Inc., 125 So.2d 903 (Fla.Dist.Ct.App.1961) (agreement for sign on wall held void because of indefiniteness).

Whitmier is illustrative of another line of New York authority, of which the prime example is Borough Bill Posting Co. v. Levy, 144 App.Div. 784, 129 N.Y.S. 740 (1911), cited and relied on by the dissenting judge in the principal case. This line of authority has recently been reaffirmed in *In re* XAR Corp. v. Di Donato, 76 A.D.2d 972, 429 N.Y.S.2d 59 (1980). In *XAR Corp.*, the court had this to say about the recording act issue that the Court of Appeals raises in its opinion in the principal case:

> The recording statutes protect only a subsequent purchaser in good faith and for a valid consideration. Actual "knowledge and notice of any facts which would put a prudent man upon inquiry, impeaches the good faith of [p*923] the subsequent purchaser". [Citation omitted.] Here, petitioner admits that it had knowledge of the existence of the sign, and made no inquiry of respondents concerning their rights or interests.

Id. at 973, 429 N.Y.S.2d at 60. Is there some reason why the presence of an advertising sign should put a purchaser on inquiry notice but the presence of someone else's washing machines should not? If the real concern in these cases is notice to the subsequent purchaser of the land, should that not be the focus of the court's inquiry rather than whether the appropriate label to apply to the agreement is "lease," "license," or "easement." Certainly the labeling process can lead courts to miss the notice point. In *Reliable Washer*, *supra*, note 2, the defendant subsequent purchaser of the land, Delmar Associates, had acquired its interest from Ramled Holding, Inc. "Ramled" is "Delmar" spelled backwards.

4. Where the agreement's terms tend to indicate the parties had in mind an interest both personal and revocable, this can be taken as evidence of intent to create a license. Where nothing of this sort appears, how is intent to be found? Is the subject matter of the agreement pertinent? *See Whitmier & Ferris Co. v. State*, *supra*, note 3. *See also* Drye v. Eagle Rock, 364 S.W.2d 196, 205 (Tex.1962), discussed in DKM3, p. 934. Finally, consider Justice Holmes addressing the question: Does a ticket of admission create in the holder an easement or license?

> The fact that the purchase of the ticket made a contract is not enough. A contract binds the person of the maker, but does not create an interest in the property that it may concern, unless it also operates as a conveyance. The ticket was not a conveyance of an interest in the race track, not only because it was not under seal but because by common understanding it did not purport to have that effect. There would be obvious inconveniences if it were construed otherwise. But if it did not create such an interest, that is to say, a right *in rem* valid against the landowner and third persons, the holder had no right to enforce specific performance by self-help. His only right was to sue upon the contract for the breach.

Marrone v. Washington Jockey Club, 227 U.S. 633, 636 (1913). *Cf*. Mosher v. Cook United, Inc., 62 Ohio St.2d 316, 405 N.E.2d 720 (1980). *See generally* 3 R. POWELL, REAL PROPERTY Ê 428, at 34–305 to 34–323 (P. Rohan ed.1991); Conard, *The Privilege of Forcibly Ejecting an Amusement Patron*, 90 U.PA.L.REV. 809 (1942).

5. The dissent in *Todd* also raised the possibility that the agreement might be sustained (and held to bind the defendants) as a covenant running with the land. *See infra*, § 3B.

2. Easements Arising By Other Means

COOKE v. RAMPONI

Supreme Court of California
38 Cal.2d 282, 239 P.2d 638 (1952)

SPENCE, J. Defendants appeal from a judgment decreeing plaintiffs' ownership of an easement over defendants' land and enjoining defendants from interfering in any manner with plaintiffs'

use and enjoyment thereof. The propriety of this judgment is not open to dispute upon the application of equitable principles.

In 1937 plaintiffs purchased approximately 160 acres of land in Sonoma County from one Herbert Tracy. The only usable roadway permitting access to plaintiffs' property from a public highway, the Lovell Valley Road, was a [p*924] dirt and gravel road which crossed adjoining property then owned by the State of California and used as a part of the Sonoma State Home. The latter property, acquired by the state in 1920, consisted of some 200 acres; the state in the early part of 1944 conveyed it to Gerald Foster, and in August of that same year Foster conveyed it to defendants. The roadway in question, connecting plaintiffs' property with the Lovell Valley Road and crossing defendants' land, was in existence as early as 1886. It was used by plaintiffs' predecessors in interest until 1907, when Tracy acquired the property and began to use another roadway which was opened to a different public highway and was called the Tracy Road. Use of this latter road was abandoned by Tracy in 1920, about the time when the state acquired title to the property now owned by defendants, and travel over the older route, the roadway in question, was again established, and has continued, as the exclusive means of access to plaintiffs' property from the public highway. The Tracy Road has since fallen into complete disrepair and has not been used.

Just prior to plaintiffs' purchase of the property, plaintiff Charles M. Cooke addressed a letter to the Department of Institutions of the State of California inquiring as to the use of the roadway crossing the state's property. The deputy director replied that the state had never objected to the use of the roadway by the prior owner of the adjoining property and would likewise make no objection to the Cookes' use thereof. Soon after receiving such advice, plaintiffs built a small cabin on their land but did little else to improve their property for some four years. Then starting in the middle of 1941, plaintiffs constructed a nine-room home on their property, drilled a well, and made other substantial improvements in the clearing of their land, spending in excess of $15,000, all with the intent that the property should constitute their place of residence. During the process of this construction plaintiff Mary Louise Cooke called upon Dr. F.O. Butler, medical superintendent of the Sonoma State Home, and Mr. H.H. Waterhouse, business manager of the home, to inquire whether the state would bear part of the cost of improving the roadway on the state's property. These officials replied that although they believed that the state was not justified in assuming any portion of the expense, plaintiffs could make whatever improvements they desired without interference from the state. In line with this understanding, plaintiffs had portions of the road straightened, caused scraping and surfacing work to be done and culverts to be built, all of which improvements, along with the construction of the house, were seen from time to time by the mentioned state officials.

