# EQUITABLE SERVITUDES--A RECENT CASE AND ITS IMPLICATIONS FOR THE ENFORCEMENT OF COVENANTS NOT TO COMPETE

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In 1962, a Massachusetts corporation, Ouellette & Sons, Inc., deeded part of a tract of land to certain trustees, covenanting "for itself, its successors and assigns" not to employ its remaining tract, which lay adjacent to that conveyed, for a use competitive with the use made of the transferred land.[1] The duration of the restriction was fifteen years. The trustees conveyed part of their land to Shell Oil Co., who, in reliance upon the covenants in the 1962 deed from Ouellette to the trustees, spent $100,000 in the construction of a gasoline service station. The land was subsequently sold by Shell to Stafac Inc., who leased it back to Shell. A year after the Shell station began operation, Ouellette granted to Mobil Oil Co., who had notice of the covenant in favor of Shell, an option to purchase part of its remaining land for the construction of a gasoline service station. In a suit in equity brought by Shell to enforce the restrictive covenants of the 1962 deed against Ouellette and Mobil, the trial court ruled against Shell. On appeal, *held,* affirmed. Where a grantor covenants for himself and his successors to refrain from using his land in a manner competitive with a use made by his grantee, such restrictions are "personal"; they do not create a covenant running with the land, and may not be enforced in equity by the lessee of a subsequent grantee against the grantor or his proposed transferee who has notice of the restriction. *Shell Oil Co. v. Henry Ouellette & Sons, Inc.,* 227 N.E.2d 509 (Mass. 1967).

Although the courts will not tolerate unreasonable restraints upon trade,[2] and frown upon restrictions imposed upon the free use of land,

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[1] The exact wording of the covenant is as follows:
> Grantor for itself, its successors and assigns covenants that the grantor's adjacent property . . . for a period of fifteen years after such recording will not be subject in whole or in part to any use or occupation which at the time such use or occupation is commenced is competitive with any of the following uses of the premises hereby conveyed: (a) a use then being made, or a use which shall have been made, within the six months prior thereto. Shell Oil Co. v. Henry Ouellette & Sons, Inc., 227 N.E.2d 509, 510 (Mass. 1967).

[2] Discussion as to when covenants not to compete are unenforceable because "unreasonable" in scope or duration has been omitted. For interesting remarks upon this subject see Hercules Powder Co. v. Continental Can Co., 196 Va. 935, 86 S.E.2d 128 (1955).

In addition, the scope of this note does not include a treatment of what are commonly referred to as "covenants in gross," but assumes the existence of dominant and servient tenements. It might be said in passing, however, that the absence of a servient tenement will not necessarily prevent the benefit of a covenant not

the great majority of jurisdictions enforce as an equitable servitude both the benefit and the burden of a covenant restricting business uses by and against those who succeed to the estates of the original covenantee and covenantor with notice of the restriction.[3] There are two primary

to compete from running to the successor in interest to the dominant estate. *See* National Union Bank v. Segur, 39 N.J.L. 173 (N.J. 1877); C. CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND 184 (2d ed. 1947) [hereinafter cited as CLARK]. Covenants where the benefit is in gross have also been equitably enforced against a successor to the servient tract. See Bald Eagle Val. Ry. v. Nittany Val. Ry., 171 Pa. 284, 33 A. 239 (1895) (the covenant by the owner of a land company to deal with a railroad was held enforceable against an assignee of the land company's estate); Folger v. Commissioner, 330 S.W.2d 106 (Ky. 1959), *rev'd on other grounds*, 350 S.W.2d 703 (Ky. 1961); Smith v. Gulf Ref. Co., 162 Ga. 191, 134 S.E. 446 (1926). In the latter two cases the courts went so far as to hold a promise to sell only the promisee's products on the premises, made by the owner of the servient tract, enforceable against the owner's vendee who took without notice of the covenant. This view is criticized in Note, 4 WIS. L. REV. 125 (1927).

This note assumes that the covenant not to compete is not in restraint of trade as that term is generally understood under the federal antitrust laws. For discussion of this aspect of covenants not to compete, *see* Tardy v. Creasy, 81 Va. 553, 59 Am. Rep. 676 (1886); RESTATEMENT OF CONTRACTS § 514 (1932); S. WILLISTON, CONTRACTS § 1637, at 4584-5 (Williston and Thompson rev. ed. 1936).

