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it, is none of the lofty and nebulous considerations given above, but simply a refusal of the Court to prefer a jury verdict as to the reasonableness of a traffic plan to the considered decision of an expert government body which, under the evidence adduced at the trial, carefully executed a traffic safety plan which operated without a hitch for over three years previous to the accident which it allegedly caused.

Whatever the reasoning behind the decision in the instant case, the chaos in this section of the law should give one pause before relying on it as binding precedent in any but an identical fact situation.

PROPERTY

Requirements for Covenants Running With the Land

In *Nicholson v. 300 Broadway Realty Corp.*,[1] the plaintiff and defendant's predecessor in title entered into an agreement whereby the latter was to supply steam heat to a building on the plaintiff's property and to furnish and maintain pipes for that purpose. Plaintiff agreed to pay $50.00 yearly and allow the defendant's predecessor to build a spur track across his land. The agreement provided that it applied to the heirs and assignees of the parties. For twenty-seven years, the defendant's predecessor provided the heat in fulfillment of its covenant. In 1956, a series of conveyances took place which formed the basis of the present action. The plaintiff alleged in his complaint that the original covenantor, The Embossing Co. (defendant's predecessor in title), had contracted to sell its land to an agent of the defendant, who agreed to assume the obligation to supply heat. He, in turn, assigned the contract of sale to another agent of defendant, who also assumed the burden of the covenant to provide heat, and to whom the land was deeded as grantee. Subsequently, the land was reconveyed, this time to the defendant, in an agreement making no mention of the obligation to provide heat. Upon the defendant's refusal to perform the covenant, the plaintiff brought an action for specific performance and damages. The defendant contended that the action had become academic, since the plaintiff had sold his own land to the defendant. The Court of Appeals, although agreeing that the question of specific performance was moot, held that the plaintiff might properly litigate the question of damages.

The Appellate Division affirmed an order of the Supreme Court dismissing the plaintiff's complaint, holding that the covenant to supply heat was not one which may run with the land, since it was affirmative in nature.[2] The Court of Appeals reversed, holding that the covenant ran with the land and so was enforceable against a subsequent grantee. In addition, the Court held that the assumption agreement between The Embossing Co. and defendant's alleged

1. 7 N.Y.2d 240, 196 N.Y.S.2d 945 (1959).
2. 6 A.D.2d 627, 180 N.Y.S.2d 535 (3d Dep't 1958).

agents constituted a third-party creditor beneficiary contract, which the plaintiff may enforce. In deciding the case on alternative grounds, the Court indicated the possibility of relitigation on the covenant aspect of the decision, if the plaintiff fails to show an agency relationship between the successive grantees of the burdened land, as it alleged in its complaint.

The claim that the covenant ran with the land was most emphasized by the Court as the basis for its decision. The Court first cites the general rule in New York, that affirmative covenants, i.e. ones requiring the parties to do positive acts concerning the land, do not run with the land so as to bind successive grantees to their performance. This rule, however, has significant exceptions. In *Neponsit v. Industrial Savings Bank*,[3] the Court held that an affirmative covenant will be enforced against subsequent grantees, when the rights which normally flow from the ownership of land are substantially affected, i.e. rights unique to each individual landowner. There are, in addition, a number of other New York decisions in which covenants clearly affirmative in nature were held to run with the land.[4]

The Court then indicates that the burden of affirmative covenants may be enforced against subsequent grantees of the originally burdened land when it appears that "(1) the original covenantor and covenantee intended such a result; (2) there has been a continuous succession of conveyances between the original covenantor and the party now sought to be burdened and (3) the covenant touches and concerns the land to a substantial degree."[5] The Court dismissed the first two as essentials clearly present. It then argues that the third, the *Neponsit* test, was met since the plaintiff had, as the original covenantee, the right to have heat supplied to his building as long as both it, and the building on the covenantor's land which was the source of the heat, were standing and in use. In addition, the right was unique to him, and one not running to other land owners in general, with the covenant imposing a like burden to supply heat upon the Embossing Co. and its assignees. Thus, the rights of the two parties in the enjoyment of their land were substantially affected, as the *Neponsit* test requires.

Although the Court here acknowledges a rule with notable exceptions, these exceptions are in keeping with the rationale of that rule. It is the Court's concern with the burdensome nature of affirmative covenants that is the basis of the New York rule against the running of these covenants with the land. The Court here stated, that since the covenant, by its terms, runs with the land only as long as both buildings are standing and in use, the covenant did not impose such an onerous burden on the title that alienation would be unduly

3. 278 N.Y. 248, 15 N.E.2d 793 (1938).
4. Morgan Lake Co. v. N.Y., N.H. & H. R.R. Co., 262 N.Y. 234, 186 N.E. 685 (1933); Greenfarb v. R.S.K. Realty Corp., 256 N.Y. 130, 175 N.E. 649 (1931); Moxley v. N.J. & N.Y.R.R. Co., 143 N.Y. 649, 37 N.E. 824 (1894).
5. Supra note 1 at 245, 196 N.Y.S.2d 949-950 (1959).

restricted. Thus, the Court indicates that affirmative covenants may run with the land when their duration is limited in time.

