THE LAW OF PROPERTY

SUPPLEMENTAL READINGS

Class 11

Professor Robert T. Farley, JD/LLM

barbri

Review

New York State Bar Review - 2007

Outlines:

PERSONAL PROPERTY
REAL PROPERTY
CONSTITUTIONAL LAW
NEW YORK TRUSTS
NEW YORK WILLS

CV. RIGHTS IN THE LAND OF ANOTHER—EASEMENTS, PROFITS, COVENANTS, AND SERVITUDES

A. IN GENERAL

Easements, profits, covenants, and servitudes are ***nonpossessory*** interests in land. They create a right to ***use land possessed by someone else***. For example, A, the owner of Blackacre, grants to B, the owner of an adjacent parcel, Whiteacre, the right to use a path over Blackacre connecting Whiteacre to a public road. An easement has been created, giving B the right to use—but ***not*** to possess—the pathway over Blackacre. Easements, profits, covenants, and servitudes have many similarities in operation, coverage, creation, and termination. They also have important differences, mainly in the requirements that must be met for their enforcement.

B. EASEMENTS

1. Introduction

The holder of an easement has the ***right to use*** a tract of land (called the servient tenement) for a special purpose, but has ***no right to possess and enjoy*** the tract of land. The owner of the servient tenement continues to have the right of full possession and enjoyment subject only to the limitation that he cannot interfere with the right of special use created in the easement holder. Typically, easements are created in order to give their holder the right of access across a tract of land, *e.g.*, the privilege of laying utility lines, or installing sewer pipes and the like. Easements are either affirmative or negative, appurtenant or in gross.

a. Types of Easements

1) Affirmative Easements

Affirmative easements entitle the holder ***to enter upon the servient tenement and make an affirmative use of it*** for such purposes as laying and maintaining utility lines, draining waters, and polluting the air over the servient estate. The ***right-of-way*** easement is another instance of an affirmative easement. Thus, an affirmative easement privileges the holder of the benefit to make a use of the servient estate that, absent the easement, would be an unlawful trespass or nuisance.

2) Negative Easements

A negative easement does not grant to its owner the right to enter upon the servient tenement. It does, however, entitle the privilege holder to compel the possessor of the servient tenement to ***refrain from engaging in activity*** upon the servient tenement that, were it not for the existence of the easement, he would be privileged to do. In reality, a negative easement is simply a restrictive covenant. (*See* D.1.e.1), *infra*.)

Example: A owns Lot 6. By written instrument, he stipulates to B that he will not build any structure upon Lot 6 within 35 feet of the lot line. B has acquired a negative easement in Lot 6.

Courts hesitate to recognize new forms of negative easements and generally have confined them to a traditional handful: easements for ***light, air, subjacent or lateral support***, and for the ***flow of an artificial stream***.

b. Easement Appurtenant

An easement is deemed appurtenant when the right of special use benefits the holder of the easement in his physical use or enjoyment of another tract of land. For an easement appurtenant to exist, there must be ***two tracts*** of land. One is called the dominant tenement, which has the benefit of the easement. The second tract is the servient tenement, which is subject to the easement right. One consequence of appurtenance is that the benefit passes with transfers of the benefited land, regardless of whether the easement is mentioned in the conveyance.

Example: A owns Lot 6 and B owns Lot 7, which are adjoining tracts of land. By a written instrument, B grants to A the right to cross B's tract (Lot 7). A's use and enjoyment of Lot 6 is benefited by virtue of the acquisition of the right to use Lot 7 for this special purpose. The right is an easement appurtenant. B remains the owner of Lot 7. A has only a right to use Lot 7 for a special purpose, *i.e.*, the right to cross the tract.

1) Use and Enjoyment

In an easement appurtenant, the benefits to be realized by the easement must be directly beneficial to the possessor of the ***dominant tenement*** in his physical use and enjoyment of that tract of land. It is not sufficient that the easement makes use of the land more profitable.

Example: A owns Lot 6 and B owns adjacent Lot 7. A grants to B the right to use part of Lot 6 to mine coal. The right is not an easement appurtenant because the benefit granted is not related to B's physical use and enjoyment of Lot 7.

2) Benefit Attached to Possession

The benefit of an easement appurtenant becomes an incident of the possession of the dominant tenement. All who possess or subsequently succeed to title to the dominant tenement become, by virtue of the fact of possession, entitled to the benefit of the easement. There can be no conveyance of the easement right apart from possession of the dominant tenement, except that the easement holder may convey the easement to the owner of the servient tenement in order to extinguish the easement.

3) Transfer of Dominant and Servient Estates

Both the dominant and servient parcels can be transferred. As discussed above, if the dominant parcel is transferred, the benefit of the easement goes with it automatically—even if it is not mentioned in the deed—and becomes the property of the new owner. If the servient parcel is transferred, its new owner takes it subject to the burden of the easement, unless she is a bona fide purchaser (*see* VI.E.3., *infra*) with no notice of the easement. There are three ways the person who acquires the servient land might have notice of the easement: (i) actual knowledge; (ii) notice from the visible appearance of the easement on the land; and (iii) notice from the fact that the document creating the easement is recorded in the public records. Everyone who buys land is expected to inspect the land physically and to examine the public records.

Example: A owns Lot 6 and grants B (the owner of Lot 7) an easement for a driveway across Lot 6 to benefit adjacent Lot 7. The easement is not recorded. Then A sells Lot 6 to X. The tire tracks of the driveway are plainly visible at the time of the sale. X is therefore not a bona fide purchaser, and takes Lot 6 subject to the easement.

c. Easement in Gross

An easement in gross is created where the holder of the easement interest acquires a right of special use in the servient tenement independent of his ownership or possession of another tract of land. In an easement in gross, the easement holder is not benefited in his use and enjoyment of a possessory estate by virtue of the acquisition of that privilege. There is no dominant tenement. An easement in gross passes entirely apart from any transfer of land.

Example: A owns Lot 6. By a written instrument, she grants to B the right to build a pipeline across Lot 6. B receives the privilege independent of his

ownership or possession of a separate tract of land. B has acquired an easement in gross.

Easements in gross can be either personal (*e.g.*, O gives friend right to swim and boat on lake) or commercial (*e.g.*, utility or railroad track easements). Generally, an easement in gross is transferable only if the easement is for a commercial or economic purpose.

d. Judicial Preference for Easements Appurtenant

If an easement interest is created and its owner holds a corporeal (possessory) estate that is or could be benefited in physical use or enjoyment by the acquisition of the privilege, the easement will be deemed appurtenant. This is true even though the deed creating the easement makes no reference to a dominant tenement.

Example: A conveys to "B, her heirs, successors, and assigns, the right to use a strip 20 feet wide on the north edge of Blackacre for ingress and egress to Whiteacre." Because there is ambiguity as to whether the benefit was intended to attach to B's land, Whiteacre, or to B personally, a court will apply the constructional preference and hold that the benefit was intended to be appurtenant, with the consequence that any conveyance of Whiteacre by B will carry with it the right to use the strip across Blackacre.

2. Creation of Easements

The basic methods of creating an easement are: express grant or reservation, implication, and prescription.

a. Express Grant

Because an easement is an interest in land, the Statute of Frauds applies. Therefore, any easement must be in writing and signed by the grantor (the holder of the servient tenement) unless its duration is brief enough (commonly one year or less) to be outside a particular state's Statute of Frauds' coverage. An easement can be created by conveyance. A grant of an easement must comply with all the formal requisites of a deed. An easement is presumed to be of perpetual duration unless the grant specifically limits the interest (*e.g.*, for life, for 10 years).

b. Express Reservation

An easement by reservation arises when the owner (of a present possessory interest) of a tract of land conveys title but reserves the right to continue to use the tract for a special purpose after the conveyance. In effect, the grantor passes title to the land but reserves unto himself an easement interest. Note that, under the majority view, the easement can be reserved ***only for the grantor***; an attempt by the grantor to reserve an easement for anyone else is void. (There is a growing trend to permit reservations in third parties, but it remains a minority view.)