As above noted, the state in the early part of 1944 conveyed the property upon which the roadway in question is situated to Foster. Shortly thereafter Foster and Mrs. Cooke discussed the Cookes' use of the roadway in accordance with the Cookes' previous exercise of their rights thereon, and they reached an agreement whereby Foster would bear one third and the Cookes two thirds of the cost of maintenance and repair of the roadway. Both parties were to have the right to use the road. Pursuant to this arrangement, plaintiffs hired a bulldozer to scrape the road, the Cookes contributing $27.50 and Foster about $15 as their respective shares of the cost.

In the fall of 1944, Foster conveyed his property to the Ramponis, defendants herein. Soon thereafter Mrs. Cooke had a conversation with Mr. Ramponi in an attempt to continue the arrangement plaintiffs had with Foster respecting the maintenance and repair of the roadway, but Ramponi stated that he was a "poor woodcutter" and refused to bear any of the [p*925] expense. The conversation concluded with the agreement that plaintiffs could do what they wished about the maintenance of the road so long as they did not bother defendants in that regard. Upon that basis, plaintiffs during the winter season of 1944–1945 had the ditches cleaned and deepened, the

road scraped and graded again and surfaced with oil, and culverts installed, all at substantial expense. Following these expenditures, Ramponi barricaded the road and indicated to plaintiffs that it was defendants' private roadway, that plaintiffs did not have the right to travel thereon, and their free use of it would no longer be permitted. Prior to this the parties had used the road jointly. Defendants' property was in the main unimproved and uncultivated land, with considerable tree and shrub growth thereon. Ramponi was accustomed to traveling the road in question with his truck in the process of carrying on his woodcutting operations, and from this principal road he had made some dirt roads leading into various interior portions of his property to haul out rock and firewood.

In September, 1945, plaintiffs commenced this action, seeking to establish their right to the use of the road as a means of access to their property and to enjoin defendants from interfering with their use thereof. Defendants filed their answer and cross-complaint, setting forth a damage claim of $5,000 by reason of alleged acts committed by plaintiffs on defendants' property in connection with the maintenance of the road and seeking a declaration of defendants' exclusive rights in such road. Upon the preliminary hearing of the matter, plaintiffs were granted a temporary injunction. Thereafter, in the successive years of 1946 and 1947, plaintiffs expended some $1,000 in macadamizing the road, as well as doing oiling and other maintenance work in pursuance of their agreement to keep the road in condition for vehicular travel. Following the trial of the action . . . [t]he trial court made findings favorable to plaintiffs upon all controverted issues in sustaining their claim of an easement "for road and right of way purposes" over defendants' property. The judgment which was thereafter entered decreed that plaintiffs had an irrevocable license to use the road for the purposes of ingress and egress to and from their property for so long as the nature of their use required the continuance of the license, and defendants were estopped to deny plaintiffs' rights. The court further enjoined defendants, their agents and those acting for them from obstructing plaintiffs' use of the road.

There appears to be ample evidence in support of the findings and judgment. As stated in *Stoner v. Zucker*, 148 Cal. 516, at page 520 [83 P. 808, 113 Am.St.Rep. 301, 7 Ann.Cas. 704], it is well settled in this state that "where a licensee has entered under a parol license and has expended money, or its equivalent in labor, in the execution of the license, the license becomes irrevocable, the licensee will have a right of entry upon the lands of the licensor for the purpose of maintaining his structures, or, in general, his rights under his license, and the license will continue for so long a time as the nature of it calls for." The principal basis for this view is the doctrine of equitable estoppel; the license, similar in its essentials to an easement, is declared to be irrevocable to prevent the licensor from perpetrating a fraud upon the licensee. [Citations omitted.] While the doctrine of estoppel may, in exceptional cases, be applied in favor of a private person against the state or its agencies [citations omitted], and the parties argue the propriety of invoking that doctrine against the state and its successors in interest by reason of plaintiffs' expenditures during the period of the state's ownership of the servient tenement and in reliance upon the representations and acquiescence of its responsible agents [citations omitted], the assailed judgment [p*926] need not rest on that theory of estoppel. Rather the record establishes an executed, irrevocable parol license in favor of plaintiffs as the result of their respective agreements with the state's successors in interest—Foster and then defendants—and the mutual performance of the parties thereunder.

Proceeding to an examination of the facts and the circumstances surrounding the period of Foster's ownership of the servient tenement in 1944, the record shows that a bulldozer was used to scrape and level the road and laborers were employed to remove the annual accumulation of trash and debris from the bordering ditches; that for such work Foster and plaintiffs expended respectively $15 and $27.50. In line with their joint undertaking, Foster and plaintiffs agreed that the road was subject to their mutual use and enjoyment. Then upon Foster's conveyance of the servient tenement to defendants, the same kind of agreement was made between plaintiffs and

defendants as to the parties' mutual use of the road but defendants were not to bear any of the cost of maintenance. Consistent with this latter understanding and in the spring of 1945, plaintiffs at their own expense had the ditches cleaned and deepened, the road scraped and graded again and surfaced with oil, installed culverts, and carried on the usual yearly maintenance program necessitated by the winter rains. Defendants accepted the benefits of this work, using the road in question as the main artery from which they constructed various side roads furnishing the only means of access into interior sections of their property.

Defendants cite the case of *McCarthy v. Mutual Relief Assn.*, 81 Cal. 584, 588 [22 P. 933], for the proposition that "when a party relies upon expenditure upon the faith of a license as an estoppel," it "should not be trivial in amount." There the expenditure was only two or three dollars, and no additional costs were involved in the way of a continuing liability. But here the license rests on an entirely different basis, presenting not only plaintiffs' outlay of $27.50 as their share for one year's repair work on the road pursuant to their agreement with Foster, but further substantial expense for necessary maintenance in the succeeding year in accord with their understanding with defendants to assume the entire cost of the upkeep of the road. . . .