[3] Pavkovich v. Southern Pac. Ry., 150 Cal. 39, 87 P. 1097 (1906) (covenant prohibiting a quarry business); Dick v. Sears-Roebuck & Co., 115 Conn. 122, 160 A. 432 (1932) (covenant prohibiting operation of a retail furniture store) noted 11 CHI-KENT L. REV. 122 (1933); Wright v. Scratton, 13 Del. Ch. 402, 121 A. 69 (1923) (covenant prohibiting a garage business); Natural Prods. Co. v. Dolese Shepherd Co., 309 Ill. 230, 140 N.E. 840 (1923) (covenant prohibiting a quarry business) noted 18 ILL. L. REV. 326 (1923), 33 YALE L.J. 447 (1923); Frye v. Patridge, 82 Ill. 267 (1876) (covenant prohibiting the organization of a ferry boat landing); Clem v. Volentine, 155 Md. 19, 141 A. 710 (1928) (covenant prohibiting a general mercantile business); Watrous v. Allen, 57 Mich. 362, 24 N.W. 104 (1885) (covenant prohibiting a liquor business); Kreger Glass Co. v. Kreger, 49 S.W.2d 260 (Mo. App. 1932) (covenant prohibiting a glass business); Hodge v. Sloan, 107 N.Y. 244, 17 N.E. 335 (1887) (covenant prohibiting a sand business); Blackard v. Good, 207 Okla. 175, 248 P.2d 596 (1952) (covenant prohibiting animal hospital business); Weller v. Himmelreich, 57 Berks. 191 (Pa. Com. Pl. 1965) (covenant not to prepare and sell building stone); Hercules Powder Co. v. Continental Can Co., 196 Va. 935, 86 S.E.2d 128 (1955) (covenant prohibiting the manufacture of chemical or merchanical pulpwood); Oliver v. Hewitt, 191 Va. 163, 60 S.E.2d 1 (1950) (covenant prohibiting a grocery business); Huntley v. Stanchfield, 168 Wis. 119, 169 N.W. 276 (1918) (covenant prohibiting a hotel business); RESTATEMENT OF PROPERTY § 539 comment *k* (1944).

Promises not to organize a competing business have also been upheld where put in the form of a condition subsequent. In *Boughton v. Socony Mobil Oil Co.*, 231 Cal. App. 2d 188, 41 Cal. Rptr. 714 (1964), the grantor inserted a restriction in a deed stating that if the granted land were used for service station purposes before 1979 the title would revert to the grantor. The court held the condition subsequent enforceable against the grantee's transferee, stating:

> The single restriction is imposed, not personally on the plaintiffs restraining them from engaging or carrying on any profession, trade or business but, on the use of the land upon which they as grantees are barred merely from selling petroleum products, and then only for a limited period of time. *Id.* at 189, 41 Cal. Rptr. at 715.

To the same effect is *Los Angeles Land and Water Co. v. Kane*, 96 Cal. App. 418, 274 P. 380 (1929), where the land was to revert if used for the sale of crushed rock.

It is generally accepted that a covenant inserted in a lease, prohibiting the lessor-covenator from letting other land to tenants in competition with his lessee, is enforceable in equity against all who take the restricted premises with notice of the restriction. *See* Savon Gas Stations, Inc. v. Shell Oil Co., 309 F.2d 306 (4th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963); Carter v. Adler, 138 Cal. App. 2d 63, 291 P.2d 111 (1955); Gonzalez v. Reynolds, 34 N.M. 35, 275 P. 922 (1929).

doctrines of enforcement underlying the decisions: the contract theory and the equitable easement theory.[4] It is necessary to analyze the cases within the context of each theory, as the requisites necessary to bring the majority rule into operation will often differ depending upon the doctrine adopted.

Both the contract theory and the equitable easement theory originate from differing interpretations of the leading English case of *Tulk v. Moxhay*.[5] Under the contract theory, the restrictive agreement is

