I. INTRODUCTION TO NON-POSSESSORY INTERESTS IN LAND (REVIEWED)

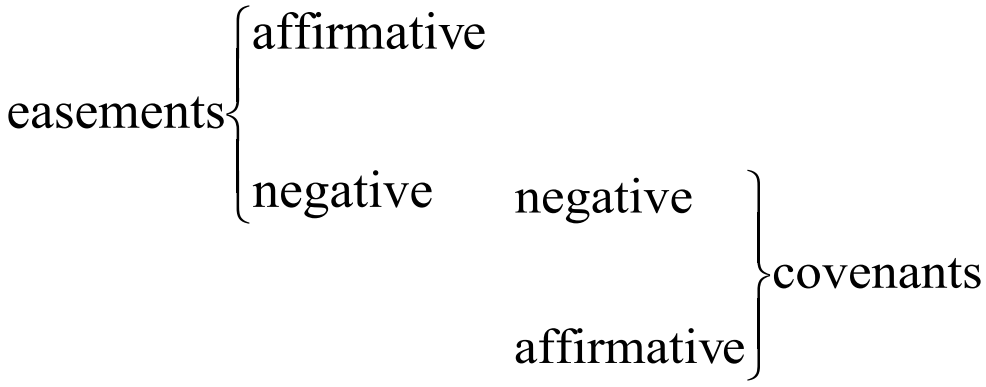
1. Introduction to non-possessory interests

corporeal vs. incorporeal hereditaments

iura in re sua vs. *iura in re aliena*
("rights in his own thing vs. rights in the thing of another")

2. the questions on p. S384:
   a. Any legal effect?
   b. Changed conditions, changed use
   c. Abandonment, adverse possession
   d. Conveyance, succession
   e. Appurtenance vs. in gross
   f. Residual rights
   g. Eminent domain

3. Labels dictate result.
   a. Right in the land of another vs. estate (either leasehold or freehold)
   b. Burden vs. benefit
   c. Easement vs. covenant
      i. driveway easement as easement
      ii. as covenant
   d. Affirmative vs. negative



   e. "Runs with the land" If I have successfully created an easement it will run with the land. I may, however, successfully create a covenant in the sense that there is a binding agreement between ourselves, which may or may not "run with the land," that is to say that it will benefit and bind the successors in title to the land even if they did not agree.
   f. Appurtenant vs. in gross
   g. Dominant vs. servient

II. INTRODUCTION TO NON-POSSESSORY INTERESTS IN LAND (CONT'D)

In order for there to be a non-possesory interest in land, there must be at least one piece of land to which either the benefit or the burden or both attach.

Vocabulary for Non-Possessory Interests that are 'In Gross'

No Tract of Land

Affirmative / Negative Easement
Negative / Affirmative Covenant
Benefit
In gross
In gross

Tract of Land

Affirmative / Negative Easement
Negative / Affirmative Covenant
Burden
Appurtenant/Runs with the Land
Servient tenement

Tract of Land

No Tract of Land

Affirmative / Negative Easement
Negative / Affirmative Covenant
Benefit
Appurtenant/Runs with the Land
Dominant tenement

Affirmative / Negative Easement
Negative / Affirmative Covenant
Burden
In gross
In gross

Vocabulary for Non-Possessory Interests that are 'Appurtenant'

Tract of Land A

Tract of Land B

Affirmative / Negative Easement	Affirmative / Negative Easement
Negative / Affirmative Covenant	Negative / Affirmative Covenant
Benefit	Burden
Dominant tenement	Servient tenement
Appurtenant/Runs with the Land	Appurtenant/Runs with the Land

There have been, at least historically, doubts as to whether interests that fill all of these boxes could be created. Be that as it may be, this is what they are called if they can be created.

III. EASEMENTS

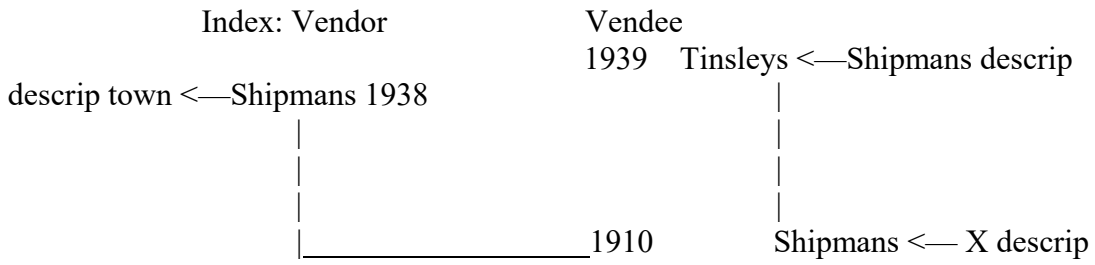
1. *Waldrop*—the court holds that this is an easement.

https://www.google.com/maps/dir/"/500+Howell+Rd,+Brevard,+NC+28712/@35.1159941,-82.8403239,17.04z/data=!4m8!4m7!1m0!1m5!1m1!1s0x8859bb34ae3fd693:0xe7f7e18f37628d17!2m2!1d-82.843784!2d35.118059

a. What kind of an easement?

b. What difference would this have made if covenant?

i. notice



ii. changed conditions

c. why is this an easement? What does the language say?

