LexisNexis Law School Publishing
Advisory Board

William Araiza
Professor of Law
Brooklyn Law School

Ruth Colker
Distinguished University Professor & Heck-Faust Memorial Chair in Constitutional Law
Ohio State University, Moritz College of Law

Olympia Duhart
Associate Professor of Law
Nova Southeastern University Shepard Broad Law School

Samuel Estreicher
Dwight D. Opperman Professor of Law
Director, Center for Labor and Employment Law
NYU School of Law

David Gamage
Assistant Professor of Law
UC Berkeley School of Law

Joan Heminway
College of Law Distinguished Professor of Law
University of Tennessee College of Law

Edward Imwinkelried
Edward L. Barrett, Jr. Professor of Law
UC Davis School of Law

Paul Marcus
Haynes Professor of Law
William and Mary Law School

Melissa Weresh
Director of Legal Writing and Professor of Law
Drake University Law School
A STUDENT’S GUIDE TO EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES

THIRD EDITION

Stephen A. Siegel
Distinguished Research Professor of Law
De Paul University College of Law
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter 1</th>
<th>EASEMENTS</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.01</td>
<td>INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>1.02</td>
<td>EXPRESS EASEMENTS</td>
<td>3</td>
</tr>
<tr>
<td>[A]</td>
<td>Definitions</td>
<td>3</td>
</tr>
<tr>
<td>[B]</td>
<td>Discussion and Questions</td>
<td>3</td>
</tr>
<tr>
<td>[1]</td>
<td>Determining Whether the Document Transfers an Easement or a Fee Simple Estate</td>
<td>4</td>
</tr>
<tr>
<td>[2]</td>
<td>Determining Whether the Document Transfers an Easement Appurtenant or an Easement in Gross</td>
<td>8</td>
</tr>
<tr>
<td>[3]</td>
<td>The Ancient Conveyancing Rule that Prohibits Conveying a Property Interest to a “Stranger to the Deed”</td>
<td>9</td>
</tr>
<tr>
<td>[C]</td>
<td>Review Problems</td>
<td>12</td>
</tr>
<tr>
<td>Problem 1</td>
<td>12</td>
<td></td>
</tr>
<tr>
<td>Problem 2</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>Problem 3</td>
<td>17</td>
<td></td>
</tr>
<tr>
<td>Problem 4</td>
<td>18</td>
<td></td>
</tr>
<tr>
<td>[D]</td>
<td>Recapitulation</td>
<td>20</td>
</tr>
<tr>
<td>1.03</td>
<td>IMPLIED EASEMENTS</td>
<td>21</td>
</tr>
<tr>
<td>[A]</td>
<td>Definitions</td>
<td>21</td>
</tr>
<tr>
<td>[B]</td>
<td>Discussion and Questions</td>
<td>21</td>
</tr>
<tr>
<td>[C]</td>
<td>Review Problems</td>
<td>27</td>
</tr>
<tr>
<td>Problem 5</td>
<td>27</td>
<td></td>
</tr>
<tr>
<td>Problem 6</td>
<td>31</td>
<td></td>
</tr>
<tr>
<td>Problem 7</td>
<td>34</td>
<td></td>
</tr>
<tr>
<td>Problem 8</td>
<td>36</td>
<td></td>
</tr>
<tr>
<td>[D]</td>
<td>Recapitulation</td>
<td>37</td>
</tr>
<tr>
<td>1.04</td>
<td>SCOPE</td>
<td>38</td>
</tr>
<tr>
<td>[A]</td>
<td>Definitions</td>
<td>38</td>
</tr>
<tr>
<td>[B]</td>
<td>Discussion and Questions</td>
<td>38</td>
</tr>
<tr>
<td>[C]</td>
<td>Review Problems</td>
<td>47</td>
</tr>
<tr>
<td>Problem 9</td>
<td>47</td>
<td></td>
</tr>
<tr>
<td>Problem 10</td>
<td>49</td>
<td></td>
</tr>
<tr>
<td>Problem 11</td>
<td>52</td>
<td></td>
</tr>
<tr>
<td>Problem 12</td>
<td>54</td>
<td></td>
</tr>
<tr>
<td>[D]</td>
<td>Recapitulation</td>
<td>55</td>
</tr>
<tr>
<td>1.05</td>
<td>TRANSFER: ALIENATION AND APPORTIONMENT</td>
<td>56</td>
</tr>
<tr>
<td>[A]</td>
<td>Definitions</td>
<td>56</td>
</tr>
<tr>
<td>[B]</td>
<td>Discussion and Questions</td>
<td>56</td>
</tr>
<tr>
<td>[1]</td>
<td>Easements Appurtenant</td>
<td>57</td>
</tr>
<tr>
<td>[2]</td>
<td>Easements in Gross</td>
<td>58</td>
</tr>
<tr>
<td>[C]</td>
<td>Review Problems</td>
<td>64</td>
</tr>
</tbody>
</table>
### Table of Contents