The record here shows that plaintiffs have only this one road available for access to their property; that its location and use by plaintiffs were facts open to defendants at the time of their acquisition of the servient tenement, and with such knowledge defendants made their agreement with plaintiffs for the maintenance and upkeep of the road to their mutual interest in servicing their respective pieces of property. Plaintiffs have performed their part of the agreement, and to allow defendants now to repudiate the parties' agreement would work an injustice that equity should not tolerate. [Citations omitted.] Like considerations have prevailed in cases where it has been held that "an oral agreement, if executed and based upon a valuable consideration, will convey an equitable title to the easement agreed upon" [citation omitted], and rights so created will be protected by injunction. [Citations omitted.]

The judgment is affirmed.

Notes and Questions

1. Compare the case of Anastaplo v. Radford, 14 Ill.2d 526, 153 N.E.2d 37 (1958), in which specific enforcement was granted the plaintiff who had purchased a motel property in reliance on an oral agreement by the vendor that he [p*927] would grant a written easement for a sewer over adjacent property. In the course of its opinion, the court said:

> Having found that a contract in fact existed, the next question presented is the effect of the Statute of Frauds. We conclude that it can have no application here. The statute is never available as a defense where there has been sufficient performance by one party in reliance upon the agreement. Thus an oral promise to convey land will be specifically enforced in equity, notwithstanding the Statute of Frauds, where the promisee has taken possession of the property, made valuable improvements and furnished consideration for the conveyance. [Citations omitted.] The same rule applies to an oral agreement granting a right of way where the agreement is made for a valuable consideration followed by possession and use.

Id. at 537–38, 153 N.E.2d at 43. Is anything more than this going on in *Cooke*?

See the earlier Illinois decision in St. Louis Nat'l Stockyards v. Wiggins Ferry Co., 112 Ill. 384, 396–97 (1884):

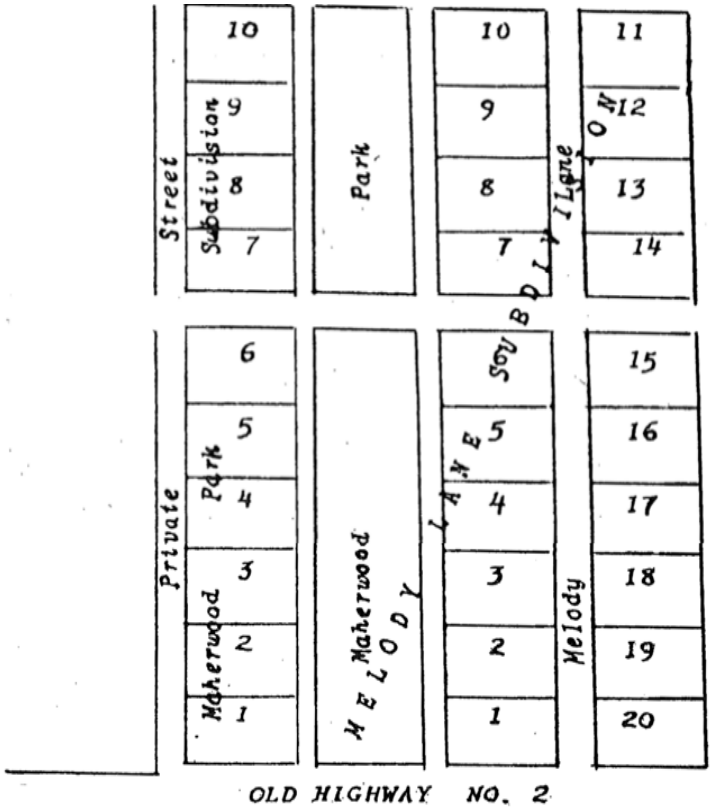
> The only material question in this suit [the court having found part performance inapplicable, there being no contract to grant an easement] . . . is, whether conceding, as we must, appellant entered appellee's premises and built the track in question under a mere parol license from the Wiggins Ferry Company, the latter has at any time been guilty of such conduct as to estop it from asserting its right to the possession of the land upon which the

track is built. . . . Now, it is clear that outside of the fact of revoking the license there is no ground for the claim that appellant has in any way been deceived or misled by appellee. Permission was given to build the track at the place it was built, and it was probably built about as both parties supposed it would be. . . . It was a plain, common business transaction. No compensation on the one hand was asked for the right of way, nor was any guaranty asked on the other side as to the length of time this right of way should be enjoyed. Probably both parties supposed the operation of the road would be mutually beneficial, and that that would be ample security against appellee revoking the license on the one hand, and against appellant removing its track on the other. If appellant saw proper, as it did, to enter upon appellee's land and spend money in constructing its track, upon a mere parol license, which, as [a] matter [of] law, it is conclusively presumed to have known was revocable at the pleasure of appellee, it was its own folly.

Under what circumstances is reliance on a license reasonable? Was Cooke's reliance reasonable?

