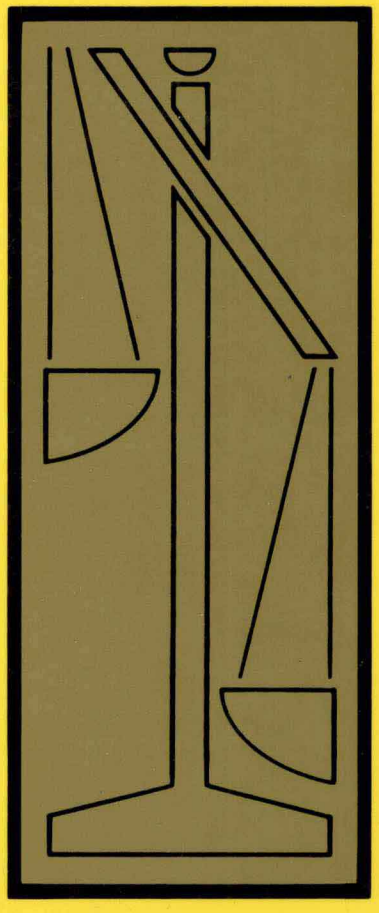
A Student's Guide to

Easements, Real Covenants and Equitable Servitudes

Stephen A. Siegel



Student Guide Series

A STUDENT'S GUIDE TO EASEMENTS, REAL COVENANTS AND EQUITABLE SERVITUDES

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DEDICATION

To the memory of my father

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ABBREVIATIONS

The following abbreviations are used in this Student Guide:

ALP	American Law of Property (A. Casner ed. 1952)
CSW	R. Cunningham, W. Stoebuck, & D. Whitman, The Law of Property (1984)
Powell	R. Powell, The Law of Real Property (rev. ed. 1987)
Restatement	American Law Institute, Restatement of the Law of Property (1944) [The Restatement (Second) of the Law of Property has not yet dealt with the law of easements, real covenant and equitable servitudes]

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GENERAL INTRODUCTION

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

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* 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."

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.

But 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.

Thus, 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.

As interesting, or as puzzling, as this distinction may be, it gives no understanding of the practical function and importance of servitudes in modern property law. 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. But servitudes are the 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 give her more rights than she really wants and wishes to use. (And 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 has witnessed a quantum jump in the frequency and severity of land interdependence.

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 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 -- to one's understanding of it, if not to its substance. 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, infra. Postponement is necessary until a context has been developed through a completed exploration of easement law. Suffice it to

say, at this point, 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 around 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, even a symposium, propounding diverse perspectives and answers have been devoted to this issue. See Berger, Integration of the Law of Easements, Real Covenants and Equitable Servitudes, 43 Wash. & Lee L. Rev. 337 (1986); Symposium, 55 S. Cal. L. Rev. 1177 (1982); Newman & Losey,

Covenants Running With the Land and Equitable Servitudes: Two Concepts or One?, 21 Hastings L.J. 1319 (1970).

But 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. Aiding you in this work is the goal of the following Student Guide.