Equitable Servitudes (Covenants Running "in Equity") [Tulk, p. 608]

- Coventantee can enforce covenant against a successor of the original covenantor in "equity" (*i.e.*, can get **injunction**) if:
 - Covenant was **intended to bind successors**
 - Covenant **"touches and concerns" land**, and
 - Defendant purchased the land with **notice** of covenant
- **Privity of estate not needed** for injunction! (purchaser w/notice of covenant can "adjust")



Note 3(c)

- B can get an injunction against C, despite their lack of privity
 - Covenant was intended to bind successors
 - Covenant touches and concerns the land (prohibits business use on the land, which benefits B's adjacent parcel)
 - C has notice of recorded covenant; he could've found it in a title search, and adjusted (either by not buying, or by paying a lower price)



The Privity Requirement Today

- Common law used “privity” to try to limit the kinds of promises that could bind land (and thus affect its alienability), but did so very crudely
- Less significant today b/c
 - 1) New Restatement rejects privity requirement (query: will courts adopt that view?), and
 - 2) **Most** actions to enforce covenants ask for injunctive (equitable) relief rather than damages



“Touch and Concern”

- For a covenant to bind successors, either at law or in equity, it must “touch and concern” land
- Do negative covenants in note 3 problem (no business use) “touch and concern” land?
- How about the covenant in *Bremmeyer*?



A. Yes

B. No



“Touch and Concern”

- “No business use” covenant in note 3 clearly “touches and concerns” the land
 - **Burden** “touches and concerns” b/c covenant limits permissible use of each lot
 - **Benefit** “touches and concerns” b/c covenant benefits each lot by preventing other lot from being used in a way that would result in undesirable external costs, e.g., noise/traffic associated w/business use)



“Touch and Concern”

- Traditionally, courts were reluctant to say *affirmative covenants* (e.g., covenants to pay money, fill covenant in *Bremmeyer*) “touched and concerned” land
 - Rationales: (1) impact on alienability of burdened land; (2) no corresponding benefit to other land to “offset” burden



“Touch and Concern”

- *Bremmeyer*: covenant to use Bremmeyer to fill the lot might burden ownership of Parks lot, but it doesn’t benefit ownership of any other land (it is a benefit **in gross**)
- Traditional rule: if the benefit of a covenant is in gross, the burden of that covenant won’t run to bind successors



Neponsit

- 1917: Deyer buys a subdivision lot
 - Deed obligates owner to pay lot assessment
 - If unpaid, assessment becomes a lien in favor of Neponsit Property Owners’ Ass’n (NPOA)
- Deyer’s successor (Emigrant Bank) refuses to pay assessment; NPOA seeks to foreclose lien
- Does burden of the assessment covenant “run with the land” to bind Emigrant Bank?



Neponsit Questions

- Was the covenant intended to bind successors like Emigrant Bank?
- Does the covenant “touch and concern” land?
- Did Bank have sufficient notice of the covenant? If so, how?
- Why did Bank bother to bring this suit, given that the covenants were about to expire?



Neponsit: Touch and Concern

- Court (p. 680): covenant “touches and concerns” land if it “**imposes ... a burden upon an interest in land**, which **increases the value of a different interest in the same [land] or related land.**” Is this test helpful? If so, how?
 - No; it only describes the effect of enforcing a covenant; it doesn’t tell us whether or not any particular covenant **should** run w/land

- Fred, owner of Lots A and B, deeds Lot B to Susan
 - Deed: “Grantee and her heirs, successors and assigns must provide piano lessons to owner of Lot A, without charge, for 50 years.”
- Does this “touch and concern” Lots A and B under *Neponsit’s* test?

Touch and Concern Hypo



Touch and Concern

- If a covenant is enforced vs. successors, it will affect the market price of Lots A and B
 - Buyer of Lot B would “discount” price (to account for cost of obligation to provide piano lessons)
 - A buyer of Lot A who values free piano lessons would increase offer price for Lot A
- If covenant is unenforceable vs. successors, it won’t affect FMV
- But while true, this doesn’t tell us whether this covenant (or any covenant) “should” run



Why Should *Neponsit* Covenant Run?

- Rationally related to community operation
 - Assessments ensure NPOA can preserve common areas (roads, parks, signage)
 - Preserves lot values (poor maintenance might make lots less appealing to potential buyers)
- Thus, while covenant may be indirect restraint on alienation, it is still a reasonable, efficient restraint (and should be freely enforceable)



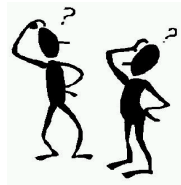
Personal Covenants

- By contrast, why should the law refuse to enforce the piano lesson covenant?
 - It isn’t related to ownership of land in any meaningful **practical** sense
 - There’s no need to “tie” provision of piano lessons to land ownership (owner of Lot A can get piano lessons elsewhere)



- Covenants only “ran” until 1940, and lot was only subject to a small annual assessment
- If assessment was small, and covenant only ran for a few more years, why did Emigrant Bank litigate; why not just pay the assessments?

Neponsit



Caullett v. Stanley Stilwell & Sons

- Stilwell sells a vacant lot in a residential development to Caullett for \$4,000
 - Covenant: “grantors reserve the right to build” original home on the lot; this covenant bind “purchasers, their heirs ... and assigns”
- Caullett sues to quiet title, arguing that the covenant does not “touch and concern” land
- Should this covenant be enforced?