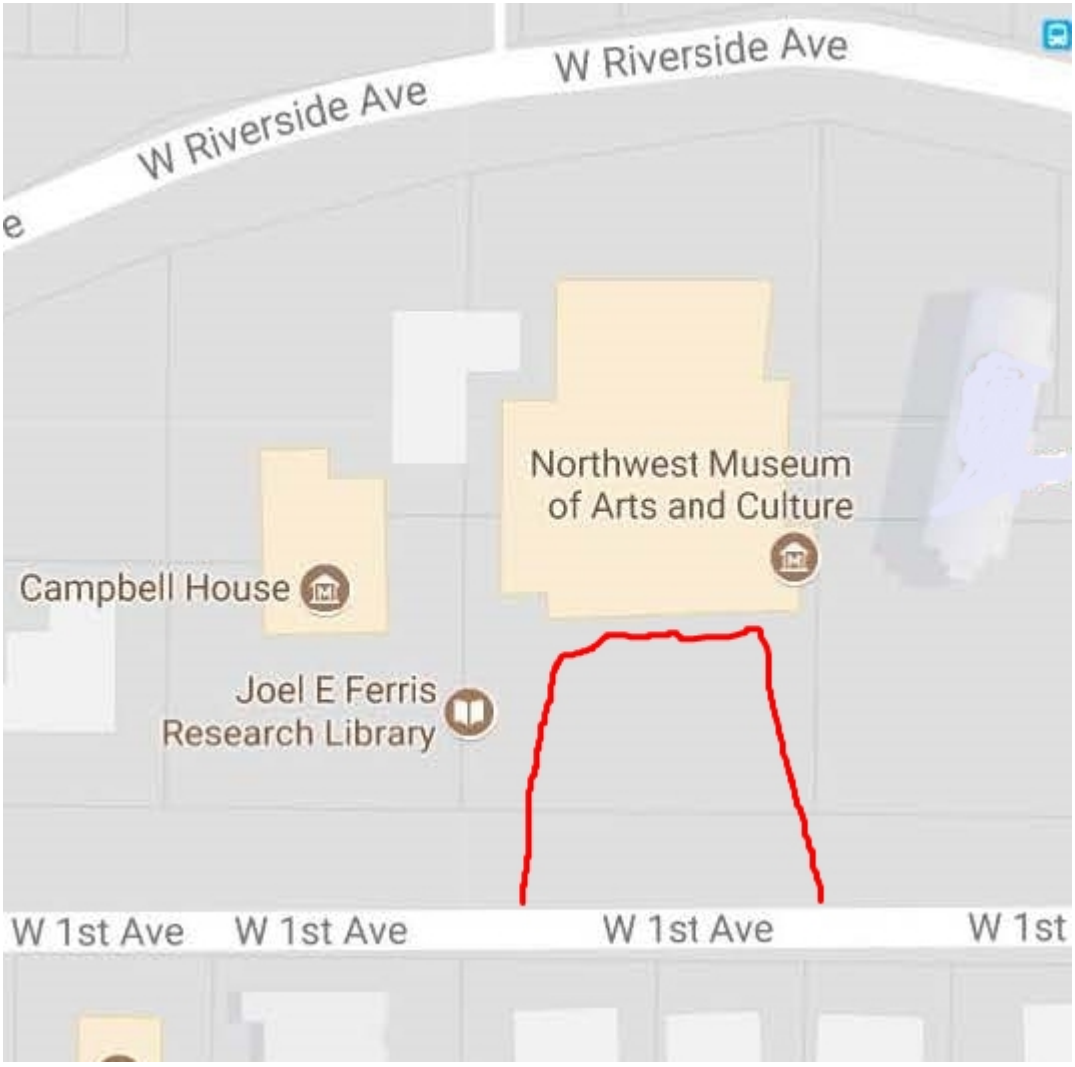
2. If a license is irrevocable, is it assignable? Does it have all the attributes of an easement? *Cf.* Industrial Disposal Corp. of Am. v. City of East Chicago, 407 N.E.2d 1203 (Ind.Ct.App.1980); Allee v. Kirk, 602 S.W.2d 922 (Mo.Ct.App.1980). [p*954]

3. The following is a plat filed in 1958 with regard to land that is now in Devil's Lake, North Dakota. The developer, Howard Maher, having filed the plat, and having, allegedly, made representations to the lot purchasers in both the Maherwook Park Subdivision and the Melody Lane Subdivision that Maherwood Park would remain available as a park for the residents of the subdivisions, then sold it to two men who were planning to develop the park and to exclude the residents of the subdivisions from it. The residents sued and obtained a permanent injunction. Putnam v. Dickinson, 142 N.W.2d 111 (N. Dak. 1966).



Is the doctrine of *Cooke v. Ramponi* responsible for the result in this case?

4. At the time that the case was decided the site of what is now the Northwest Museum of Arts and Culture in Spokane, Washington, was occupied by a large Victorian house that had been converted into apartments. Slightly to the south of what is marked on the map as the Joel E. Ferris Research Library was the former carriage house of the main house that had also been converted into apartments. The property had orginally been in common ownership, and both buildings were served by a horse-shoe shaped driveway, roughly where the line has been drawn into the image. At some point the property of the main house and that of the carriage house were divided, cutting the main house off from access to West 1st Avenue. The language of the deeds was not sufficient to create an easement in favor of the property of the main house over the property of the carriage house. The main house did have access in the back to West Riverside Avenue, but the land falls off very sharply in the rear, too sharply to install a driveway that automobiles could use. It was unclear from the history of the title whether the original owner of the property had retained the property of the main house when the property was divided or whether he had retained the property of the carriage house. On these facts, the court held that the owner of the main house had an implied easement to use the driveway to reach his property from 1st Avenue. Adams v. Cullen, 44 Wash. 2d 502, 268 P.2d 451 (1954).



Two doctrines were involved here: (1) easements implied from a 'pre-existing quasi-easement', and (2) easements implied by 'neccessity'. It is sometimes said that an easement will be implied by necessity in the situation where the owner who is dividing the property retains what will become the dominant tenement only if it is 'strictly necessary'. If the owner retains the servient tenement, however, the implication will occur if the easement is 'reasonably necessary'. Can you see how the court used, and altered, these two doctrines to reach the result that it did?

B. PROMISES CONCERNING LAND

1. Introduction

A and *B*, the neighboring owners discussed at the beginning of this section, p. S396 *supra*, conclude an agreement in which each promises for himself and all subsequent owners that no commercial enterprise will be conducted on their land and that the properties will be maintained in a neat and well-groomed condition. Do we have mutual easements? Similar language of promise can create an easement; *see Waldrop v. Town of Brevard*, *supra*, p. S402; *cf.* the introduction to that case, p. 402. But the subject matter of this agreement would in many, if not most, American jurisdictions prevent such a result. *See ibid.* Does it accomplish an effective adjustment nonetheless? (Recall that we mean by this more than an enforceable contract between *A* and *B*; *see* p. S397 *supra*.) Very likely, assuming *A* and *B* have done things properly, it does.

Actually, most such agreements, these days, are created for people like *A* and *B* by a real estate developer, *O*. With a small subdivision *O* may insert the full set of covenants in his deeds to *A* and *B*, but in a development of any scale the restrictions are likely to be so extensive they will be recorded separately and then merely incorporated by reference in *O*'s deeds to the original buyers. *See generally* R. NATELSON, LAW OF PROPERTY OWNERS ASSOCIATIONS (1989 & Supp.1990). The filing of the restrictions alone does not give them effect. *See* Parker v. Delcoure, 455 S.W.2d 339 (Tex.Civ.App.1970) (holding that the owner of a subdivision can amend recorded restrictions so long as he has not yet sold any of the lots).

