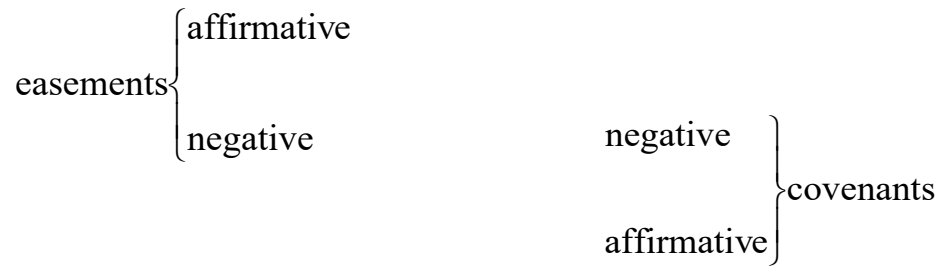


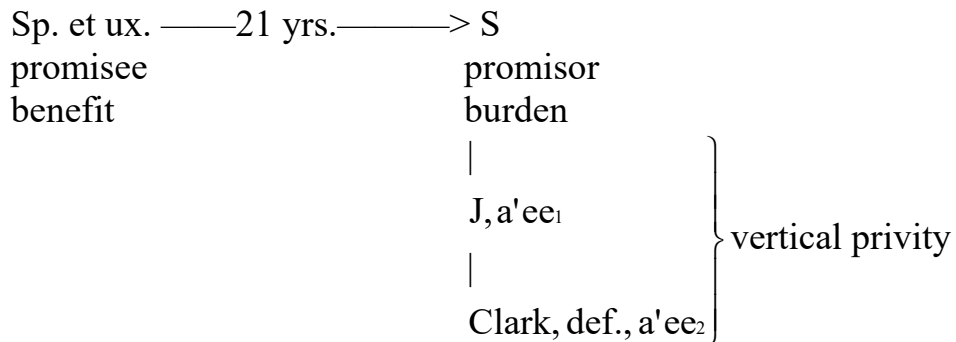
I. COVENANTS

1. Easements vs. Covenants



2. *Spencer's Case* (1583)

horizontal privity



The issue is the running of the burden

3. The rules at law

- a. formalities — I doubt that any of the common-law formalities remain today, at least in most jurisdictions, other than those imposed by the S/Frauds with the usual equitable exceptions
- b. intent — Once more, there were some odd rules at common law that probably do not exist in most jurisdictions today, but the basic concept remains
- c. touch & concern
 - i. First Restatement test
 - physical
 - relation of burden & benefit
 - ii. Judge Clark's test
 - iii. Special problems
 - affirmative covenants
 - covenants not to compete
 - iv. Third Restatement test: a public policy determination about whether this type of covenant should be allowed to run

- d. privity of estate – There are a number of cases, still not overruled on this topic, though one rarely finds, for reasons that we will get to shortly, a covenant that is not allowed to run for lack of it. The common-law of concept of privity of estate involves two elements:
 - i. vertical – it was required at common law for the burden to run at law and is required today. The distinction between assignments and subleases.
 - ii. horizontal – What constitutes horizontal privity was a matter of huge debate in the 20th century. It may be a matter of debate in the 21st, but I doubt it. I’m going to skip it. The Third Restatement seeks to abolish it.
- 4. Spencer’s Case (revisited)
 - a. privity?
 - b. touch & concern?
 - c. intent? There was certainly enough in most modern jd’s. There was not under the c.l. rules because the word “assigns” was not used.
- 5. Starting in the 19th century, the courts of equity developed what was, at least for the time, looser rules that would allow covenants to run in equity when they would not so run at law. The exact coincidence of the rules in equity and those in law remained unclear for some time, and, to a certain extent, remains unclear today. One thing, however, was clear, and remains clear today: for a covenant to run in equity, privity of estate is not required; what is required is that person against whom enforcement of the covenant is sought must have notice of the existence of the covenant.
- 6. Today
 - a. Relevance of law/equity distinction today
 - i. As to remedy
 - ii. As to changed conditions
 - b. Drafting practice
 - i. Ensuring notice in case the court gets strict about privity
 - ii. Ensuring that something that can only be remedied at law can also be remedied in equity by means of enforcement of a lien

II. THE RUNNING OF THE BENEFIT

1. *Charging*

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- a. Holds that the benefit was not intended to run?
- b. What does it hold about the burden? (The fact that we are also dealing with the running of burden may be critical to the holding. Otherwise, even if the benefit did run, it could not have been enforced against the defendant.)

- c. Could the court have held that Ms. Townsend assigned the benefit to Charping?
- d. Ways of getting the benefit to run:
 - i. Use of the word “assigns”
 - ii. Covenant to include covenants
 - iii. Common plan

2. *Richmond*

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- a. Suggests that the benefit can be held in gross — not all courts will be as liberal as *Van Sant v. Rose*; cf. *London County Council v. Allen*. Why is the benefit in gross a problem?
- b. What’s all this stuff about the amendment to the condo association agreement?
- c. A contract approach. Third-party beneficiary contracts and assignment.

3. Where are we today?

- a. *Charping* is good law — there must be intent. Where *Charping* is different is that many courts will imply intent where the touch and concern is so obvious.
- b. *Allen* has been severely criticized
- c. Most drafters don’t take the chance
 - i. Have the assignee own land, or
 - ii. Develop according to a common plan, or
 - iii. Both

III. USES OF A COMMON PLAN

1. Uses of the common plan

- a. intent
 - i. that the benefit run — *Charping*
 - ii. with what land?
- b. does the benefit run to prior takers? — vertical privity
- c. may the purchaser of land w/o covenants be bound?

2. *Werner v. Graham* (1919)

- a. why didn’t the covenants run at law? — no horiz. privity
- b. Marshall — c. 50 lots —> Def1’s
Marshall —> Plain.
Marshall — c. 66 lots —> Def2’s
Marshall releases Plain.

Marshall — c. 16 lots ———> Def3's

- i. Def3's can't enforce – why?
- ii. Def1's can't enforce – why?
- iii. Def2's can't enforce – why?

3. *Riley* (1976)—the difference between the parole evidence rule and the statute of frauds
 - a. what use of the common plan is at stake here?
 - b. how does the court interpret *Werner*? in what way does the dissent disagree?
 - c. should we now line up California with those jurisdictions that will not use a common plan for purpose 1c on statute of frauds grounds? (For thoughts but not total enlightenment on this topic see *Citizens for Covenant Compliance v. Anderson*, 12 Cal.4th 345, 906 P.2d 1314, 47 Cal.Rptr.2d 898 (1995).)
 - d. does *Riley* overrule *Cooke v. Ramponi*?

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http://www.landwatch.com/California_land_for_sale/Alpine_Meadows