Example: G owns Lot 6 and Lot 7, which are adjacent. G sells Lot 7 to B. Later, when G is about to sell Lot 6 to A, B asks G to reserve an easement over Lot 6 in favor of B. G agrees to do so, and executes a deed of Lot 6 to A that contains the following language: "Reserving an easement for a driveway in favor of Lot 7, which is owned by B." The reservation clause is void and no easement is created.

c. Implication

An easement by implication is created by ***operation of law*** rather than by written instrument. It is an exception to the Statute of Frauds. There are only two types of implied easements: (i) an intended easement based on a use that existed when the dominant and servient estates were severed, and (ii) an easement by necessity.

1) Easement Implied from Existing Use ("Quasi-Easement")

An easement may be implied if, prior to the time the tract is divided, a use exists on the "servient part" that is reasonably necessary for the enjoyment of the "dominant part" and a court determines that the parties intended the use to continue after division of the property. It is sometimes called a "quasi-easement" before the tract is divided because an owner cannot hold an easement on his own land.

a) Existing Use at Time Tract Divided

For a use to give rise to an easement, it must be apparent and continuous at

the time the tract is divided. "Apparent" means that a grantee could discover the existence of the use upon reasonable inspection. A nonvisible use may still be "apparent" if surface connections or the like would put a reasonable person on notice of its existence.

b) **Reasonable Necessity**
Whether a use is reasonably necessary to the enjoyment of the dominant parcel depends on many factors, including the cost and difficulty of the alternatives and whether the price paid reflects the expected continued use of the servient portion of the tract.

c) **Grant or Reservation**
An easement implied in favor of the grantee is said to be created by implied grant, while an easement implied in favor of the grantor is said to be created by implied reservation.

2) **Easements Implied Without Any Existing Use**
In two limited situations, easements are implied in a conveyance even though there is no preexisting use.

a) **Subdivision Plat**
When lots are sold in a subdivision with reference to a recorded plat or map that also shows streets leading to the lots, buyers of the lots have implied easements to use the streets in order to gain access to their lots. These easements continue to exist even if the ***public*** easements held by the city or county in the streets are later vacated.

b) **Profit a Prendre**
When a landowner grants a profit a prendre to a person to remove a valuable product of the soil (*e.g.*, grass, asphalt, ore, etc.), the holder of the profit also has an implied easement to pass over the surface of the land and to use it as reasonably necessary to extract the product.

3) **Easement by Necessity**
When the owner of a tract of land sells a part of the tract and by this division deprives one lot of access to a public road or utility line, a right-of-way by absolute necessity is created by implied grant or reservation over the lot with access to the public road or utility line. The owner of the servient parcel has the right to locate the easement, provided the location is reasonably convenient. An easement by necessity terminates when the necessity ceases.

d. Prescription
Acquiring an easement by prescription is analogous to acquiring property by adverse possession. (*See* V., *infra.*) Many of the requirements are the same: To acquire a prescriptive easement, the use must be ***open and notorious***; ***adverse and under claim of right***; ***and continuous and uninterrupted for the statutory period***. Note that the public at large can acquire an easement in private land if members of the public use the land in a way that meets the requirements for prescription.

1) **Open and Notorious**
The user must not attempt to conceal his use. Underground or other nonvisible uses, such as pipes and electric lines, are considered open and notorious if the use could be discovered (*e.g.*, through surface connections) upon inspection.

2) **Adverse**
The use must not be with the owner's permission. Unlike adverse possession, the use ***need not be exclusive***. The user of a common driveway, *e.g.*, may acquire a prescriptive easement even though the owner uses it too.

3) **Continuous Use**
Continuous adverse use does not mean constant use. A continuous claim of right with periodic acts that put the owner on notice of the claimed easement fulfills the requirement. Note that tacking is permitted for prescriptive easements, just as for adverse possession (*see* V.B.4.b., *infra*).

4) **When Prescriptive Easements Cannot Be Acquired**
Negative easements cannot arise by prescription, nor generally may easements in public lands. An easement by necessity cannot give rise to an easement by prescription. However, if the necessity ends, so does the easement, and the use is adverse from that point forward.

3. **Scope**
Courts enforcing easements are often called upon to interpret the arrangement in order to determine the ***scope*** and ***intended beneficiaries*** of the interest. The key to interpretation employed in all these cases is the ***reasonable intent of the original parties***. What would the parties reasonably have provided had they contemplated the situation now before the court? What result would reasonably serve the purposes of the arrangement?

a. **General Rules of Construction**
If, as typically happens, the language used is general (*e.g.*, "a right-of-way over Blackacre"), the following rules of construction usually apply: (i) ambiguities are resolved in favor of the grantee (unless the conveyance is gratuitous); (ii) subsequent conduct of the parties respecting the arrangement is relevant; (iii) the parties are assumed to have intended a scope that would reasonably serve the purposes of the grant and to have foreseen reasonable changes in the use of the dominant estate. The rule of reasonableness will be applied only to the extent that the governing language is general. If the location or scope of the permitted use is spelled out in detail, the specifics will govern, and reasonable interpretation will be excluded.

Examples: 1) In 1890, A, the owner of Blackacre, granted to B, the owner of Whiteacre, a "right-of-way" over Blackacre for purposes of ingress and egress to Whiteacre from the public highway running along the western boundary of Blackacre. At the time of the grant, there were only horses and buggies, no automobiles. Applying a "rule of reasonableness" to the general language creating the right-of-way, a court would probably find that the right-of-way could today be used for cars. If, however, the use of cars would impose a ***substantially*** greater burden on Blackacre, the court would probably find against this use on grounds that it was outside the scope reasonably contemplated by A and B.

2) If, in the example just given, the right-of-way was specifically dedicated ("only to the use of horses and carriages"), automobile use would be excluded. Similarly, if the right-of-way was specifically located (*e.g.*, "over the southern 10 feet of Blackacre"), the rule of reasonableness could not be invoked to change or enlarge the location.

b. **Absence of Location**
If an easement is created but not specifically located on the servient tenement, an easement of sufficient width, height, and direction to make the intended use reasonably convenient will be implied. The owner of the servient tenement may select the location of the easement so long as her selection is reasonable.

c. **Changes in Use**
In the absence of specific limitations in the deed creating an easement, the courts will assume that the easement is intended by the parties to meet both present and future reasonable needs of the dominant tenement.

Examples: 1) A roadway easement of unspecified width was created in 1920, when cars were only six feet wide. In the 1970s, however, cars were considerably wider. Because the original roadway easement was not specifically limited in width, the easement will expand in size to accommodate the changing and expanding needs of the owner of the dominant tenement.

2) But a basic change in the nature of the use is not allowed. Thus, a telephone or power line may not be added on the roadway. (Many courts are more liberal in allowing such additions if the roadway easement is public rather than private.)

d. **Easements by Necessity or Implication**
In the case of easements by necessity, the ***extent of the necessity determines the scope*** of the easement. Because there is no underlying written instrument to interpret, courts will look instead to the circumstances giving rise to the easement. Similarly, with other implied easements, the ***quasi-easement*** will provide the starting point for the court's

construction of the scope of the easement. Modifications in the easement will be enforced to the extent that they are necessary for reasonably foreseeable changes in the use of the dominant parcel.

e. Use of Servient Estate

Absent an express restriction in the original agreement, the owner of the servient estate may use her land in any way she wishes so long as her conduct does not interfere with performance of the easement, profit, covenant, or servitude.