To avoid confusion, let us reemphasize that we shall not here be concerned with enforcement of a promise concerning land by the promisee against the promisor. In such cases general principles of contract law dictate the outcome. Our attention shall be focused on those special rules that come into play when it is a successor to the original promisor against whom enforcement is sought, or someone other than the immediate promisee is seeking enforcement, or both. (In other and more traditional words, the circumstances under which the burdens and benefits of such a covenant "run.")

At the time these special rules arose, the common law did not generally permit assignment of contract rights or enforcement of contractual duties against one other than the promisor. To the extent contract doctrine has expanded in those respects, as it surely has, it may no longer be necessary to view covenants of the sort considered here as attaching to particular interests in land. Consequently, another useful question to carry along through these materials is: Can enforcement be justified in this instance without [p*955] going beyond standard contract doctrine, including, now, assignment and third party beneficiary theory?

2. Enforcement Against a Subsequent Owner: "The Covenants and Restrictions . . . Shall Run with and Bind the Land"

Spencer's Case, 5 Co.Rep. 16a, 77 Eng.Rep. 72 (K.B.1583) has for centuries been regarded as the fountainhead of the Anglo-American law of real covenants, covenants which run with the land, and the source of a quite rigid set of rules. The running of the benefits of a covenant was well established prior to *Spencer's Case*. Title covenants were the earliest example, but Pakenham's Case, Y.B. Hil. 42 Edw. 3, f.3, pl.14 (1368) extended the principle to other types of

covenants. *See* A. SIMPSON, HISTORY OF THE LAND LAW 115, 140 (2d ed.1986). Hence, the importance of *Spencer's Case* is limited to the burden side.

Three rules governing enforcement at law against a successor to the covenantor are commonly attributed to *Spencer's Case*:

(a) The covenantor must have intended that his successor be bound, and where the covenant concerns something not yet in existence that intent must be shown by an explicit reference to "assigns."

(b) The covenant must "touch and concern" the premises.

(c) There must be privity of estate.

The present status of these rules is the subject of the following text.

1. *Intent*. Where the subject of the covenant is in existence no particular formula must be used to manifest the covenantor's intent that the obligation pass to his successors. Indeed, courts will infer the intent from the nature of the covenant, the parties' relationship or other aspects of the original transaction.

Where the promise concerns something not "in esse" the first proposition in *Spencer's Case* may, in some states, still lurk as a trap for the sloppy draftsman. *See*, *e.g.*, Marin County Hosp.Dist. v. Cicurel, 154 Cal.App.2d 294, 316 P.2d 32 (1957) *See also* Note, *Covenants Running With the Land: The* In Esse *Requirement*, 28 BAYLOR L.REV. 109 (1976). However, in many, perhaps most, jurisdictions the proposition is no longer followed, except where it is required by statute (*see*, *e.g.*, CAL.CIV.CODE § 1464 (West 1982)). *See* Stoebuck, *Running Covenants: An Analytical Primer*, 52 WASH.L.REV. 861, 874 (1977). In England the rule has been upset by statute, Law of Property Act, 15 Geo. 5, c.20, § 79(1) (1925).

Related to intent is the question of formality. It is pretty clear that at common law for a covenant to run at law it had to be in writing and under seal. In the large number of American states which have statutes reducing or eliminating the distinction between sealed and unsealed instruments, it is sufficient that the covenant be in writing and signed by the covenantor. *See*, *e.g.*, Atlanta, K. & N.Ry. v. McKinney, 124 Ga. 929, 53 S.E. 701 (1906). But what if it is not signed by the covenantor? What if the covenant is incorporated in a deed which is signed by the grantor but not the grantee-covenantor (a deed poll rather than an indenture, *see* p. S166 *supra*)? The grantee's promise is evidenced only by acceptance of the deed. In most but apparently not all jurisdictions, acceptance of a deed with covenants is treated as the equivalent of signing. *See generally* 2 A.L.P. § 9.9; Stoebuck, *supra*, at 867–68; p. S451 and n.3 *infra*. [p*956]

2. *Touch and Concern*. The second requirement of *Spencer's Case*, that the covenant must "touch or concern" the premises, *appears* to have greater continued vitality. With leasehold covenants in England it has been, by statute, reworked into a requirement that the covenant have "reference to the subject matter" of the lease. Law of Property Act, 15 Geo. 5, c. 20, §§ 141, 142 (1925). In this country scholars and courts have repeatedly sought, without noteworthy success, to elucidate the test. The *First Restatement*'s attempt is found in section 537:

> The successors in title to land respecting the use of which the owner has made a promise can be bound as promisors only if
>
> (a) the performance of the promise will benefit the promisee or other beneficiary of the promise in the physical use or enjoyment of the land possessed by him, or
>
> (b) the consummation of the transaction of which the promise is a part will operate to the benefit and is for the benefit of the promisor in the physical use or enjoyment of land possessed by him,

> and the burden on the land of the promisor bears a reasonable relation to the benefit received by the person benefited.

RESTATEMENT OF PROPERTY § 537 (1944).

Another much cited formulation is to be found in C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH LAND (2d ed.1947) at 97:

> If the promisor's legal relations in respect to the land in question are lessened—his legal interest as owner rendered less valuable by the promise—the burden of the covenant touches or concerns that land . . . .

But Clark precedes this with the warning that: "It has been found impossible to state any absolute tests to determine what covenants touch and concern land and what do not." *Id*. at 96.