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*See also* Note, 8 ARIZ. L. REV. 390 (1967). In *Rental Dev. Corp. v. Lavery*, 304 F.2d 839 (9th Cir. 1962), the court, applying Arizona law, held that the lessee-covenantee or his assignee is entitled to recover damages against the lessor-covenantor or his successor for breach of the covenant. For a compilation of similar cases, see Annot., 97 A.L.R. 2d 1 (1961). It is submitted that where the restrictive covenant is limited in duration, *e.g.*, *Shell Oil Co. v. Henry Ouellette & Sons, Inc.*, where duration was fifteen years, there should be no differentiation between the enforcement of covenants made between owners in fee and landlord and tenant. This should be especially true where the covenant, because of notice, is classifiable as an equitable servitude rather than as a real covenant. In enforcing the former, the requirement of "privity of estate" between covenantor and covenantee or between either of them and their successors is immaterial. *See* note 15 *infra*. *See also* Reno, *The Enforcement of Equitable Servitudes in Land: Part I*, 28 VA. L. REV. 951, 967 (1942); 3 H. TIFFANY, REAL PROPERTY 445, 449 (3rd. ed. 1939), (points out that American courts have generally drawn no distinction between the enforcement of burdens in leases and in conveyances in fee).

[4] The equitable easement theory is the view adopted by the majority of American jurisdictions. 3 H. TIFFANY, REAL PROPERTY § 861, at 486 n.69 (3d ed. 1939). Although the contract and equitable easement theories are by far the most prominent, there are other less significant theories which have done little but add confusion to an already foggy area of the law. Some early cases indicated that equity merely extended the concept of real covenants running with the land. London & S.W. Ry. v. Grom, 20 Ch. D. 562 (1882). For a discussion of the confusion resulting from this view see Note, 14 VA. L. REV. 646 (1928). For a discussion of a theory entitled the "equitable principle of privity of conscience," see Abbott, *Covenants in a Lease Which Run with the Land*, 31 YALE L.J. 127, 131 (1921).

[5] 2 Ph. 774, 41 Eng. Rep. 1143 (1848). The case is often cited as the progenitor of the doctrine of equitable servitudes: that a covenant regarding the use of land may be enforceable in equity against one who takes with notice of the restriction, even though the covenant is "personal," *i.e.*, it does not "touch and concern" the land and, therefore, would be unenforceable at law as a real covenant running with the land. The statement giving rise to the *contract theory* is the following:

> 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 the vendor and with notice of which he purchased. 2 Ph. at 777, 41 Eng. Rep. at 1144.

The statement from which the *equitable easement theory* is derived appears later in the opinion:

> 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. 2 Ph. at 778, 41 Eng. Rep. at 1144.

*See also* Justice Cardozo's statement of the two theories in *Bristol v. Woodward*, 251 N.Y. 275, 287, 167 N.E. 441, 445-46 (1929); Pound, *Progress of the Law*, 33 HARV. L. REV. 813 (1920); CLARK at 171-77 (who favors the equitable easement theory); 3 H. TIFFANY, REAL PROPERTY 485-87 (3d ed. 1939) (who apparently favors the contract theory).

specifically enforceable in equity against the promiser, since it is concerned with land and the promisee is deemed to have no adequate remedy at law. Under the doctrine of the old English case of *Lumley v. Wagner*,[6] equity will impose a duty upon all third persons who have notice of the contract to refrain from conduct which will deprive the promisee of his right to specific performance of the contract. Therefore, any successor of the original promisor who takes from him with knowledge of the restriction will be required to refrain from violating it. The right of the promisee to specific performance is an equitable right in rem, assertable against all third persons having notice of the agreement.[7] If the promisor's successor has such notice, the right may then be enforced against him in an in personam action by the promisee.[8] Under the contract theory, the covenantee's successors are able to demand the benefit of the promise since both — the contract rights vested in the original convenantee and the in rem right against contractual interference — are deemed to be impliedly assigned to such successors with the transfer to them of the benefitted lands.[9] Under the equitable easement theory, a covenant by an owner of land that he will or will not use his land in a particular manner creates in the covenantee an equitable *property interest* in the burdened land. The particular burden or benefit imposed by the covenant attaches to the land as a real obligation and passes with it to all subsequent possessors who are not able to avail themselves of the defense of a bona fide purchaser without notice.[10]

Different legal consequences will often result from the application of the two different theories. For example, some jurisdictions adhering to the contract theory hold that a covenant respecting the use of land need not conform to the statute of frauds to be enforceable, since the contract creating the covenant is inoperative as a conveyance of any interest in the land itself.[11] Those jurisdictions adhering to the equitable easement theory, however, generally hold the statute of frauds applicable.[12] As is subsequently discussed, the enforcement of equitable

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[6] 1 De G.M. & G. 604 (Ch. App. 1852).

[7] Reno, *The Enforcement of Equitable Servitudes in Land: Part I*, 28 VA. L. REV. 951, 974 (1942) [hereinafter cited as Reno, Part I].