Example: A grants to B Water Company the right to lay water pipes in a specified five-foot right-of-way. A is not by this grant necessarily precluded from granting similar rights in the same right-of-way to a competing company, so long as the second grant does not interfere with the use made by B, the original grantee. A may also build over the right-of-way so long as the structure does not unreasonably interfere with B's use.

1) Duty to Repair

If the holder of the benefit is the only party making use of the easement, that party has the duty to make repairs (*e.g.*, fill in potholes on a right-of-way) and, absent a special agreement, the servient owner has no duty to do so. If the easement is nonexclusive and ***both*** the holder of the benefit and the servient owner are making use of the easement, the court will ***apportion*** the repair costs between them on the basis of their relative use.

f. Intended Beneficiaries—Subdivision of Dominant Parcel

When an easement is created for the benefit of a landowner, and the landowner later subdivides the parcel, there is a question whether each subdivision grantee will succeed to the original benefit. The answer will turn on whether the extension of the benefit to each of the subdivided parcels will burden the servient estate to a greater extent than was contemplated by the original parties. Absent any other evidence on intent, a court will not find an intent to allow an extension if extending the benefit to each parcel in the subdivision will unreasonably overburden the servient estate. Weighing all the circumstances, a court could find subdivision into four lots reasonable, but subdivision into 50 lots unreasonable; it is determined on a case-by-case basis.

Example: A, owner of Blackacre, grants to B, owner of Whiteacre, a right-of-way easement of ingress and egress over Blackacre. B then subdivides Whiteacre into 150 lots. If A and B had not contemplated the subdivision of Whiteacre, and if use of the right-of-way by all 150 lot owners would substantially interfere with A's use of Blackacre (in a way that B's use alone would not), a court would probably not find an intent that the benefit of the right-of-way easement attach to each of the 150 parcels.

g. Effect of Use Outside Scope of Easement

When the owner of an easement uses it in a way that exceeds its legal scope, the easement is said to be ***surcharged***. The remedy of the servient landowner is an ***injunction*** of the excess use, and possibly damages if the servient land has been harmed. However, the excess use ***does not terminate*** the easement or give the servient landowner a power of termination.

4. Termination of Easements

An easement, like any other property interest, may be created to last in perpetuity or for a limited period of time. To the extent the parties to its original creation provide for the natural termination of the interest, such limitations will control.

a. Stated Conditions

If the parties to the original creation of an easement set forth specific conditions upon the happening of which the easement right will terminate, the conditions will be recognized. On this basis, the following conditions are valid: an easement granted "so long as repairs are maintained," an easement granted "so long as X is the holder of the dominant tenement," an easement granted "until the dominant tenement is used for commercial purposes," etc.

b. Unity of Ownership

By definition, an easement is the right to use the lands of another for a special purpose. On this basis, the ownership of the easement and of the servient tenement must be in different persons. If ownership of the two comes together in one person, the easement is extinguished.

1) **Complete Unity Required**

For an easement to be extinguished, there must be complete unity of ownership as between the interest held in the easement and that held in the servient tenement. In other words, if the holder of an easement acquires an interest in the servient tenement, the easement is extinguished only if he acquires an interest in the servient tenement of ***equal or greater duration*** than the duration of the easement privilege. Conversely, if the holder of the servient tenement acquires the easement interests, the title acquired must be ***equal to or greater than her interest*** or estate in the servient tenement. If there is incomplete acquisition of title, the easement will not be extinguished.

Example: A is the owner of the servient tenement in fee simple. B has an access easement across the servient tenement and the duration of the easement is in fee simple. A conveys a 10-year term tenancy in the servient tenement to B. There is no complete unity of ownership. The easement right is of longer duration than is the estate acquired by B in the servient tenement. Therefore, the easement is not extinguished.

2) **No Revival**

If complete unity of title is acquired, the easement is extinguished. Even though there may be later separation, the easement will not be automatically revived.

Example: A owns Lot 6, the servient tenement. B owns adjacent Lot 7. A grants to B the privilege of crossing Lot 6, *i.e.*, grants an easement appurtenant to B. Assume A conveys Lot 6 to B in fee simple. The easement would be extinguished because B then holds both the easement and title to the servient tenement. If, thereafter, B conveys Lot 6 to C, the easement is not revived. Of course, it could be created anew.

c. **Release**

An easement may be terminated by a release given by the owner of the easement interest to the owner of the servient tenement. A release requires the ***concurrence of both owners*** and is, in effect, a conveyance. The release must be executed with all the formalities that are required for the valid creation of an easement.

1) **Easement Appurtenant**

~~The basic~~ characteristic of an easement appurtenant is that it becomes, for the purpose of succession, an incident of possession of the dominant tenement. This basic characteristic requires that the easement interest not be conveyed independently of a conveyance of the dominant tenement. However, an easement appurtenant may be conveyed to the owner of the servient tenement without a conveyance (to the same grantee) of the dominant tenement. This is an exception to the general alienability characteristics of an easement appurtenant (*see* 1.b., *supra*).

2) **Easement in Gross**

The basic characteristic of an easement in gross is that unless it is for a commercial purpose, it is inalienable. However, an easement in gross can be released; *i.e.*, can be conveyed to the owner of the servient tenement. This is an exception to the general characteristics of an easement in gross.

3) **Statute of Frauds**

The Statute of Frauds requires that every conveyance of an interest in land that has a duration long enough to bring into play a particular state's Statute of Frauds (typically one year) must be evidenced by a writing. This writing requirement is also applicable to a release of an easement interest. If the easement interest that is being conveyed has a duration of greater than one year, it must be in writing in order to satisfy the Statute of Frauds. An oral release is ineffective, although it may become effective by estoppel.

d. **Abandonment**

It has become an established rule that an easement can be extinguished without conveyance where the owner of the privilege demonstrates by physical action an intention to ***permanently*** abandon the easement. To work as an abandonment, the owner must have manifested an intention never to make use of the easement again.

Example: A owns Lot 6 and B owns Lot 7, which are immediately adjacent. A grants to B an easement across Lot 6. This easement is specifically located on the servient tenement and is a walkway. Subsequently, B constructs a house on Lot 7 that completely blocks his access to the walkway. By the physical action of constructing the house in such a way that access to the walkway (*i.e.*, the easement) is denied, B has physically indicated an intent not to use the easement again. The easement is extinguished by abandonment.

1) **Physical Act Required**
An abandonment of an easement occurs when the easement holder physically manifests an intention to permanently abandon the easement. Such physical action brings about a termination of the easement by operation of law and therefore no writing is required; *i.e.*, the Statute of Frauds need not be complied with.

2) **Mere Words Insufficient**
The oral expressions of the owner of the easement that he does not intend to use the easement again (*i.e.*, wishes to abandon) are insufficient to constitute an abandonment of the easement. For words to operate as a termination, such expression will only be effective if it qualifies as a release. In other words, the Statute of Frauds must be complied with.

3) **Mere Nonuse Insufficient**
An easement is not terminated merely because it is not used for a long period by its owner. To terminate the easement, the nonuse must be combined with other evidence of intent to abandon it. Nonuse itself is not considered sufficient evidence of that intent.

e. **Estoppel**
While the assertions of the holder of the easement are insufficient to work a termination unless there is valid compliance with the requirements of a release, an easement may be extinguished by virtue of the reasonable reliance and change of position of the owner of the servient tenement, based on assertions or conduct of the easement holder.
Example: The owner of a right-of-way tells the owner of the servient tenement that the owner of the servient tenement may build a building on the servient tenement in such a way as to make the right-of-way no longer usable, and the servient owner does in fact build the building. There will be an extinguishment of the easement by estoppel.