There is an important difference between the *Restatement* and Judge Clark's statement. According to the former (RESTATEMENT OF PROPERTY § 537 comment c (1944)), but emphatically not the latter (C. CLARK, COVENANTS AND OTHER INTERESTS WHICH RUN WITH LAND 209–14, 217–26 (2d ed.1947)) for the burden to run both the burden and the benefit of a covenant must "touch and concern." This means, at a minimum, that according the *Restatement* the benefit of a covenant may not be held in gross. There is support in the cases for both the *Clark* and the *Restatement* positions. *Compare* Orenberg v. Johnston, 269 Mass. 312, 168 N.E. 794 (1929) (burden does not run where benefit was personal) *with* Ball v. Rio Grande Canal Co., 256 S.W. 678 (Tex.Civ.App.1923) (promise to pay irrigation company at specified rate runs with the land).

Despite all this attention the requirement does not any longer seem a serious practical obstacle in most jurisdictions. Whatever their formulation nearly all contemporary decisions find that covenants intended to run do "touch and concern" the land. *See*, *e.g*., Boston & M.R.R. v. Construction Mach.Corp., 346 Mass. 513, 194 N.E.2d 395 (1963) (conveyance by railroad containing covenant that grantee, its successors and assigns would light platforms, ramps, and access ways of grantor and clear away ice and snow); Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 390 N.E.2d 243 (1979) (covenant restricting competition).

RESTATEMENT (THIRD) OF PROPERTY—SERVITUDES § 3.1 (Tent.Draft 1991) provides: "A servitude meeting the requirements of Chapter 2 [concerning formalities of writing, etc.] is valid unless the arrangement it purports to implement infringes a constitutionally protected right, contravenes a statute [p*957] or governmental regulation, or violates public policy." Lest one think that the "touch-and-concern" requirement incorporates "public policy" section 3.2 provides: "Neither the burden nor the benefit of a covenant is required to touch or concern land in order for the covenant to be valid as a servitude. . . ."

3. *Privity*. As Powell notes of *Spencer's Case*.

> The case said that since "privity of estate" existed, the covenant could devolve. It was true on the facts of this case both that the promisor and promisee stood in a tenurial relationship with each other, and that their respective successors had simultaneously existing interests in the same land. Which of these two facts connoted to the court the existence of "privity of estate," remained unclear. Two centuries later it was the accepted view that the privity of estate present in this case had been the tenurial relation between the original promisor and promisee [citing Webb v. Russell, 3 T.R. 393, 100 Eng.Rep. 639 (1789)].

5 R. POWELL, REAL PROPERTY ¶ 674, at 172 (P. Rohan ed.1980), *c.f.*, *id.*, ¶¶670[2], 673[1],[2] (P. Ronan, ed.1989).

In discussing "privity" a number of writers have found it useful to distinguish between the "privity" required between the original promisor and promisee, *horizontal privity*, and the

"privity" required between the original promisor and his successor, *vertical privity*. The point of the distinction is that a court denying enforcement of a covenant because of lack of privity of estate may be speaking of the circumstances of the original transaction between promisor and promisee or the subsequent relationship between promisor and successor. It is important to know which.

There is little disagreement among authorities about the requisite vertical privity. The *Restatement*'s position is generally followed:

> § 535. *Privity as Between Promisor and Successor*. The successors in title to land respecting the use of which the owner has made a promise are not bound as promisors upon the promise unless by their succession they hold
>
> (a) the estate or interest held by the promisor at the time the promise was made, or
>
> (b) an estate or interest corresponding in duration to the estate or interest held by the promisor at that time.

This means that a lessee is not bound in law by the promise of a landlord who holds in fee simple or a subtenant by the covenants in the original lease. *See, e.g.*, Amco Trust, Inc. v. Naylor, 159 Tex. 146, 317 S.W.2d 47 (1958); *see generally* DKM3, pp. 691–94.

The substantial controversy which surrounds privity concerns the horizontal kind. There are several distinct views about what property relationship must exist between promisor and promisee. There is the strict English position described by Powell which effectively limits the running of covenants to those embodied in the conveyance of a life estate or a leasehold. Traces of it can be found in several early American decisions especially where affirmative covenants were involved. *See, e.g.*, Tardy v. Creasy, 81 Va. 553 (1886). Such a tight view of privity may, in fact, still survive in a few jurisdictions. *See* McIntosh v. Vail, 126 W.Va. 395, 28 S.E.2d 607 (1943).

The alternative reading of *Spencer's Case* which Powell suggests was adopted in Massachusetts and has become known as the Massachusetts doctrine of privity. *See* Morse v. Aldrich, 36 Mass. 449 (1837); Hurd v. Curtis, 36 Mass. 459 (1837). This is in effect a more liberal view than the [p*958] first for it is satisfied by all cases meeting the tenurial relation test plus situations where the promisor or promisee holds an easement.

However, in most states the privity test is more lenient still. The most extreme view is that espoused by Holmes:

> According to the general opinion there must be privity of estate between the covenantor and covenantee . . . in order to bind the assigns of the covenantor. Some have supposed this privity to be tenure; some, an interest of the covenantee in the land of the covenantor; and so on. The first notion is false, the second misleading, and the proposition to which they are applied is unfounded. Privity of estate, as used in connection with covenants at common law, does not mean tenure or easement; it means succession to a title. *It is never necessary between covenantor and covenantee* . . . .

O. HOLMES, THE COMMON LAW 404 (1881) (emphasis added). Judge Clark's position is similar; he would require no horizontal, but only vertical privity. C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH LAND 111–37 (2d ed.1947). At least three states are to be found in this camp. *See* Mueller v. Bankers Trust Co., 262 Mich. 53, 247 N.W. 103 (1933); Pelser v. Gingold, 214 Minn. 281, 8 N.W.2d 36 (1943); Horn v. Miller, 136 Pa. 640, 20 A. 706 (1890).

The *First Restatement* stakes out an intermediate position finding the requisite horizontal privity in all cases satisfying the Massachusetts test plus those in which the covenant accompanies the transfer of an interest between the covenantor and covenantee. This, of course,

permits a covenant contained in the grant of a fee simple to run. This view can find support in numerous decisions. *See* Hall v. Risley, 188 Or. 69, 213 P.2d 818 (1950) ("Ordinarily a covenant may run with the land only when there is a substituting privity of estate between the covenantor and covenantee, that is, when the land itself, or some estate or interest therein . . . is transferred.").