Problem 24 ............................................................ 114
Problem 25 ............................................................ 115
Problem 26 ............................................................ 117
Problem 27 ............................................................ 119
Problem 28 ............................................................ 120

[D] Recapitulation ............................................................ 123

2.04 NOTICE ................................................................. 123
2.05 PRIVITY ................................................................. 124

[A] Definitions .............................................................. 124
[B] Discussion and Questions .................................................... 125
[1] The Concept of Horizontal Privity ............................................ 125
[5] The Restatement (Third) and Vertical Privity .................................... 130
[a] The Continued Liability of the Covenantor after a Complete or Partial Assignment of her Ownership Interest ..................................................... 132
[b] The Apportionment of Covenant Burdens and Benefits after Subdivision of the Burdened or Benefited Land ........................................................ 133
[c] The Circumvention of the Rules on Privity by Providing that a Covenant is Enforceable by a Lien ..................................................... 135

[C] Review Problems ......................................................... 136
Problem 29 ............................................................ 136
Problem 30 ............................................................ 137
Problem 31 ............................................................ 138

[D] Recapitulation ............................................................ 139

2.06 TOUCH AND CONCERN .................................................... 140

[A] Definitions .............................................................. 140
[B] Discussion and Questions .................................................... 140
[1] The Concept of Touch and Concern ........................................... 141
[3] The Restatement (Third) and Touch and Concern ................................. 152
[4] Miscellaneous Topics ..................................................... 155
[a] A Connection Between Horizontal Privity and the Touch and Concern Requirement ..................................................... 155
[b] A Connection Between the Apportionment of Covenant Benefits and Burdens and the Touch and Concern Requirement ..................................................... 156
[c] The Circumvention of the Touch and Concern Requirement by Providing that a Covenant is Enforceable by a Lien ..................................................... 157

[C] Review Problems ......................................................... 157
Problem 32 ............................................................ 157
Problem 33 ............................................................ 159
Problem 34 ............................................................ 161
Problem 35 ............................................................ 163
# Table of Contents

[D] Recapitulation ............................................................ 164

2.07 TERMINATION .................................................................. 165

[A] Definitions ...................................................................... 165

[B] Discussion and Questions .................................................... 166

[1] Abandonment .................................................................. 167


[3] Unclean Hands ............................................................. 169


[5] Changed Conditions ...................................................... 171

[6] The Restatement (Third) and the Termination of Running Covenants .............................. 175

[7] A Note on Terminology ................................................... 176

[C] Review Problems ......................................................... 177

Problem 36 ...................................................................... 177

Problem 37 ...................................................................... 178

Problem 38 ...................................................................... 179

Problem 39 ...................................................................... 181

Problem 40 ...................................................................... 182

Problem 41 ...................................................................... 184

[D] Recapitulation ............................................................ 185

Chapter 3 DISTINGUISHING EASEMENTS, REAL COVENANTS AND EQUITABLE SERVITUDES & THE RESTATEMENT (THIRD)'S UNIFICATION OF SERVITUDE LAW ........................................................... 187

3.01 INTRODUCTION .......................................................... 187

3.02 DISTINGUISHING BETWEEN EASEMENTS AND RUNNING COVENANTS ......................... 187

3.03 THE OUTCOMES THAT TURN UPON WHETHER A SERVITUDE IS AN EASEMENT OR A RUNNING COVENANT ................................................................. 190

3.04 DISTINGUISHING BETWEEN REAL COVENANTS AND EQUITABLE SERVITUDES ................. 192

3.05 THE OUTCOMES THAT TURN UPON WHETHER A RUNNING COVENANT IS A REAL COVENANT OR AN EQUITABLE SERVITUDE .................................................... 196

3.06 THE RESTATEMENT (THIRD) AND THE NEED TO DISTINGUISH AMONG SERVITUDES: THE UNIFICATION OF SERVITUDE LAW ....................................................... 198