For an easement to be extinguished by estoppel, three requirements must be satisfied. Namely, there must be (i) some ***conduct or assertion*** by the owner of the easement, (ii) a ***reasonable reliance*** by the owner of the servient tenement, (iii) coupled with a ***change of position***. Even though there is an assertion by the easement holder, if the owner of the servient tenement does not change her position based upon the assertion, the easement will not be terminated.

f. **Prescription**
An easement may be extinguished, as well as created, by prescription. Long continued possession and enjoyment of the servient tenement in a way that would indicate to the public that no easement right existed will end the easement right. Such long continued use works as a statute of limitations precluding the whole world, including the easement holder, from asserting that his privilege exists.

The termination of an easement by prescription is fixed by analogy to the creation of an easement by prescription. The owner of the servient tenement must so ***interfere with the easement*** as to create a cause of action in favor of the easement holder. The interference must be open, notorious, continuous, and nonpermissive for the statutory period (*e.g.*, 20 years).

g. **Necessity**
Easements created by necessity ***expire as soon as the necessity ends***.
Example: A, the owner of a tract of land, sells a portion of it that has no access to a highway except over the remaining lands of A. B, the purchaser, acquires by necessity a right-of-way over the remaining lands of A.

Some years later, a highway is built so that B no longer needs the right-of-way across A's property. The easement ends because the necessity has disappeared.

h. Condemnation
Condemnation of the servient estate will extinguish the nonpossessory interest. Courts are split, however, on whether the holder of the benefit is entitled to compensation for the value lost.

i. Destruction of Servient Estate
If the easement is in a structure (*e.g.*, a staircase), involuntary destruction of the structure (*e.g.*, by fire or flood) will extinguish the easement. Voluntary destruction (*e.g.*, tearing down a building to erect a new one) will not, however, terminate the easement.

5. Compare—Licenses
Licenses, like affirmative easements, privilege their holder to go upon the land of another (the licensor). Unlike an affirmative easement, the license is ***not an interest in land***. It is merely a ***privilege***, revocable at the will of the licensor. (Although licenses may acquire some of the characteristics of easements through estoppel or by being coupled with an interest.) The Statute of Frauds does not apply to licenses, and licensees are not entitled to compensation if the land is taken by eminent domain. Licenses are quite common; examples of licensees include delivery persons, plumbers, party guests, etc.

a. Assignability
An essential characteristic of a license is that it is ***personal to the licensee*** and therefore ***not alienable***. The holder of a license privilege cannot convey such right. In fact, most courts have held that the license privilege is so closely tied to the individual parties that it is revoked, by operation of law, upon an attempted transfer by the licensee.

b. Revocation and Termination
Another essential characteristic of a license is that it is revocable by nature. It may be revoked at any time by a manifestation of the licensor's intent to end it. This manifestation may be by a formal notice of revocation or it may consist of conduct that obstructs the licensee's continued use. Similarly, the licensee can surrender the privilege whenever he desires to do so. A license ends by operation of law upon the death of the licensor. In addition, a conveyance of the servient tenement by the licensor terminates the licensee's privilege.

1) Public Amusement Cases
Tickets issued by theaters, race courses, and other places of amusement have given rise to some controversy. The traditional rule is that such tickets create a license. Once describing the tickets as granting a license, the essential characteristic of a license applies; *i.e.*, it is revocable by nature. On this basis, the licensor may terminate the licensee's privilege at will.

2) Breach of Contract
A license may be granted pursuant to an express or implied contract between the licensor and licensee. On this basis, the termination of the licensee's privilege may constitute a breach of contract. While many courts may grant a cause of action for money damages for a revocation of a license in breach of contract, they continue to sustain the licensor's right to terminate the licensee's privilege to continue to remain on the servient tenement.

Example: A pays a $70 greens fee to play 18 holes of golf on B's property. After A has played only nine holes, B terminates A's right to be on B's property. Because A acquired a license and it is revocable by its very nature, B's action is not, in property terms, wrongful. However, A may have a cause of action against B to recoup part or all of A's $70.

c. Failure to Create an Easement
The Statute of Frauds requires that any conveyance of an interest in land (including an easement interest) of duration greater than one year must be in writing to be enforceable. If a party attempts to create an easement orally, the result is the creation of a license, *i.e.*, a revocable privilege. Note, however, that if an oral attempt to create an easement is subsequently "executed," to the extent that it would be inequitable to

permit its revocation (*e.g.*, the licensee has expended substantial funds in reliance on the license), the licensor may be estopped to revoke the license.

d. Irrevocable Licenses

1) Estoppel Theory
If a licensee invests substantial amounts of money or labor in reliance on a license, the licensor may be estopped to revoke the license, and the license will thus become the equivalent of an affirmative easement.

Example: A orally licenses B to come onto Blackacre to excavate a drainage ditch connected to B's parcel, Whiteacre. B does so at substantial expense. A will probably be estopped to revoke the license and prevent B from using the ditch.

Under the majority view, such irrevocable licenses or easements by estoppel last until the owner receives sufficient benefit to reimburse himself for the expenditures made in reliance on the license. A minority of courts treat easements by estoppel like any other affirmative easements and give them a potentially infinite duration.

2) License Coupled with an Interest
If a license is coupled with an interest, it will be irrevocable as long as the interest lasts.

a) Vendee of a Chattel
The purchaser of a chattel located upon the seller's land is, in the absence of an express stipulation to the contrary, given the privilege to enter upon the seller's land for the purpose of removing the chattel. The purchaser's right is irrevocable. He must, however, enter at reasonable times and in a reasonable manner.

Example: A, the owner of Blackacre, sells 100 crates of oranges stored in a shed on Blackacre and at the same time licenses B to come onto Blackacre to remove the crates of oranges. B has an irrevocable license to enter Blackacre and remove the crates within a reasonable time.

b) Termination of Tenancy
If a tenant's right to possess land has been lawfully terminated, the tenant may still reenter the land at reasonable times and in a reasonable manner for the purpose of removing his chattels. This is an irrevocable privilege.

c) Inspection for Waste
The owner of a future interest in land (*e.g.*, a landlord, holder of a reversionary interest, or a remainderman) is privileged to enter upon the land, at reasonable times and in a reasonable manner, for the purpose of determining whether waste is being committed by the holder of the present possessory estate.

C. PROFITS

Like an easement, a profit (profit a prendre) is a ***nonpossessory*** interest in land. The holder of the profit is entitled to enter upon the servient tenement and take the soil or a substance of the soil (*e.g.*, minerals, timber, oil, or game). Also, like an easement, a profit may be appurtenant or in gross. In contrast to easements, however, there is a constructional preference for profits in gross rather than appurtenant.

1. Creation
Profits are created in the same way as easements.

2. Alienability
A profit appurtenant follows the ownership of the dominant tenement. A profit in gross may be assigned or transferred by the holder.

3. Exclusive and Nonexclusive Profits Distinguished
When an owner grants the ***sole right*** to take a resource from her land, the grantee takes an exclusive profit and is solely entitled to the resources, even to the exclusion of the owner of the servient estate. By contrast, when a profit is nonexclusive, the owner of the servient

estate may grant similar rights to others or may take the resources herself. Ordinarily, profits (like easements) are construed as nonexclusive.