Of the three rules limiting the running of covenants at law this last—privity—has received the most criticism from commentators. Judge Clark, whose position on privity has already been noted, considered any more rigid requirement a "barren formality." C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH LAND 117 (2d ed.1947). Professor Powell comments:

> Ultimately the decision to continue the prerequisite of privity in a substantial form (as did the Restatement) or to eliminate it by diluting its content (as Judge Clark advocated) depends on the decision of the question of social value. If one believes these burdens to be generally objectionable, since they impose restrictions on persons who never made a promise, and since they restrict the free use and alienability of land, the continuance of a prerequisite of privity will lessen their importance. If, on the other hand, one believes that these burdens generally serve socially useful ends, and aid rather than hinder the alienability of land, the result will be a readiness to minimize or to emasculate the prerequisite of privity, so that more can run as to burden.

5 R. POWELL, REAL PROPERTY ¶ 673[2], at 60–76 (P. Rohan ed.1989).

He also points out in conclusion: "Under either the Restatement approach, or Judge Clark's approach, most of the promises which have been involved in litigation sufficiently meet the claimed surviving prerequisites of privity to permit their devolution . . . ." *Id*.

RESTATEMENT (THIRD) OF PROPERTY—SERVITUDES § 2.4 (Tent.Draft 1989) provides: "No privity relationship between the parties is necessary to create a servitude." The comment explains: [p*959]

> . . .Application of the horizontal privity requirement prevents enforcement at law of covenants entered into between neighbors and between other parties who do not transfer or share some other interest in the land. The rule can easily be circumvented by conveyance to a strawperson who imposes the covenant in the reconveyance. Since the rule serves no necessary purpose and simply acts as a trap for the poorly represented, it has been abandoned. . . .

Id. comment b. (Whether and in what form the new *Restatement* will retain the *vertical* privity requirement is unclear.)

Before committing yourself to a definite position on the desirability of retaining any privity requirement, including the generally accepted test of vertical privity, or, for that matter, either of the first two rules, you ought probably to consider the different set of principles which governs enforcement of covenants in equity. *Tulk v. Moxhay*, which follows, introduces them.

TULK v. MOXHAY

Court of Chancery
2 Ph. 774, 41 Eng.Rep. 1143 (1848)

In the year 1808 the Plaintiff, being then the owner in fee of the vacant piece of ground in Leicester Square, as well as of several of the houses forming the Square, sold the piece of ground by the description of "Leicester Square garden or pleasure ground, with the equestrian statue then standing in the centre thereof, and the iron railing and stone work round the same," to one Elms in fee: and the deed of conveyance contained a covenant by Elms, for himself, his heirs, and assigns with the Plaintiff, his heirs, executors, and administrators, "that Elms, his heirs, and assigns should, and would from time to time, and at all times thereafter at his and their own costs and charges, keep and maintain the said piece of ground and square garden, and the iron railing round

the same in its then form, and in sufficient and proper repair as a square garden and pleasure ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that it should be lawful for the inhabitants of Leicester Square, tenants of the Plaintiff, on payment of a reasonable rent for the same, to have keys at their own expense and the privilege of admission therewith at any time or times into the said square garden and pleasure ground."

The piece of land so conveyed passed by divers mesne conveyances into the hands of the Defendant, whose purchase deed contained no similar covenant with his vendor: but he admitted that he had purchased with notice of the covenant in the deed of 1808.

The Defendant having manifested an intention to alter the character of the square garden, and asserted a right, if he thought fit, to build upon it, the Plaintiff, who still remained owner of several houses in the square, filed this bill for an injunction; and an injunction was granted by the Master of the Rolls to restrain the Defendant from converting or using the piece of ground and square garden, and the iron railing round the same, to or for any other purpose than as a square garden and pleasure ground in an open state, and uncovered with buildings.

On a motion, now made, to discharge that order . . ..

THE LORD CHANCELLOR [COTTENHAM] . . .. That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using the land [p*960] purchased in a particular way, is what I never knew disputed. Here there is no question about the contract: the owner of certain houses in the square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a square garden. And it is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without the Court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said that, the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased. . . .

I think the cases cited before the Vice-Chancellor and this decision of the Master of the Rolls perfectly right, and, therefore, that this motion must be refused, with costs.

Notes and Questions

1. It is not said in so many words but for reasons that should by now be clear to you the covenant involved in *Tulk v. Moxhay* could not have been enforced in a damage action; under the English rules that evolved from *Spencer's Case* it could not run at law. It lacked the requisite horizontal privity. Do you also see why it did not create an easement? *See* pp. S408–409 *supra*. The case thus represents the birth of a more liberal set of rules governing enforcement of promises concerning land *in equity* against the promisor's successor. (And the case continues to provoke comment. *E.g.*, George, *Tulk v. Moxhay Restored—to Its Historical Context*, 12 LIVERPOOL L.REV. 173 (1990); Griffith, *Tulk v. Moxhay Reclarified*, CONV. & PROP.LAW. 29

(1983); Gardner, *The Proprietary Effect of Contractual Obligations under* Tulk *v.* Moxhay *and* De Mattos *v.* Gibson, 98 LAW Q.REV. 279 (1982).)

2. Haywood v. Brunswick Bldg. Soc'y, 8 Q.B.D. 403 (C.A.1881), limited this new development to restrictive covenants. That case denied enforcement of an affirmative covenant, a covenant to repair, on the ground that privity of estate was not present and that with such covenants equity ought not to enforce where the law courts would not. The distinction, not always an easy one to apply, is between promises which limit the use which can be made of the affected property and those which require affirmative conduct—building or repairing something, providing a service, paying a sum of money. According to the *American Law of Property*, this restriction of *Tulk v. Moxhay* was passed over by many U.S. jurisdictions and specifically rejected by others. 2 A.L.P. § 9.36, at 438. But it was not totally ignored. *See* Furness v. Sinquett, 60 N.J. Super. 410, 159 A.2d 455 (1960). *But see* Petersen v. Beekmere, Inc., 117 N.J. Super. 155, 283 A.2d 911 (1971). *See also* Davidson Bros. v. D. Katz & Sons, Inc., [p*961] 121 N.J. 196, 579 A.2d 288 (1990) ("The time has come to cut the gordian knot that binds this state's jurisprudence regarding covenants running with the land. Rigid adherence to the 'touch and concern' test as a means of determining the enforceability of a restrictive covenant is not warranted. Reasonableness, not esoteric concepts of property law, should be the guiding inquiry into the validity of covenants at law."). Even in England certain types of affirmative covenants, sometimes referred to as "spurious easements" were enforced, promises to repair fences or private ways, for example. *See* C. GALE, THE LAW OF EASEMENTS 410 (12th ed.1950); 3 R. POWELL, REAL PROPERTY Ê 405, at 34–10 (P. Rohan ed.1989).