The Court dismisses the second essential required for a covenant to run with the land, i.e. that there be a continuous succession of conveyances between the original covenantor and the party now sought to be burdened, without discussion, although it presents some rather grave questions. In New York, for a covenant to run with the land *at law,* there has been traditionally required a "privity of estate" between the original covenantor and covenantee, upon which the covenant must rest.[6] Privity of estate has been variously defined, but the term at least connotes a mutual or successive relationship to the same rights of property or interests therein.[7] For the privity requirement to be fulfilled, New York courts have held that there must be a conveyance of an interest in land, by the covenantor to the covenantee, or vice versa, at the time the covenant is made.[8] A grant, by the owner of land, of an interest such as an easement will satisfy the requirement of privity of estate, and thus allow a covenant between the grantor and the grantee to run at law.[9] In the instant case, the Court makes no mention of the requirement of this type of privity of estate. Although it is possible that the Court assumed that the right of way granted for the spur track under the original agreement was an easement, this point would seem to have merited further discussion by the Court. This is so, because if the grant of a right to run a spur track across the plaintiff's land was only a license, this would not create privity of estate between the covenantor and covenantee, and any covenant resting upon such a license could not run at law so as to bind subsequent grantees. New York courts are not bound by the characterization given a grant by the agreeing parties,[10] but rather will make their determination by viewing the actual effect of the grant.[11] Thus the courts will consider the duration of the right granted, and its extent.[12] If the right is irrevocable, and of the type that can be created as an easement, it will be capable of satisfying the privity requirement.[13] In the instant case, the agreement provided for a right of way for a spur railroad track, which is commonly the subject of an easement. However, whether this was an easement, or a mere license as indicated by the language of the agreement which speaks in terms of consent, rather than grant, was not discussed by the Court. Thus, the question whether the requirement of privity of estate was satisfied is left in doubt.

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6. Cole v. Hughes, 54 N.Y. 444, 13 Am. Rep. 611 (1873); Nye v. Hoyle, 120 N.Y. 195, 24 N.E. 1 (1890). See also, Neponsit v. Industrial Savings Bank, supra note 3.
7. Mygatt v. Coe, 124 N.Y. 212, 126 N.E. 611 (1891).
8. Lawrence v. Whitney, 115 N.Y. 410, 22 N.E. 174 (1889); Harsha v. Reid, 45 N.Y. 415 (1871).
9. 3 Tiffany, Real Property § 853 (3d ed. 1939).
10. G.L. & P.J.R.R. Co. v. N.Y. & G.L. R.R. Co., 134 N.Y. 435, 31 N.E. 874 (1892).
11. Id. at 441, 31 N.E. 875.
12. Id. at 440, 31 N.E. 875.
13. See Clark, Licenses In Real Property Law, 21 Colum. L. Rev. 757 (1921).

Not outside the scope of reasonable inference is the possibility that the Court may have intentionally disregarded the question of privity of estate between covenantor and covenantee. Thus, it may have simply indicated by omission, that the test in future cases will be as stated as a continuous succession of conveyances between the original covenantor and the party now sought to be burdened. If this is so, then it would appear that the type of privity required has been changed. Rather than requiring privity between the originally covenanting parties, the New York courts will require that privity of estate which normally flows from the conveyance of land by grantor to grantee.

This apparent change of the privity requirement seems desirable and is in accord with the view of a leading modern authority in this area.[14] Clark states that the requirement of privity is designed to furnish a connecting link between the parties.[15] Since that is present because of the promise between the covenantor and covenantee, the only remaining need is to justify the transfer of the right or duty created by the promise. This is accomplished by requiring a continuous succession of conveyances between the original covenantor and the party now sought to be burdened. Previously, by requiring privity of estate between the covenantor and covenantee, there arose the need for a conveyance between the two parties. Professor Clark argues that a conveyance from the covenantor to the covenantee, and then back, would fulfill the formality of this privity requirement.[16] Although the New York courts are concerned with undue restrictions on the alienation of land, the privity requirement as previously formulated has no real effect, either to hinder or facilitate alienability. This is so because, as previously indicated, a barren formality will suffice to create privity of estate between covenantor and covenantee.

This decision seemingly eliminates the last vestiges of the requirement of privity of estate between covenantor and covenantee still apparent in the *Neponsit* case. If so, this case may herald future decisions in which the New York courts will be concerned with the "intent and substantive effect of the covenant, rather than its form."[17] In determining when a covenant may run with the land, the courts will be free to ignore at least one formalistic and technical question, i.e., is there privity of estate between the covenantor and covenantee. They may instead regard the actual burden the covenant places on the land, in terms of the financial burden it may seek to impose, and its duration in time.[18]

DESTRUCTIBILITY OF EASEMENTS IMPLIED IN GRANT

"An easement . . . is an interest in land existing independent of the fee

14. Clark, Covenants and Interests Running With the Land 117 (2d ed. 1947).
15. Ibid.
16. Ibid.
17. Supra note 3 at 259, 15 N.E.2d 797 (1938).
18. Supra note 2.