4. Scope

The extent and nature of the profit is determined by the words of the ***express grant*** (if there was a grant), or by ***the nature of the use*** (if the profit was acquired by prescription). Note that implied in every profit is an easement entitling the profit holder to enter the servient estate to remove the resource.

Example: A, the owner of Blackacre, grants B the right to come onto Blackacre to carry off gravel from a pit on Blackacre. B has a profit with respect to the gravel and also the benefit of an implied affirmative easement to go onto Blackacre by reasonable means to remove the gravel.

a. Apportionment of Profits Appurtenant

Courts treat the subdivision of land with a profit appurtenant just as they treat the subdivision of land with an easement appurtenant. The ***benefit of the profit*** will attach to each parcel in a subdivision ***only*** if the burden on the servient estate is not as a result ***overly increased***.

Example: A, owner of Blackacre, grants B, owner of adjacent Whiteacre, the right to take water from a pond situated on Blackacre. If the profit was to take water for purposes of household consumption on Whiteacre, then an increase in use from 1 to 150 households when Whiteacre is subdivided will probably be viewed as overburdensome to Blackacre.

If, however, the profit was to take water for purposes of irrigating Whiteacre, apportionment would be allowed because subdivision would not increase the number of acres to be irrigated and consequently would not impose a greater burden on Blackacre.

b. Apportionment of Profits in Gross

Because profits are freely alienable, a question frequently arises as to whether the holder of a profit can convey it to several people. If a profit is exclusive, the holder may transfer the profit to as many transferees as he likes. Likewise, if the grant of the profit specifies a limit on the profit (less than all), the right can be transferred to multiple transferees. If, however, the profit is nonexclusive and not limited as to amount, it is generally not divisible. Undue burden to the servient estate is again the benchmark, however, and a nonexclusive profit may be assigned to a single person or to several persons jointly if the multiple assignees work together and take no more resources than would have been taken by the original benefit holder.

5. Termination

Profits are terminated in the same way as easements. In addition, ***misuse*** of a profit, unduly increasing the burden (typically through an improper apportionment), will be held to ***surcharge*** the servient estate. The result of surcharge in this case is to extinguish the profit. (Contrast this with the result when the benefit of an ***affirmative easement*** is misused: Improper or excessive use increasing the burden on the servient estate is ***enjoinable*** but, in most jurisdictions, does not extinguish the easement.)

D. COVENANTS RUNNING WITH THE LAND AT LAW (REAL COVENANTS)

A real covenant, normally found in deeds, is a ***written promise*** to do something on the land (*e.g.*, maintain a fence) or a promise not to do something on the land (*e.g.*, conduct commercial business). Real covenants run with the land at law, which means that subsequent owners of the land may enforce or be burdened by the covenant. To run with the land, however, the benefit and burden of the covenant must be analyzed separately to determine whether they meet the requirements for running.

1. Requirements for Burden to Run

If all requirements are met for the burden to run, the successor in interest to the burdened estate will be bound by the arrangement entered into by her predecessor as effectively as if she had herself expressly agreed to be bound.

a. Intent

The covenanting parties must have intended that successors in interest to the covenantor be bound by the terms of the covenant. The requisite intent may be inferred from

circumstances surrounding creation of the covenant, or it may be evidenced by language in the conveyance creating the covenant (*e.g.*, "this covenant runs with the land," or "grantee covenants for herself, her heirs, successors, and assigns").

b. Notice

Under the common law, a subsequent purchaser of land that was subject to a covenant took the land burdened by the covenant, whether or not she had notice. However, under American recording statutes (*see* VI.E., *infra*), if the covenant is not recorded, a bona fide purchaser who has no notice of the covenant and who records her own deed ***will take free*** of the covenant. Hence, as a practical matter, if the subsequent purchaser pays value and records (as will nearly always be true), she is not bound by covenants of which she has no actual or constructive notice.

c. Horizontal Privity

This requirement rests on the relationship between the ***original covenanting parties***. Specifically, horizontal privity requires that, at the time the promisor entered into the covenant with the promisee, the two shared ***some interest in the land independent of the covenant*** (*e.g.*, grantor-grantee, landlord-tenant, mortgagor-mortgagee).

Examples: 1) A and B are neighboring landowners, neither having any rights in the other's land. For good consideration, A promises B, "for herself, her heirs, successors, and assigns," that A's parcel "will never be used for other than residential purposes." The horizontal privity requirement is ***not*** met, and successors in interest to A will ***not*** be bound because at the time A made this covenant, she and B shared no interest in land independent of the covenant.

2) A, owner of Blackacre in fee, promised B, holder of a right-of-way easement over Blackacre, "always to keep the right-of-way free of snow or other impediment to B's use of the right-of-way." Horizontal privity is met because, at the time the covenant was made, A owned the parcel in fee and B held the benefit of an easement in it.

3) A, owner of Blackacre and Whiteacre, deeds Whiteacre to B, promising "not to use Blackacre for other than residential purposes." Horizontal privity exists here by virtue of the grantor-grantee relationship between A and B.

d. Vertical Privity

To be bound, the successor in interest to the covenanting party must hold the ***entire durational interest*** held by the covenantor at the time she made the covenant.

Example: A, who owns Blackacre and Whiteacre in fee simple absolute, sells Whiteacre to B and, in the deed, covenants for herself, her heirs, successors, and assigns, to contribute one-half the expense of maintaining a common driveway between Blackacre and Whiteacre. A then transfers Blackacre to C "for life," retaining a reversionary interest for herself. B ***cannot*** enforce the covenant against C because C does not possess the entire interest (fee simple absolute) held by her predecessor in interest, A, at the time A made the promise.

e. Touch and Concern

The covenant must be of the type that "touches and concerns" the land. The phrase "touch and concern the land" is not susceptible to easy definition. It generally means that the effect of the covenant is to make the land itself more useful or valuable to the benefited party. The covenant must affect the legal relationship of the parties as landowners and not merely as members of the community at large. Therefore, as a general matter, for the burden of a covenant to run, performance of the burden must diminish the landowner's rights, privileges, and powers in connection with her enjoyment of the land.

1) Negative Covenants

For the burden of a negative covenant to touch and concern the land, the covenant must restrict the holder of the servient estate in his ***use of that parcel*** of land.

Examples: 1) A, who owned Blackacre and Whiteacre, covenanted with B, the grantee of Whiteacre, that she would not erect a building of over

two stories on Blackacre. The burden of the covenant touches and concerns Blackacre because it diminishes A's rights in connection with her enjoyment of Blackacre.

2) A, who owned Blackacre and Whiteacre, covenanted with B, the grantee of Whiteacre, that she would never operate a shoe store within a radius of one mile of Whiteacre. The covenant does not touch and concern Blackacre because its performance is unconnected to the enjoyment of Blackacre.

Note the similarity of negative covenants and negative easements. The primary difference between them is that negative easements are limited to a few traditional categories, but there are no limits on negative covenants.

2) Affirmative Covenants

For the burden of an affirmative covenant to touch and concern the land, the covenant must require the holder of the servient estate ***to do something***, increasing her obligations in connection with enjoyment of the land.

Examples: 1) A, who owned Blackacre and Whiteacre, covenanted with B, the grantee of Whiteacre, to keep the building on Blackacre in good repair. The covenant touches and concerns Blackacre because it increases A's obligations in connection with her enjoyment of Blackacre.

2) A owned Blackacre and Whiteacre, which were several miles apart. A covenanted with B, the grantee of Whiteacre, to keep the building on Whiteacre in good repair. The covenant does not touch and concern Blackacre because its performance is unconnected to the use and enjoyment of Blackacre.