[8] *Id.*

[9] *Id.* at 975. *See also* Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 19 COL. L. REV. 177 (1919).

[10] Reno, Part I, at 977.

[11] Thornton v. Schobe, 79 Colo. 25, 243 P. 617 (1925); Hall v. Solomon, 61 Conn. 476, 23 A. 876 (1892); Pratte v. Balatsos, 99 N.H. 430, 113 A.2d 482 (1955); Johnsons v. Mt. Baker Presbyterian Church, 113 Wash. 458, 194 P. 536 (1920). *See also* orbiter dicta of Judge Cardozo in *Bristol v. Woodward*, 251 N.Y. 275, 287, 167 N.E. 441, 445 (1929). These decisions either failed to discuss that provision of the statute which relates to contracts the performance of which will take more than one year or were rendered by jurisdictions which hold that their one-year provisions have no application to agreements in any way involving interests in realty.

[12] Sprague v. Kimble, 213 Mass. 380, 100 N.E. 622 (1913); Frisch v. Rutgers Village, 8 N.J. Super. 392, 73 A.2d 83 (1950); Dunbar Camps v. Amster, 279 App.

servitudes is predicated upon knowledge of the restriction being imparted to the *covenantor's* successor. Though knowledge of the benefit on the part of the *covenantee's* successor is immaterial for enforcement under the equitable easement theory, at least one court, adhering to the contract theory, has held such knowledge mandatory for enforcement.[13] A court following the contract theory will not permit an adverse possessor of the dominant tenement to enforce the benefit of the covenant against the owner of the servient tenement. "Under no possible stretch of the imagination, can the disseisee be said to have impliedly assigned his contract rights against the owner of the burdened land to such a disseisor."[14]

In all jurisdictions, and under either theory, before a covenant not to compete will be enforced as an equitable servitude various require-

Div. 605, 107 N.Y.S.2d 441 (1951); Turner v. Glenn, 220 N.C. 620, 18 S.E.2d 197 (1942); Cottrell v. Nurnberger, 131 W. Va. 391, 47 S.E.2d 454 (1948); RESTATEMENT OF PROPERTY § 522 (1944). This view is well illustrated in *Miller v. Babb*, 263 S.W. 253 (Tex. 1924), where the court held that an oral agreement imposing a restriction upon the use of realty constitutes a negative easement which is an interest in land and is therefore within that part of the statute of frauds pertinent to *contracts for the sale of realty*. *See also*, McBride v. Freeman, 191 Cal. 152, 215 P. 678 (1923); Werner v. Graham, 181 Cal. 174, 183 P. 945 (1919). Even though Arizona has adopted neither the equitable easement nor the contract theory, it would seem that Arizona would nevertheless hold restrictive covenants within the provisions of its statute of frauds on the basis of these Texas and California decisions. The Arizona statute of frauds, ARIZ. REV. STAT. ANN. § 44-101 (1956), was adopted from these two jurisdictions. *See* CAL. CIV. CODE § 1624 (West 1954); TEX. CIV. STAT. § 3995 (Vernon's 1966). Moreover, Arizona would probably hold a restrictive covenant within the one-year section of its Statute of Frauds, ARIZ. REV. STAT. ANN. § 44-101(5) (1956). *See Long v. Cramer Meat Packing Co.*, 155 Cal. 402, 101 P. 297 (1909), where a restrictive covenant was held to be governed by California's one-year section.

[13] Judd v. Robinson, 41 Colo. 222, 92 P. 724 (1907).

[14] Reno, *The Enforcement of Equitable Servitudes in Land: Part II*, 28 VA. L. REV. 1067, 1069 (1942) hereinafter cited as Reno, *Part II*.

In addition to the different legal consequences mentioned in the text, two others might be noted. Pennsylvania apparently has held that under the equitable easement theory the original covenantor is no longer liable on his promise after he conveys his land to another. Goldberg v. Nicola, 319 Pa. 183, 185, 178 A. 809, 811 (1935). *See also* Reno, *Part I* at 977. The view of the Pennsylvania court is generally not followed, most courts applying no such hard and fast rule. These courts hold that whether the original covenantor remains liable upon his covenant after transfering his land to another depends upon the intent manifested by the original parties at the time they made the covenant. City of Glendale v. Barclay, 94 Ariz. 358, 385 P.2d 230 (1963); Bolles v. Pecos Irr. Co., 23 N.M. 32, 167 P. 280 (1917); RESTATEMENT OF PROPERTY § 538, comment *c* (1944). In addition to the language of the covenant, two factors regarded as important indicators of this intent are the covenantee's reliance upon the covenantor's credit and whether the promised act can be performed independently of possession of the land. However, the fact that the promised act can only be performed by the party in possession does not inevitably lead to the conclusion that the original parties must have intended to release the covenantor from liability when he parts with his land. City of Glendale v. Barclay, 94 Ariz. 358, 385 P.2d 230 (1963).