Chapter 4 CONDOMINIUMS, HOMEOWNERS ASSOCIATIONS, AND THE LAW OF EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES ......................... 201

4.01 INTRODUCTION .......................................................... 201

4.02 THE MULTI-FACTORED REASONABLENESS TEST FOR THE VALIDITY OF CONDOMINIUM DECLARATIONS, BYLAWS, AND HOMEOWNER ASSOCIATION DECISIONS ................. 203

[A] The Validity of the Covenants and Bylaws Contained in the Original DCC&R and HOA Decisions Applying Them ................................................................. 203

[B] The Validity of DCC&R Amendments, Bylaw Amendments, and HOA Decisions Applying Them .............................................................................. 204

[C] HOA Decisions Regarding its Administrative Responsibilities ........................................ 205

[D] Concluding Remarks on the Multi-Factored Reasonableness Test ........................................ 205
Table of Contents

4.03 THE RESTATEMENT (THIRD) AND THE VALIDITY OF CONDOMINIUM DECLARATIONS, BYLAWS, AND HOMEOWNER ASSOCIATION DECISIONS ........................................ 208
[A] The Restatement (Third)’s Default Rules for DCC&R Amendments ................................ 208
[B] The Restatement (Third)’s Default Rules for Bylaw Amendments ................................. 209

Table of Cases .................................................................................................................... TC-1

Index ................................................................................................................................ I-1
DEDICATION

To my students, past, present, and future
Easements, real covenants, and equitable servitudes are distinct property interests; yet they are so intimately related that they have a collective designation. As a group, easements, real covenants and equitable servitudes are known as servitudes. For convenience, the term “servitude” will be used when saying something that applies to all three interests.

What distinguishes servitudes from other property interests is that they give their owner the right to use, or to prevent the use of, property that she neither owns nor possesses.* Classic examples are a right to cross a neighbor’s land or to prevent her from altering its natural state.

Because servitudes involve rights to use property that one neither owns nor possesses, legal theorists consider them present but nonpossessory property interests. In this regard, they stand in contrast to the fee simple and leasehold estates which are considered both present and possessory.

It may seem strange to say that servitudes are nonpossessory property interests. Pipeline companies and railroad companies frequently establish their routes by acquiring easements. Yet, it may be difficult to explain to someone who has just tripped over an oil pipeline or railroad track that the pipeline or railroad company does not possess the ground its pipeline or track occupies. And in any event, what distinction is there between the right of possession and the right of use? Possession, after all, is a use of property.

The legal concept of possession is not a physical fact; it is an abstract, subtle legal concept. Possession certainly involves the right to make present use of the property. But possession involves more than just any right of use. Possession involves the right to make an extended number of uses of property. The right to make a specific or a limited number of uses of property does not possession make.

The distinction between possessory and nonpossessory interests focuses on the generality or specificity of the uses which the interest authorizes its holder to make. Fee simple and leasehold estates are possessory property interests because they carry the right to make general — not necessarily unlimited — use of property. Servitudes are nonpossessory interests because they carry the right to make only a specific or a limited number of uses of property.

The function and importance of servitudes in a system of private property arises from the interdependence of land-use. Land-use involves what economists call “externalities.” The use of one parcel of land affects other parcels, either beneficially or harmfully. Servitudes are the preeminent means by which individuals adjust these externalities. Public law, through such bodies of law as nuisance and zoning, has tools by which land externalities are adjusted. Servitudes are the main private law mechanism by which individuals anticipate, alter or fine-tune the provisions of public law to their particular desires.

Servitudes are not the only private law means for adjusting the interdependence of land-use. Frequently, however, they are the most efficient. Consider the position of a landowner who needs a path across neighboring land in order to provide her land with more convenient access to main thoroughfares. Or consider the position of a landowner who needs assurance that neighboring land will not be developed commercially before she will develop her land residentially. The landowner could acquire the desired path or assurance by acquiring a fee estate, a long-term leasehold, or a servitude in the neighboring land. Any of these interests would give the concerned landowner the path or assurance she needs.

A fee estate or leasehold would give the concerned landowner the general right to control the neighboring land. A servitude would give her only the specific right to use the neighboring land that she needs. And therein lies the significant difference.