3. Is there anything comparable to law's "touch and concern" test in equity? The classic answer is furnished by Justice Holmes in Norcross v. James, 140 Mass. 188, 192, 2 N.E. 946, 949 (1885):

> . . . [E]quity will no more enforce every restriction that can be devised, than the common law will recognize as creating an easement every grant purporting to limit the use of land in favor of other land. The principle of policy applied to affirmative covenants applies also to negative ones. They must "touch or concern," or "extend to the support of the thing" conveyed. . . . Or, as it is said more broadly, new and unusual incidents cannot be attached to land, by way either of benefit or of burden. . . . [This] covenant [against competition] falls outside the limits of this rule . . ..

While the general proposition is still widely asserted, Holmes's conclusion that a covenant not to compete does not "touch and concern" the land has little following today. It has even been overruled in Massachusetts. Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 390 N.E.2d 243 (1979). Holmes's conclusion is also misleading in another way: It implies that the same "touch and concern" tests apply to both covenants enforceable at law and those enforceable in equity. For example, the *First Restatement*, which, as we noted *supra* p. S431, generally requires that both the burden and the benefit of the covenant touch and concern land for it to run at law, seems to require that only the burden touch and concern land for the burden of the covenant to run in equity. RESTATEMENT OF PROPERTY § 539 comment *k* (1944). It would thus permit personal benefits to be enforced in equity.

4. The holding of *Tulk* is clear enough, but what is its doctrinal foundation? According to a now-classic article, Reno, *The Enforcement of Equitable Servitudes in Land: Part 1*, 28 VA.L.REV. 951, 972–78 (1942), there are two possibilities: (1) The case may be viewed as an extension of the notion of Lumley v. Wagner, 1 DeG.M. & G. 604 (Ch.App.1852), that equity will impose a duty upon all third persons with notice to refrain from conduct which might deprive the promisee of his equitable right to specific performance of his contract. Normally this duty is a negative one only, but someone who purchases the land with notice of the covenant has become the only person who can perform the contract. The generalized duty not to interfere with others'

contracts becomes in the purchaser with notice a specific duty to perform the covenant. (2) The other theory explains the enforcement of restrictive equitable servitudes as an extension of the legal doctrine of negative easements to new situations. Few if any courts follow either the "contract" theory or the "property" theory of equitable servitudes consistently, but the general view that one takes of the theories may affect results. Thus, the fact that the English courts came not to apply *Tulk* to affirmative covenants and, as we shall see *infra*, p. S444, did not allow the benefit of equitable servitudes to be held in gross, may reflect [p*962] a "property" theory of equitable servitudes. In England, as we have seen *supra*, p. S418, the benefit of an easement may not be held in gross, and courts throughout the Anglo-American world have had difficulty with enforcing easements that compel the holder of the burdened land to do something. *See* note 3, *supra*.

Other questions the answers to which might depend on whether one espoused a "contract" or a "property" theory of equitable servitudes are: (1) Is the original convenantor still bound on the contract after he or she has sold the land? (The original covenantor is bound as surety where the covenant is contained in a lease. *See* DKM3, p. 693. By and large, the original covenantor is not bound after he or she has conveyed away a fee estate. 2 A.L.P. § 9.18.) (2) What formalities must be followed in creating the covenant? (You will recall that the Statute of Frauds has different requirements for contracts concerning land and conveyances of interests in land. 2 A.L.P. § 9.25. In the case of the former most statutes require simply a "sufficient memorandum," which is generally thought to require less than what is required for a conveyance.) (3) If the land is taken by eminent domain, must the holder of the benefit of the servitude be compensated? (*See* p. S409 *supra*.) [p*969]

3.Enforcement by One Other Than the Promisee: "The Covenants and Restrictions . . . Shall inure to the Benefit of and Be Enforceable by the Association, Any Owner, Their Respective Heirs, Successors, and Assigns"

We now turn to the other side of the promise, the benefit side. Assuming the existence of restrictions capable of binding subsequent holders of the covered property, it becomes important to know who can enforce them. The covenantee surely can. (Or can he? *See* p. S445 *infra*.) But any number of alternative plaintiffs may come forward: a municipality which required the restrictions as a condition for subdivision approval or rezoning, other owners in the subdivision (including those owning lots conveyed by the developer before or subsequent to the lot in question), a homeowners' association purporting to represent the neighbors collectively, or some other party designated in the original declaration. The setting for the question need not be litigation. Instead the owner burdened by a particular restriction, desiring its removal and willing to pay, may be inquiring, "With whom must I bargain?"

CHARPING v. J.P. SCURRY & CO.
Court of Appeals of South Carolina
296 S.C. 312, 372 S.E.2d 120 (1988)

CURETON, J. This is an appeal from an order granting summary judgment to J.P. Scurry and Company, Inc., and dismissing the complaint [p*970] of William P. Charping with prejudice. The dispute involves real property. The issue is whether a restrictive covenant contained in a deed is a real or a personal covenant.

Mary Lemon Owens Townsend acquired title to two contiguous parcels of land in Columbia, South Carolina, during 1976. One parcel contained five unimproved lots and faced Forest Drive. The other parcel contained three lots with a residence and faced Stratford Road. The properties abutted along a part of their rear common boundary.

In 1980, Townsend sold the Forest Drive property containing the five lots to a partnership. The deed contained a restriction stating "[t]he above property is to be developed into a maximum