England, which adheres to the equitable easement theory, requires a dominant tenement before the benefit of a covenant respecting the use of land can be enforced as an equitable servitude. The English rationale is that since a legal easement requires a dominat tenement, so does an "equitable easement." 3 H. TIFFANY, REAL PROPERTY § 861, at 486-87 (3d ed. 1939). American courts have enforced such covenants without a dominant tract. *See* note 2 *supra*.

ments must be found to exist.[15] The most important is that of notice: the party against whom enforcement is sought, *i.e.*, the covenantor's transferee, must have notice, either actual or constructive, of the restrictive use.[16]

A second requirement is that both the original covenantor and covenantee must evince an intention that the restriction bind the land, not merely themselves as individuals; and the benefit and the burden must be intended to move to their transferees.[17] This intent is to be ascertained from the language of the deed itself, construed in conjunction with the circumstances existing at the time it was executed.[18] The required intent is clearly shown where the agreement itself expressly designates the land with which the benefit or burden is to run.[19] The use of the phrase "and assigns" is generally taken as a very persuasive indicator of intent to bind transferees.[20] A few cases have used language indicating a presumption in favor of an intent that the covenant run where it is of the type that "touches and concerns" the land and the covenantee owns land adjoining the covenantor.[21] This is not the prevailing view, since most courts consider the covenant personal unless the contrary is shown.[22] The underlying rationale of the latter view is

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[15] The concept of "privity of estate," which has injected much confusion into the law regarding the enforcement of *real* covenants, is not a necessary requirement for the enforcement of equitable servitudes. *Meade v. Dennistone*, 173 Md. 295, 196 A. 330 (1938); Cheatham v. Taylor, 148 Va. 26, 138 S.E. 545 (1927). *But see* dicta in Ouellette at 227 N.E.2d 512.

[16] Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143 (1843). In *Murphey v. Gray*, 84 Ariz. 299, 327 P.2d 751 (1958), it was stated:

> A purchaser of land with notice of a right or interest in it existing by agreement is bound to do that which his grantor has agreed because it would be unconscionable and inequitable for him to violate or disregard a valid agreement in regard to the estate of which he had notice when he became the purchaser. *Id.* at 305, 327 P.2d at 755.

Concerning constructive notice, the successor to the servient estate is held accountable only for what appears in his "chain of title." *See* Annot., 23 A.L.R.2d 520 (1950).

[17] Murphey v. Gray, 84 Ariz. 299, 327 P.2d 751 (1958); O'Malley v. Central Methodist Church, 67 Ariz. 245, 194 P.2d 444 (1948); Weiner v. Graham, 181 Cal. 174, 183 P. 945 (1919).

[18] O'Malley v. Central Methodist Church, 67 Ariz. 245, 194 P.2d 444 (1948).

[19] Cheeseboro v. Moers, 233 N.Y. 75, 134 N.E. 842 (1922). In *Murphey v. Gray*, 84 Ariz. 299, 306, 327 P.2d 751, 755 (1958), the following provision in a deed was held to manifest the requisite intent: "Restrictions shall continue and remain in full force and effect at all times as against the owner of said lots, however title thereto may be acquired . . . ."

[20] Ball v. Milleken, 31 R.I. 36, 76 A. 789 (1910). However, even though the use of the phrase is persuasive, its absence is not conclusive of lack of intent. Berardi v. Ohio Turnpike Comm'n, 1 Ohio App. 2d 365, 205 N.E.2d 23 (1965); Metropolitan Inv. Co. v. Sine, 14 Utah 2d 36, 376 P.2d 940 (1962). *But see* Fitzimmons v. South Realty Corp., 162 Md. 108, 159 A. 111 (1932) (absence of the phrase was strongly indicative of an intent that the covenant be merely personal).

[21] *E.g.*, Weil v. Hill, 193 Ala. 407, 69 So. 438 (1915); Ball v. Milleken, 31 R.I. 36, 76 A. 789 (1910).