By giving the concerned landowner the general right to control the neighboring land, the fee estate and leasehold

* For convenience, throughout the remainder of this STUDENT GUIDE the phrase “right to use” should be understood as meaning “right to use, or to prevent the use of.”
give her more rights than she really wants and wishes to use. Their cost is commensurately higher. Servitudes, by providing for the acquisition of narrow, specific rights to use land that is owned by another allows for the acquisition of the narrow, specific rights that frequently are all that are necessary to adjust the externalities that result from land-use interdependence. In sum, the function and importance of servitudes is that they allow landowners to acquire rather specific rights to control land-use. By so doing, servitudes allow a landowner efficiently to acquire specific rights of control over neighboring land and, thereby, secure beneficial, or prevent harmful, interactions.

Land-use has always been interdependent. Accordingly, a law of servitudes has always been a part of the common law. Nonetheless, the law of servitudes has undergone vast development and transformation in the past two centuries. This is because the past two centuries have witnessed a quantum jump in the frequency and severity of land interdependence. The trend of the past two centuries toward greater interdependence has only increased with the recent growth, in America, of condominiums and planned communities as preferred places of abode for over 60 million people.

Servitude law has been dramatically affected by this development. Over the past two centuries, our society has evolved from one predicated upon a rural and agricultural economic base to one predicated upon an urban and industrial, perhaps even a post-industrial, economic base. Land-use in a rural-agricultural economy involves less complex and dense development than land-use in an urban-industrial economy. Consequently, land-use in a rural-agricultural economy is far more self-sufficient, and less interdependent, than land-use in an urban-industrial economy. Accordingly, a rural-agricultural society may be well served by a law of servitudes that is less elaborate, and perhaps even different, than the law of servitudes required by an urban-industrial society.

In fact, that the early common law had a law of servitudes has proven more of a bane than a boon to the modern law. The roots of the modern law may be traced to the early common law. But with the increase in land interdependence stemming from the nineteenth century urban-industrial revolution, the traditional law of servitudes proved inadequate. It was refashioned. Part of the mold in which the existing law was set was carried forward. But other parts of the inherited mold were transformed, indeed broken, and fundamentally new law was developed under the guise of continuity. New principles reworked old doctrines; and old principles created new doctrines. The legal aphorism of pouring new wine into old bottles, or of new corn springing from old fields, fairly accurately describes the judiciary’s development of the modern law of servitudes during the nineteenth and early twentieth centuries.

Particulars of the industrial revolution’s transformation of servitude law will be taken up in §§ 3.02 and 3.04, below. Postponement is necessary until a context has been developed through a complete exploration of easement law. At this point, suffice it to say that the development of real covenants and equitable servitudes was due to limitations in the existing law of easements which until the industrial revolution was the most important form of common law servitude. Real covenants and equitable servitudes developed as a means of circumventing the limitations of the law of easements.

All that needs be grasped at this time is that (a) easements, real covenants, and equitable servitudes are related in that they all give their owners the right to make fairly specific use of land owned by another; and (b) the primary function of all these interests is the efficient adjustment of land-use externalities. Historical accident, more than policy rationale, is responsible for many features of the modern common law of servitudes, including its division into three distinct but related doctrines.

Indeed, one central issue of the current law of servitudes is whether the three part division should be continued. Some legal scholars suggest combining real covenants and equitable servitudes into one doctrine; others suggest reducing easements as well as real covenants and equitable servitudes to one doctrine; still others oppose any unification of these property interests. Law review articles and multiple scholarly symposia propounding diverse perspectives and answers have been devoted to this issue. Although the American Law Institute’s decision, in its RESTATMENT (THIRD) OF THE LAW OF PROPERTY: SERVITUDES, to integrate easement, real covenant and equitable servitude law into a unified body of doctrine added fuel to this debate, our nation’s court have yet to adopt any major changes in the common law’s traditional tripartite division of servitude law.

Whatever the future holds, the three part division of the common law of servitudes has existed for the past two centuries. It exists at present. Law students must come to terms with the law as currently laid down and as it might
evolve. Aiding you in this work is the goal of the following STUDENT GUIDE, which discusses both current law and the RESTATEMENT (THIRD)’S integrated approach. Included in this coverage is a new Chapter discussing the impact of the growth of condominium living on the law of servitudes.
# ABBREVIATIONS

The following abbreviations are used in this STUDENT GUIDE:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALP</td>
<td><em>American Law of Property</em> (A. Casner ed. 1952)</td>
</tr>
<tr>
<td>Restatement</td>
<td>American Law Institute, <em>Restatement of the Law of Property</em> (1944)</td>
</tr>
<tr>
<td>(First)</td>
<td></td>
</tr>
<tr>
<td>(Third)</td>
<td></td>
</tr>
</tbody>
</table>