3) A, the grantee of a parcel in a residential subdivision, covenants to pay an annual fee to a homeowners' association for the maintenance of common ways, parks, and other facilities in the subdivision. At one time, it was thought that such covenants, because physically unconnected to the land, did not touch and concern. The prevailing view today is that the burden will run because the fees are a charge on the land, increasing A's obligations in connection with the use and enjoyment of it.

3) Relation Between Benefit and Burden

The Restatement of Property imposes as an additional requirement that for the burden of a covenant to run, both the benefit and the burden of the covenant must meet the touch and concern test. Thus, under the Restatement view, if the benefit is personal to the covenantee, the burden will not run; *i.e.*, for the burden to run, the benefit of the promise must benefit the promisee in the physical use or enjoyment of the land possessed by her. No clear majority of states has lined up behind the Restatement approach, and the most that can be said is that a conflict exists on the point.

2. Requirements for Benefit to Run

If all requirements for the benefit to run are met, the successor in interest to the promisee will be allowed to enjoy the benefit (*i.e.*, enforce the covenant).

a. Intent

The covenanting parties must have intended that the successors in interest to the covenantee be able to enforce the covenant. Surrounding evidence of intent, as well as language in the instrument of conveyance, is admissible.

b. Vertical Privity

The benefit of a covenant runs to the assignees of the original estate or of any lesser estate (*e.g.*, a life estate). The owner of ***any*** succeeding possessory estate can enforce the benefit at law. In the majority of states today, horizontal privity is not required for the benefit to run. As a consequence, if horizontal privity is missing, the benefit may run to the successor in interest to the covenantee even though the burden is not enforceable against the successor in interest of the covenantor.

Example: A, who owns Blackacre, covenants with her neighbor, B, who owns Whiteacre, that "A, her successors, and assigns will keep the building on Blackacre in good repair." Horizontal privity is missing. B then conveys Whiteacre, the dominant estate, to C. C can enforce the benefit of the affirmative covenant against A because horizontal privity is not needed for the benefit to run. If, however, A conveys Blackacre to D, neither B nor C could enforce the covenant against D, for horizontal privity is required for the burden to run.

c. Touch and Concern

For the benefit of a covenant to touch and concern the land, the promised performance must benefit the covenantee and her successors ***in their use and enjoyment of the benefited land.***

Examples: 1) A, who owned Blackacre and Whiteacre, covenanted with B, the grantee of Whiteacre, not to erect a building over two stories on Blackacre. The benefit of the covenant touches and concerns Whiteacre because, by securing B's view, it increases his enjoyment of Whiteacre.

2) A, who owned Blackacre and Whiteacre, covenanted with B, the grantee of Whiteacre, to keep the building on Blackacre freshly painted and in good repair. The benefit of the covenant touches and concerns Whiteacre because, by assuring the view of an attractive house, it increases the value of Whiteacre.

Compare: A, who owned Blackacre, covenanted with B, a supermarket operator owning no adjacent land, to erect and maintain on Blackacre a billboard advertising B's supermarkets. The benefit of the covenant does ***not*** touch and concern because it is not connected to and does not operate to increase B's enjoyment of any piece of land.

3. Specific Situations Involving Real Covenants

a. Promises to Pay Money

The majority rule is that if the money is to be used in a way connected with the land, the burden will run with the land. The most common example is a covenant to pay a homeowners' association an annual fee for maintenance of common ways, parks, etc., in a subdivision.

b. Covenants Not to Compete

Covenants not to compete have created several problems. Clearly, the burden of the covenant—restricting the use to which the land may be put—"touches and concerns" the land. However, the benefited land, while "commercially enhanced," is not affected in its physical use. Thus, some courts have refused to permit the benefit of such covenants to run with the land.

The Restatement of Property, somewhat inconsistently, permits the benefit but not the burden of such covenants to run. Most courts seem willing to overlook these technical distinctions and permit both the benefit and the burden of covenants not to compete to run with the land.

c. Racially Restrictive Covenants

If a covenant purports to prohibit an owner from transferring land to persons of a given race, no court (state or federal) is permitted to enforce the covenant. To do so would involve the court in a violation of the Equal Protection Clause of the Fourteenth Amendment.

4. Remedies—Damages Only

A breach of a real covenant is remedied by an award of money damages, not an injunction. If equitable relief, such as an injunction, is sought, the promise must be enforced as an equitable servitude rather than a real covenant (*see* below). Note that a real covenant gives rise to personal liability only. The damages are collectible out of the defendant's general assets.

5. Termination

As with all other nonpossessory interests in land, a real covenant may be terminated by: (i) the holder of the benefit executing a ***release in writing***; (ii) ***merger*** (fee simple title to both the benefited and burdened land comes into the hands of a single owner); and (iii) ***condemnation*** of the burdened property.

E. EQUITABLE SERVITUDES

If a plaintiff wants an injunction or specific performance, he must show that the covenant qualifies as an equitable servitude. An equitable servitude is a covenant that, regardless of whether it runs with the land at law, equity will enforce against the assignees of the burdened land who have ***notice*** of the covenant. The usual remedy is an injunction against violation of the covenant.

1. Creation

Generally, equitable servitudes are created by covenants contained in a writing that satisfies the Statute of Frauds. As with real covenants, acceptance of a deed signed only by the grantor is sufficient to bind the grantee as promisor. There is one exception to the writing requirement: Negative equitable servitudes may be implied from a common scheme for development of a residential subdivision.

a. Servitudes Implied from Common Scheme

When a developer subdivides land into several parcels and some of the deeds contain negative covenants but some do not, negative covenants or equitable servitudes binding ***all*** the parcels in the subdivision may be implied under the doctrine of "reciprocal negative servitudes." The doctrine applies only to negative covenants and equitable servitudes and not to affirmative covenants. Two requirements must be met before reciprocal negative covenants and servitudes will be implied: (i) a common scheme for development, and (ii) notice of the covenants.

Example: A subdivides her parcel into lots 1 through 50. She conveys lots 1 through 45 by deeds containing express covenants by the respective grantees that they will use their lots only for residential purposes. A orally assures the 45 grantees that ***all*** 50 lots will be used for residential purposes. Some time later, after the 45 lots have been developed as residences, A conveys lot 46 to an oil company, which plans to operate a service station on it. The deed to lot 46 contains no express residential restriction. A court will nonetheless imply a negative covenant, prohibiting use for other than residential purposes on lot 46 because both requirements have been met for an implied reciprocal negative servitude. First, there was a ***common scheme***, here evidenced by A's statements to the first 45 buyers. Second, the oil company was on ***inquiry notice*** of the negative covenant because of the uniform residential character of the other lots in the subdivision development.

1) Common Scheme

Reciprocal negative covenants will be implied only if at the time that sales of parcels in the subdivision began, the developer had a plan that all parcels in the subdivision be developed within the terms of the negative covenant. If the scheme arises after some lots are sold, it cannot impose burdens on the lots previously sold without the express covenants. The developer's common scheme may be evidenced by a ***recorded plat***, by a ***general pattern*** of prior restrictions, or by ***oral representations***, typically in the form of statements to early buyers that all parcels in the development will be restricted by the same covenants that appear in their deeds. On the basis of this scheme, it is inferred that purchasers bought their lots relying on the fact that they would be able to enforce subsequently created equitable servitudes similar to the restrictions imposed in their deeds.

2) Notice

To be bound by the terms of a covenant that does not appear in his deed, a grantee must, at the time he acquired his parcel, have had notice of the covenants contained in the deeds of other buyers in the subdivision. The requisite notice may be acquired through ***actual notice*** (direct knowledge of the covenants in the prior deeds); ***inquiry notice*** (the neighborhood appears to conform to common restrictions); or ***record notice*** (if the prior deeds are in the grantee's chain of title he will, under the recording acts, have constructive notice of their contents).