[22] *E.g.*, Berryman v. Hotel Savoy Co., 160 Cal. 559, 117 P. 677 (1911); McNichol v. Townsend, 73 N.J. Eq. 276, 67 A. 938 (1907).

that restrictions upon land impede alienability and, therefore, are not to be encouraged.[23]

The greatest confusion in the law of equitable servitudes arises from those jurisdictions which, in addition to requiring an intent that the restriction affect the land and run to subsequent transferees, demand that the covenant "touch and concern" the land. This characteristic has always been regarded as essential for the enforcement of real covenants that run with the land at law regardless of notice.[24] In those jurisdictions adhering to the "equitable easement" theory, perhaps some logical basis can be laid for the "touch and concern" requirement.[25] Any restrictive easement, "equitable" or otherwise, necessitates some relation between the restriction and the land itself. The requirement of "touch and concern" would be a legitimate test to demonstrate this relationship. Nevertheless, the intrusion of "touch and concern" into the law of equitable servitudes is patently inconsistent with the doctrine of *Tulk v. Moxhay*,[26] which is generally understood to bind a purchaser to a restriction of which he has notice regardless of whether it "touches and concerns" the land.[27] However, this inconsistency is, for the most part, purely academic, since the majority of courts which require a covenant to "touch and concern" the land have

[23] Reno, *Part II* at 1073. The author criticizes this reasoning, pointing out that most restrictive covenants are imposed for the purpose of maintaining property values and therefore are *conducive* to alienability.

[24] *Spencer's Case*, 5 Coke 16a, 77 Eng. Rep. 72 (K.B. 1583), gives the classic statement of "touch and concern":

> But although the covenant be for him [an original party to the promise] and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. 77 Eng. Rep. at 74.

[25] As is subsequently discussed, Massachusetts imposes the "touch and concern" requirement upon equitable servitudes as well as real covenants. In this regard, it is significant that Massachusetts also adheres to the equitable easement theory for the enforcement of equitable servitudes. Riverbank Inv. Co. v. Chadwick, 228 Mass. 242, 117 N.E. 244, 245 (1917); Sprague v. Kimble, 213 Mass. 380, 100 N.E. 622, 624 (1913).

[26] 2 Ph. 774, 41 Eng. Rep. 1143 (1848).

[27] Bialkin & Bohannan, *Covenants Not to Establish a Competing Business — Does the Benefit Pass?*, 41 VA. L. REV. 675, 676 (1955). The *Restatement of Property* imposes the "touch and concern" requirements upon the enforceability of *real* covenants (which will run *without notice*) and holds that a covenant not to compete fails to meet this test. For a covenant to "touch and concern" it must operate to benefit the owner in the *physical* use of the land and it is not enough that the covenant increases the income an owner derives from his land. RESTATEMENT OF PROPERTY § 537, comment *f* (1944). With regard to the enforcement of covenants not to compete against those who take with *notice* of the covenant, however, the *Restatement* points out that the "touch and concern" requirement does not apply and holds that covenants not to compete are enforceable against all who fail to show themselves to be bona fide purchasers for value and without notice. *Id. at* § 539, comment *k*. Arizona courts have not yet been confronted with this question; it is probable that they would adopt the view of section 539. The *Restatement* will be followed in Arizona in the absence of controlling precedent. Ingalls v. Neidlinger, 70 Ariz. 40, 46, 216 P.2d 387, 390 (1950).

recognized that a covenant not to use land competitively with that of another meets this test.[28]

The case of *Shell Oil Co. v. Henry Ouellette & Sons, Inc.*[29] represents the position of a small minority of jurisdictions that follow the view of *Norcross v. James*.[30] This well known opinion, written by Justice Holmes, stands for the proposition that a covenant limiting competition is personal between the promising parties as a matter of law since it does not benefit the land in its natural state, but merely benefits the owner of the business operated thereon.[31] The *Norcross* line of decisions not only imposes the "touch and concern" requirement upon the enforcement of both equitable servitudes and real covenants, but also demands that the covenant confer a physical, as opposed to a business or financial, benefit upon the land for it to meet the "touch and concern" test.

This doctrine of *Norcross*, which attempts to distinguish between

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[28] *See generally* cases cited *supra* note 3; McMahon v. Williams, 79 Ala. 288 (1885). The concept of "touch and concern" has received such diverse treatment throughout the cases that it is impossible to lay down any absolute tests as to its meaning. CLARK at 96. As an example of the confusion and diversity in this area compare *Restatement of Property* § 537 (1944) with *Clark* 140-45, where the *Restatement's* definition of "touch and concern" as applied to *real* covenants is criticized.

