

A rancher owned in fee simple two adjoining lots, Lots 1 and 2. He conveyed Lot 1 in fee simple to his cousin. The deed was in usual form of a warranty deed with the following provision inserted in the appropriate place: "Grantor, for himself, his heirs and assigns, does covenant and agree that any reasonable expense incurred by grantee, his heirs and assigns, as the result of having to repair the retaining wall presently situated on Lot 1 at the common boundary with Lot 2, shall be reimbursed one-half the costs of repairs; and by this provision the parties intend a covenant running with the land."

The cousin conveyed Lot 1 in fee simple to a woman by warranty deed in usual and regular form. The deed omitted any reference to the retaining wall or any covenant. Fifty years after the rancher's conveyance to the cousin, the woman conveyed Lot 1 in fee simple to a developer by warranty deed in usual form. This deed omitted any reference to the retaining wall or the covenant.

There is no statute that applies to any aspect of the problems presented except a recording act and a statute providing for acquisition of title after 10 years of adverse possession. The deed from the rancher to the cousin was never recorded. All other deeds were promptly and properly recorded.

Lot 2 is now owned by the rancher's daughter, who took by intestate succession. The developer expended \$3,500 on the retaining wall. Then he obtained all the original deeds in the chain of title from the rancher to himself. Shortly thereafter, the developer discovered the covenant in the rancher's deed to the cousin. The developer demanded that the daughter pay \$1,750. When she refused, he instituted an appropriate action to recover that sum.

If judgment is for the daughter, what will be the likely reason?

- A. The cousin's deed from the rancher was never recorded.
- B. The developer did not know about the covenant until after he had incurred the expenses and, hence, could not have relied on it.
- C. The developer is barred by adverse possession.
- D. The developer's expenditures were not proved to be reasonable and customary.

## Explanation:

A **real covenant** is an express promise regarding land that is enforceable by an action for **money damages**. Although the promising parties can enforce the covenant under contract law, the covenant can only bind **successors in interest** if the benefit/burden **runs with the land**. This requires proof of the following elements:

**Writing** – covenant is in a writing that satisfies the statute of frauds (eg, Lot 1 deed to the cousin)

**Intent to run** – promising parties intended for the covenant to run to their successors in interest (eg, deed says "heirs and assigns" and "running with the land")

**Touch and concern** – covenant relates to the use, enjoyment, or occupation of the benefited and burdened lands (eg, shared enjoyment of retaining wall)

**Horizontal privity** – promising parties simultaneously transferred the land and created the covenant (eg, covenant was created when Lot 1 was deeded to the cousin)

**Vertical privity** – successor of the *benefited* estate has a possessory interest (eg, developer owns Lot 1) and successor of the *burdened* estate has a promising party's entire estate or ownership interest (eg, daughter has rancher's fee simple in Lot 2)

**Notice** – person to be bound had **notice** of the covenant if he/she *purchased* the property (eg, daughter *inherited* Lot 2, so it is irrelevant that the cousin's deed was never recorded)  
**(Choice A)**

Therefore, the daughter is bound by the covenant to pay reasonable expenses for the repairs. Judgment would likely be entered for the daughter if the developer's expenditures were *not* proved to be reasonable and customary.

**(Choice B)** Notice is not a requirement for successors in interest of land *benefited* by a real covenant (eg, the developer) to enforce it.

**(Choice C)** Persons who acquire land subject to a real covenant through **adverse possession** cannot enforce the covenant. But the developer acquired Lot 1 by deed—not through adverse possession.

## Educational objective:

A real covenant will only bind successors in interest if the following elements are met: (1) writing, (2) intent to run, (3) touch and concern, (4) horizontal privity, (5) vertical privity, and (6) notice.

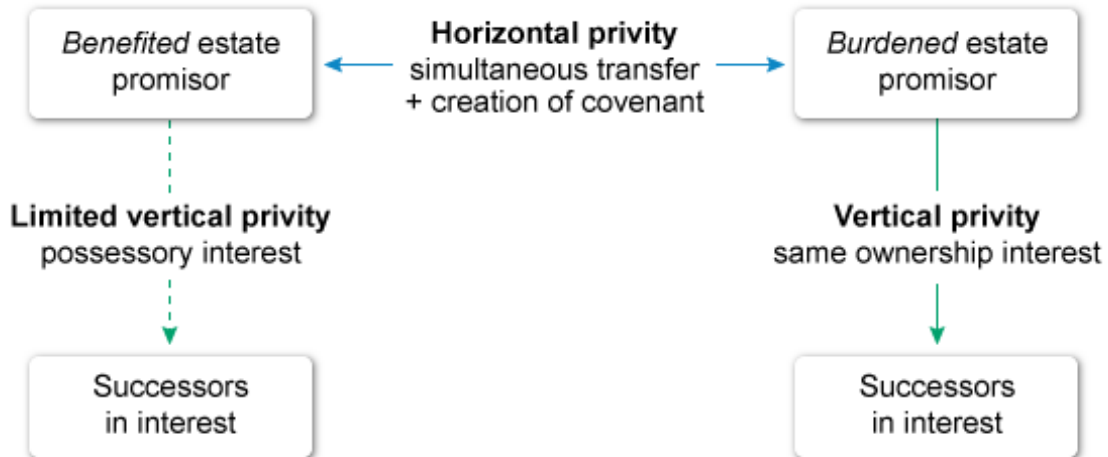
## References

Restatement of Property §§ 530–38 (Am. Law Inst. 1944) (elements of real covenants).

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### Privity requirements for real covenants



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