2. Enforcement

For successors of the original promisee and promisor to enforce an equitable servitude, certain requirements must be met.

a. Requirements for Burden to Run

1) Intent

The covenanting parties must have intended that the servitude be enforceable by

and against assignees. No technical words are required to express this intent. In fact, the intent may be ascertained from the purpose of the covenant and the surrounding circumstances.

2) **Notice**
A subsequent purchaser of land burdened by a covenant is not bound by it in equity unless she had actual or constructive notice of it when she acquired the land. This rule is part of the law of equitable servitudes, and exists apart from the recording acts.

3) **Touch and Concern**
This is the same requirement as applies to real covenants (*see* D.1.e., *supra*).

b. Requirements for Benefit to Run
The benefit of the equitable servitude will run with the land (and thus to successors in interest of the original parties) if the original parties so ***intended*** and the servitude ***touches and concerns*** the benefited property.

c. Privity Not Required
The majority of courts enforce the servitude not as an in personam right against the owner of the servient tenement, but as an equitable property interest in the land itself. There is, therefore, no need for privity of estate.

Examples: 1) A acquires title to Blackacre by adverse possession. Even though he is not in privity of estate with the original owner, he is subject to the equitable servitude because the servitude is an interest in the land.

2) A and B are neighboring landowners, neither having any rights in the other's land. A promises B, "for herself, her heirs, successors, and assigns," that A's parcel "will never be used for other than residential purposes." B records the agreement. A sells Blackacre to C. The burden created by this promise would ***not run at law*** as a negative covenant because horizontal privity is missing. However, under an equitable servitude theory, the burden ***will run***, and an injunction will issue against other than residential uses.

3) Same as above, but A transfers only a life estate to C. Again, the burden would not run at law because of the absence of vertical privity. The burden would, however, be enforceable as an equitable servitude.

d. Implied Beneficiaries of Covenants—General Scheme
If a covenant in a subdivision deed is silent as to who holds its benefit, any neighbor in the subdivision will be entitled to enforce the covenant if a general scheme or plan is found to have existed at the time he purchased his lot.

Example: A subdivides her parcel into Lots 1 through 10. She conveys Lot 1 to B, who covenants to use the lot for residential purposes only. A then conveys Lot 2 to C, who makes a similar covenant. Thereafter, A conveys the balance of the lots to other grantees by deeds containing the residential restriction. Can C enforce the restrictions against B? Can B enforce against C?

Subsequent purchaser versus prior purchaser (C v. B): In most jurisdictions, C (the later grantee) can enforce the restriction against B if the court finds a common plan of residential restrictions at the very outset of A's sales. (Evidence would be the similar covenant restrictions in all the deeds.) The rationale is that B's promise was made for the benefit of the land at that time retained by A, the grantor. Such land, Lots 2 through 10, became the dominant estate. When A thereafter conveyed Lot 2 to C, the benefit of B's promise passed to C with the land.

Prior purchaser versus subsequent purchaser (B v. C): In most jurisdictions, B could likewise enforce the restriction against C, even though A made no covenant in her deed to B that A's retained land would be subject to the residential restrictions.

There are two theories on which a prior purchaser can enforce a restriction in a subsequent deed from a common grantor. One theory is that B is a third-party beneficiary of C's promise to A. The other theory is that

an implied reciprocal servitude attached to A's retained land at the moment she deeded Lot 1 to B. Under this theory, B is enforcing an ***implied*** servitude on Lot 2 and ***not*** the express covenant later made by C.

3. **Equitable Defenses to Enforcement**
A court in equity is not bound to enforce a servitude if it cannot in good conscience do so.

a. **Unclean Hands**
A court will not enforce a servitude if the person seeking enforcement is violating a similar restriction on his own land. This defense will apply even if the violation on the complainant's land is less serious, as long as it is of the same general nature.

b. **Acquiescence**
If a benefited party acquiesces in a violation of the servitude by one burdened party, he may be deemed to have abandoned the servitude as to other burdened parties. (Equitable servitudes, like easements, may be abandoned.) Note that this defense will not apply if the prior violation occurred in a location so distant from the complainant that it did not really affect his property.

c. **Estoppel**
If the benefited party has acted in such a way that a reasonable person would believe that the covenant was abandoned, and the burdened party acts in reliance thereon, the benefited party will be estopped to enforce the covenant. Similarly, if the benefited party fails to bring suit against a violator within a reasonable time, the action may be barred by ***laches***.

d. **Changed Neighborhood Conditions**
Changed neighborhood conditions may also operate to end an equitable servitude. If the neighborhood has changed significantly since the time the servitude was created, with the result that it would be inequitable to enforce the restriction, injunctive relief will be withheld. (Many courts, however, will allow the holder of the benefit to bring an action at law for damages.)
Example: A, the owner of Blackacre and Whiteacre, adjacent parcels in an undeveloped area, sells Blackacre to B, extracting a promise that Blackacre "will always be used only for residential purposes." Fifteen years later, the neighborhood has developed as a commercial and industrial center. If B or her successors in interest to Blackacre now wish to use the parcel for a store, an injunction will probably ***not*** issue. A may, however, recover from B or her successors any damages that she may suffer from termination of the residential restriction.

1) **Zoning**
Zoning plays an important role in determining whether changed conditions will be allowed as a defense to enforcement of an equitable servitude. Zoning that is inconsistent with the private restriction imposed by the equitable servitude will not of itself bar the injunction, but it will provide good evidence that neighborhood conditions have changed sufficiently to make the injunction unjust. Thus, in the example above, the position of B or her successors would be fortified by a showing that the area in which Blackacre is situated is presently zoned for commercial uses.

2) **Concept of the "Entering Wedge"**
The concept of the "entering wedge" also plays an important role in changed condition cases. If the equitable servitude is part of a general plan of restrictions in a subdivision, and if the parcel in question is located somewhere at the outer edge of the subdivision, changed conditions outside of the subdivision will not bar the injunction if it is shown that lifting the restriction on one parcel will produce changed conditions for surrounding parcels, requiring that their restrictions also be lifted, and so on (the "domino effect"). Thus, in the example above, if removing the restriction and allowing commercial development of Blackacre would produce changed conditions for the neighboring, similarly restricted parcel—Whiteacre—with the consequence that its servitude could not be equitably enforced, the injunction against commercial use on Blackacre will probably be allowed, notwithstanding the changed conditions. Note that injunctive relief may be granted if the substantial change occurs within the subdivision.

4. Termination

Like other nonpossessory interests in land, an equitable servitude may be terminated by a ***written release*** from the benefit holder(s), ***merger*** of the benefited and burdened estates, or ***condemnation*** of the burdened property. (*See* B.4.b., c., h., *supra.*)

F. RELATIONSHIP OF COVENANTS TO ZONING ORDINANCES

Both restrictive covenants and zoning ordinances (*see* IX.C., *infra*) may affect legally permissible uses of land. Both must be complied with, and neither provides any excuse for violating the other. For example, if the zoning permits both residential and commercial use but an applicable covenant allows only residential use, the covenant will control.

These two forms of land use restrictions are enforced differently. As discussed above, covenants (if they meet the relevant requirements) can be enforced by nearby property owners at law or in equity. Zoning, on the other hand, is not subject to enforcement by private suit, but can be enforced only by local governmental officials.

G. PARTY WALLS AND COMMON DRIVEWAYS

Often, a single wall or driveway will be built partly on the property of each of two adjoining landowners. Absent an agreement between the owners to the contrary, courts will treat the wall as belonging to each owner to the extent that it rests upon her land. Courts will also imply mutual cross-easements of support, with the result that each party has the right to use the wall or driveway, and neither party can unilaterally destroy it.