In the old English case of *Congleton v. Pattison*, 10 East 130, 103 Eng. Rep. 725 (K.B. 1808), a lessee's promise to employ only workers not subject to the poor rates was held not to run to the lessee's assignee since it benefitted the lessor only as a taxpayer and not as a holder of the reversion. It was pointed out that the covenant must affect the nature, quality, or *value* of the thing demised or the mode of occupying it in order for it to "touch and concern" the land. A test which has drawn favorable comments from legal writers is the following proposed by Professor Bigelow: if the covenantor's legal interest is rendered less valuable by the covenant, the *burden* touches and concerns his estate; if the covenantee's legal interest is rendered more valuable by the covenant, the *benefit* touches and concerns his estate. Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639 (1914). It should be noted that the Bigelow test involves separate analyses of both benefit and burden. The fact that either the benefit or the burden is found not to "touch and concern" the land should not preclude the enforcement of the other should it meet the test. CLARK at 105. See also *Herbert v. Duparty*, 42 La. Ann. 343, 7 So. 580 (1890), where a covenant not to compete was allowed to run to the benefit of the lessee's assignee, but not allowed to run against the purchaser of the reversion. For favorable comment upon and explanation of, the Bigelow test, *see* CLARK at 97; Aigler, Note and Comment, 17 MICH. L. REV. 93 (1919). In *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 257, 15 N.E.2d 793, 796, which Professor Clark believes to be the leading American case on the subject, the Bigelow test is cited with approval.

[29] Shell Oil Co. v. Henry Ouellette & Sons, Inc., 227 N.E.2d 509 (Mass. 1967).

[30] 140 Mass. 188, 2 N.E. 946 (1885). The *Norcross* case involved a covenant not to operate a quarry. See also *Shade v. O'Keefe*, 260 Mass. 180, 156 N.E. 867 (1927), where the covenant prohibited a grocery business, and *Brewer v. Marshall*, 19 N.J. Eq. 537 (1868), where the covenant prohibited the grantor from selling marl on retained land. *Cf. Oliver v. Hewitt*, 191 Va. 163, 60 S.E.2d 1 (1950), which overruled *Tardy v. Creasy*, 81 Va. 553 (1886), a case which had previously aligned Virginia with the *Norcross* view.

[31] The *Norcross* definition of "touch and concern," which is made applicable to *both* real covenants and equitable servitudes in the *Ouellette* case, is identical with that espoused by the *Restatement of Property* § 537, comment *f*, which is expressly made applicable to *real covenants only*. *See* note 27 *supra*.

physical and financial benefits, is a hyper-technical application of the "touch and concern" concept, a concept that is more pertinent to the enforcement of real covenants than to equitable servitudes. Such a doctrine is oblivious to modern business reality. It is naive to hold that financial values are totally divorced from one's use and enjoyment of his land. But the *Norcross* rationale purports to do just that. It ignores the fact that if one's business can be operated at a greater profit because the adjoining landowner is precluded from engaging in a similar type of business, then the market value of the land for business purposes has been enhanced. Is not the preservation of market values a primary purpose of all zoning laws and building restrictions? *Norcross* states that non-competing covenants are conducive to monopoly, and implicit in the decision is the often stated legal maxim that "restrictions impede the alienability of land." A close analysis of these two arguments reveals their lack of substance. Admittedly a non-competing covenant may, in certain instances, "tend" toward monopoly. But such economic evils, when found to exist, are more appropriately monitored by traditional restraint-of-trade legislation, not by the application of property law. If not violative of such restraint-of-trade tests, covenants not to compete — rather than retarding the economic development of a community — would act as a stimulus to investment by allowing promoters to calculate their expected rates of return with greater certainty and upon the basis of higher projected incomes. The reasonable imposition of these covenants is not conducive to higher consumer prices, but facilitates consumer convenience by providing the land developer with a practical tool to use in planning the composition of modern shopping centers. The use of covenants not to compete is essential to the development of these "shopping plazas," which attempt to group in one unit numerous diversified and noncompetitive businesses and are designed to serve not just one need, but as many needs of the consumer as are feasible within the economic framework of the shopping unit. Although a plethora of unnecessary restrictions undoubtedly restricts alienability, where the restrictions imposed are moderate in number, reasonable in scope, and geared to the enhancement of property values, alienability would be fostered, not impeded. The freedom of alienability argument must also be considered from the viewpoint of the individual transferor, *i.e.*, that an owner of property should generally be free to convey it subject to any reasonable restriction or conditions he may see fit to impose.[32]