"It is understood and agreed that the party of the second part is purchasing the property hereinabove described for use as a dumping ground for garbage, waste, trash, resuse, and other materials and products which the party of the second part desires to dispose of. And as a part of this conveyance the parties of the first part do hereby grant and convey unto the said party of the second part, its successors and assigns, the right without limit as to time and quantity, to use the lands hereinabove described as a dumping ground for the Town of Brevard for garbage, waste, trash, resuse and other materials and products of any and every kind which the said party of the second part desires to dispose of by dumping on the said lands and burning or leaving theron, and the said parties of the first part do herby release, discharge, waive and convey unto the said party of the second part, its successors or assigns, any or all rights of action, either legal or equitable which they have or ever might or may have by reason of any action of the party of the second part in using the lands hereinabove described as dumping ground for the Town of Brevard, or by reason of any fumes, odors, vapors, smoke or other discharges into the atmosphere by reason of such location and use of a dumping ground on the lands hereinaove described.

"The agreements and waiver hereinabove set out shall be covenants running with the remainder of the lands owned by the parties of the first part, and binding on the said parties as the owners of said lands, and their heirs and assigns, and anyone claiming under them, or any of them, as owners or coccupants thereof."

If you come to the conclusion that it really doesn't make any difference what you say, if the interest can be intrepreted as an affirmative easement, it will be called an affirmative easement, you're in good company.

2. *Waldrop* reviewed. The court seems to say that there would have been a requirement of notice if it had been a convenant, but it was an easement, so there's no problem with notice. That raises the obvious question of what about the the Recording Act. NC is strange because it has a pure race statute, but even NC does not regard a wild deed as being properly recorded. So the point that the court is making are two (and these could be applicable anyplace):

a. To enforce a covenant in equity one has to establish that the defendant has notice; it is part of the plaintiff's case in chief. The Recording Act is a defense; the defendant has the burden of showing that he took without notice.

b. In order to establish that one took without notice under the Recording Act (or that the deed is a wild deed in NC) one has to show that the interest in question is not contained in a deed from a common grantor to another tract of land that was originally part of your land. In order to establish notice for purposes of a covenant, one has to show that the covenant is in the defendant's direct chain of title.

3. *Petersen*

a. what kind of easement is it? | labeling game

b. why is there an issue? | good draftsmanship

c. what diff. would it have made if it had been (1) a fee estate? (2) a covenant?

i. building

ii. damages

iii. injunction

iv. eminent domain

v. changed conditions

d. who's the plaintiff?

e. solar and conservation easements

At the doctrinal level the issue is whether there is going to be a limitation on the types of negative easements that you can have. Nineteenth-century doctrine, at least in some jurisdictions, suggested that negative easements were limited to four: (a) light, (b) air, (c) support, and (d) certain water rights. It is unlikely that any court would so hold today, but knowing that helps to explain why, as we will see shortly, the negative covenant came to be the preferred method of creating other sorts of negative interests.

The drafter of the easement in this case took a chance. S/he worded the interest as a negative easement, and described it with considerable precision. The light and air part of it was already authorized by the California statute and the traditional doctrine. View does not seem to be much of a stretch, and the court has no difficulty (notice that this is not even a Supreme Court case) holding that it is valid. The fact that it was described with considerable precision probably helped. The court had confidence that the parties knew what they were doing.

4. *Cox*

a. changed conditions—1945 $8600; 1960 $250 K; c. 3000%

b. the scope consequences of appurtenance

c. why presume appurtenance

d. why width of road controlling but not use?

e. why not tell the parties what they really want to know?

f. It worked for a while, but ultimately something happened:

https://www.google.com/maps/place/Glenbrook,+NV/@39.084821,-119.9406482,16.98z/data=!4m2!3m1!1s0x80999b81e54a934b:0xc142dc11b9122afc
Move the map up to see the area marked in the sketch in the case.

https://www.chaseinternational.com/homes-for-sale-in-reno-sparks-tahoe-carson/?perRow=4&limit=48&layout=card&area=city%7Cglenbrook&order=price%7Cdesc&page=1