

The owner of a five-acre parcel of land constructed a house on the land. The following year, the owner installed an underground drainage system on the land in order to prevent future flooding of his house.

Several years later, the owner gave one acre of the land in fee simple to his niece. The deed contained a provision in which the niece promised that she and her heirs and assigns would maintain the portion of the drainage system on her one acre. This deed was not recorded.

Five years later, the niece sold her one acre, in fee simple, at its fair market value to a buyer. Although the niece informed the buyer of her promise with regard to the drainage system, the deed by which the niece conveyed her property to the buyer did not mention this promise. The buyer promptly recorded this deed. Ten months later, there was a severe rainstorm. Because of the buyer's failure to maintain the drainage system, the owner's house flooded. The owner has sued the buyer for damages resulting from this failure.

A statute in the applicable jurisdiction provides, "No conveyance of an interest in real property shall be good against subsequent purchasers for value unless the same be first recorded according to law."

Should the court enforce the niece's promise against the buyer?

- A. No, because the deed by which the owner conveyed the one acre to his niece was not recorded.
- B. No, because the doctrine of estoppel by deed does not apply here.
- C. Yes, because both horizontal and vertical privity exist.
- D. Yes, because the buyer learned of the promise from the niece herself.

## Explanation:

A **real covenant** is an express promise to do (affirmative) or not do (negative/restrictive) something on land that is enforceable by an action for damages.\* Although the promising parties are bound to the covenant under contract law, the covenant will only **bind** their **successors in interest** if it **runs with the land**. This requires proof of the following elements:

**Writing** – covenant is in a writing that satisfies the statute of frauds (eg, deed from owner to niece)

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

**Touch and concern** – covenant relates to the use, enjoyment, or occupation of the benefited and burdened lands (eg, maintaining drainage system on one parcel to benefit the other)

**Horizontal privity** – promising parties simultaneously transferred the land and created the covenant (eg, covenant created when one-acre parcel was deeded to niece)

**Vertical privity** – successor of the *burdened* estate (buyer) has a promising party's entire estate or ownership interest (eg, niece's entire fee simple interest) OR successor of the *benefited* estate (not seen here) has a possessory interest **(Choice C)**

**Notice** – person to be bound had **notice** of the covenant (eg, buyer learned about covenant from niece) **(Choice D)**

Therefore, the covenant here did run with the land and could have been imposed on the buyer. However, the buyer is not subject to the covenant in this **pure race jurisdiction**. This recording act prevents a real property interest from being enforced against a **subsequent purchaser** of a conflicting interest who **recorded first**. Since the buyer's deed (which did not mention the covenant) was recorded first and the deed from the owner to the niece (which created the covenant) was not recorded, the niece's promise should not be enforced.

\*In contrast, when an injunction is sought to enforce a covenant, it is called an equitable servitude.

**(Choice B)** Estoppel by deed prevents a grantor who conveys an interest in land by warranty deed before actually owning it from later denying the effectiveness of the deed.

## Educational objective:

Under a race recording act, a real property interest (eg, real covenant) cannot be enforced against a subsequent purchaser of a conflicting real property interest (eg, land burdened by the covenant) who records first.

## References

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

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### Privity requirements for real covenants