Adherence to the *Norcross* doctrine actually promotes unjust enrichment. To obtain a promise not to compete, the promisee-grantee must pay the promisor-grantor a greater consideration than if he pur-

[32] Murphey v. Gray, 84 Ariz. 299, 305, 327 P.2d 751, 755 (1958); Whittaker v. Holmes, 74 Ariz. 30, 243 P.2d 462 (1952). *See* R. Pound, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 108 (1922).

chased the land without such a promise. If the promisor is allowed to remove the effect of the covenant by a mere transfer of the servient tenement, he, in effect, has given nothing in return for the price of the promise.[33] Moreover, since a promise not to use specific land in a manner competitive with the use of the land of another is the type of promise that cannot be performed independently of ownership, the original covenantor will probably escape liability for all breaches occurring subsequent to his transfer of the burdened land to another unless there is a provision in the covenant expressly stipulating that he shall remain liable.[34] The same holds true with regard to the enforceability of the benefit of the promise by the original promisee's transferee. If the transferee, who is in possession of the benefitted land, cannot enforce the promise against the promisor, no one — including the original promisee — can.[35]

Although the Massachusetts court in the *Ouellette* opinion recognizes that *Norcross* is contrary to the majority view and that it has been the subject of substantial criticism,[36] it refused to overrule *Norcross* on the grounds of "past bar reliance" upon it as precedent.[37] The court did indicate, however, that but for the force of *Norcross* as precedent it probably would have enforced "a reasonable covenant restricting competition" against a transferee taking with notice of the restriction and standing in privity of estate with the covenantor.[38] The court con-

[33] This is the situation present in the instant case. As stated in *Tulk v. Moxhay*, 2 Ph. 774, 41 Eng. Rep. 1143 (1848):

> 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 able to escape from the liability which he had himself undertaken. 41 Eng. Rep. at 1144.

[34] See note 14 *supra* and cases cited therein.

[35] Werner v. Graham, 181 Cal. 174, 183 P. 945 (1919); Kent v. Kach, 166 Cal. App. 2d 579, 333 P.2d 411 (1959); Walsh, *Conditional Estates and Covenants Running with the Land*, 14 N.Y.U.L.Q. REV. 162, 171 (1936).

[36] The following writers have expressed criticism of the *Norcross* doctrine: CLARK at 105; Walsh, *supra* note 35 at 171; Reno, *Part II* at 1071; Bialkin and Bohannan, *supra* note 27 at 684.

[37] Shell Oil Co. v. Henry Ouellette & Sons, Inc., 227 N.E.2d 509, 512 (Mass. 1967).

[38] *Id.* Since *Norcross* has dominated this area of Massachusetts law for close to a century, the reluctance of the court to overrule on the basis of *stare decisis* is understandable. Nevertheless, the court might have used some Massachusetts dicta as support for holding differently in *Ouellette*. In *Whitney v. Union Ry.* it was stated:

cluded its opinion with a footnote suggesting that the legislature take notice of this area.[39] Since the *Norcross* doctrine cannot be justified on either equitable principles or in the context of modern business practices, it is hoped that the court's suggestion will be followed — not only in Massachusetts, but in the relatively few other jurisdictions still adhering to the *Norcross* view.

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A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform. 77 Mass. 359, 364 (1858).

See also Boston v. Main Ry. v. Construction Mach. Corp., 346 Mass. 513, 194 N.E.2d 395, 400 (1963). In addition, Massachusetts has not applied its narrow view of "touch and concern" to covenants not to compete which restrict the uses of leaseholds. *See* Jacob v. Levine, 285 Mass. 125, 188 N.E. 502 (1934); Sheff v. Candy Box, Inc., 274 Mass. 402, 174 N.E. 466 (1931). See note 3 *supra*, and cases cited therein with respect to leaseholds and statements to the effect that where the restrictive covenant is limited in duration and there is privity of estate between the covenantor and the covenantee there should be no distinction made between the enforcement of covenants not to compete made with a conveyance in fee and those made as part of a lease arrangement.

[39] Shell Oil Co. v. Henry Ouellette & Sons, Inc., 227 N.E.2d 509, 513 (Mass. 1967).