1. Creation

While a ***written agreement*** is required by the Statute of Frauds for the express creation of a party wall or common driveway agreement, an "irrevocable license" can arise if there has been detrimental reliance on a parol agreement. Party walls and common driveways can also result from ***implication*** or ***prescription***.

2. Running of Covenants

If party wall or common driveway owners agree to be mutually responsible for maintaining the wall or driveway, the burdens and benefits of these covenants will run to successive owners of each parcel. The cross-easements for support satisfy the requirement of horizontal privity because they are mutual interests in the same property. And each promise touches and concerns the adjoining parcels.

V. ADVERSE POSSESSION

A. IN GENERAL

Title to real property may be acquired by adverse possession. (Easements may also be acquired by prescription.) Gaining title by adverse possession results from the operation of the statute of limitations for trespass to real property. If an owner does not, within the statutory period, take legal action to eject a possessor who claims adversely to the owner, the owner is thereafter barred from bringing suit for ejectment. Moreover, title to the property vests in the possessor.

B. REQUIREMENTS

1. Running of Statute

The statute of limitations begins to run when the claimant goes adversely into possession of the true owner's land (*i.e.*, the point at which the true owner could first bring suit). The filing of suit by the true owner is not sufficient to stop the period from running; the suit must be pursued to judgment. However, if the true owner files suit before the statutory period (*e.g.*, 20 years) runs out and the judgment is rendered after the statutory period, the judgment will relate back to the time that the complaint was filed.

2. Open and Notorious Possession

Possession is open and notorious when it is the kind of use the usual owner would make of the land. The adverse possessor's occupation must be ***sufficiently apparent*** to put the true owner on ***notice*** that a trespass is occurring. If, *e.g.*, Water Company ran a pipe under Owner's land and there was no indication of the pipe's existence from the surface of the land, Water Company could not gain title by adverse possession because there was nothing to put Owner on notice of the trespass.

Example: A's use of B's farmland for an occasional family picnic will not satisfy the open and notorious requirement because picnicking is not necessarily an act consistent with the ownership of farmland.

3. Actual and Exclusive Possession

a. Actual Possession Gives Notice

Like the open and notorious requirement, the requirement of actual possession is designed to give the true owner notice that a trespass is occurring. It is also designed to give her notice of the ***extent*** of the adverse possessor's claim. As a general rule, the adverse possessor will gain title only to the land that she actually occupies.

1) Constructive Possession of Part

Actual possession of a portion of a unitary tract of land is sufficient adverse possession as to give title to the whole of the tract of land after the statutory period, as long as there is a ***reasonable proportion*** between the portion actually possessed and the whole of the unitary tract, and the possessor has color of title (*i.e.*, a document purporting to give him title) to the whole tract. Usually, the proportion will be held reasonable if possession of the portion was sufficient to put the owner or community on notice of the fact of possession.

b. Exclusive Possession—No Sharing with Owner

"Exclusive" merely means that the possessor is not sharing with the true owner or the public at large. This requirement does not prevent two or more individuals from working ***together*** to obtain title by adverse possession. If they do so, they will obtain the title as tenants in common.

Example: A and B are next door neighbors. They decide to plant a vegetable garden on the vacant lot behind both of their homes. A and B share expenses and profits from the garden. If all other elements for adverse possession are present, at the end of the statutory period, A and B will own the lot as tenants in common.

4. Continuous Possession

The adverse claimant's possession must be continuous throughout the statutory period. Continuous possession requires only the degree of occupancy and use that the average owner would make of the property.

a. Intermittent Periods of Occupancy Not Sufficient

Intermittent periods of occupancy generally are not sufficient. However, constant use by the claimant is not required so long as the possession is of the type that the usual owner would make of the property. For example, the fact that the adverse possessor is using the land for the intermittent grazing of cattle will probably not defeat continuity if the land is ***normally*** used in this manner.

b. Tacking Permitted

There need not be continuous possession by the same person. Ordinarily, an adverse possessor can take advantage of the periods of adverse possession by her predecessor. Separate periods of adverse possession may be "tacked" together to make up the full statutory period with the result that the final adverse possessor gets title, provided there is privity between the successive adverse holders.

1) "Privity"

Privity is satisfied if the subsequent possessor takes by descent, by devise, or by deed purporting to convey title. Tacking is not permitted where one adverse claimant ousts a preceding adverse claimant or where one adverse claimant abandons and a new adverse claimant then goes into possession.

2) Formalities on Transfer

Even an oral transfer of possession is sufficient to satisfy the privity requirement.

Example: A received a deed describing Blackacre, but by mistake built a house on an adjacent parcel, Whiteacre. A, after pointing the house out to B and orally agreeing to sell the house and land to her, conveyed to B, by a deed copied from her own deed, describing the property as Blackacre. The true owner of Whiteacre argues that there was no privity between A and B because the deed made no reference to Whiteacre, the land actually possessed. Nonetheless, the agreed oral transfer of actual possession is sufficient to permit tacking.

emanuel®
law outlines

Property

Ninth Edition

Steven L. Emanuel

Wolters Kluwer

PROPERTY

NINTH EDITION

STEVEN L. EMANUEL

Founder & Editor-in-Chief, *Emanuel Law Outlines* and
Emanuel Bar Review
Harvard Law School, J.D. 1976
Member, NY, CT, MD and VA bars

The *Emanuel*® *Law Outlines* Series

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

eISBN: 978-1-4548-7855-1

About Wolters Kluwer Legal & Regulatory U.S.

Wolters Kluwer Legal & Regulatory U.S. delivers expert content and solutions in the areas of law, corporate compliance, health compliance, reimbursement, and legal education. Its practical solutions help customers successfully navigate the demands of a changing environment to drive their daily activities, enhance decision quality and inspire confident outcomes.

Serving customers worldwide, its legal and regulatory portfolio includes products under the Aspen Publishers, CCH Incorporated, Kluwer Law International, ftwilliam.com and MediRegs names. They are regarded as exceptional and trusted resources for general legal and practice-specific knowledge, compliance and risk management, dynamic workflow solutions, and expert commentary.

CHAPTER 9

EASEMENTS AND PROMISES CONCERNING LAND

Introductory note: This chapter considers various rights which one may have in the land of *another*. These fall into two broad classes: (1) ***easements*** (and the related concept of licenses); and (2) ***promises concerning land***, which include both covenants that may be enforced at law, and so-called ***"equitable servitudes,"*** which are enforceable in equity (usually by injunction).

I. EASEMENTS GENERALLY

A. Definition of easement: An ***easement*** is a privilege to ***use the land of another***. Easements can be of either an affirmative or negative nature.

1. Affirmative easements: An ***affirmative*** easement is one which entitles its holder to ***do a physical act*** on the land of another. Most easements are of this variety.

Example: *A* is the owner of Blackacre. He gives *B* a ***right of way*** over Blackacre, so that *B* can pass from his own property to a highway which adjoins Blackacre. *B* holds an affirmative easement, since he is permitted to make physical use of *A*'s property (by passing over it).

2. Negative easement: A ***negative*** easement is one which enables its holder to ***prevent*** the owner of land from making certain uses of that land. Such easements are comparatively rare, and do not permit the holder of the easement actually to go upon the property.

Example: *A* owns Whiteacre, which is right next to the ocean. *B* owns Blackacre, which is separated from the ocean by Whiteacre. *A* gives *B* an easement of "light and air", which assures *B* that *A* will not build any structure on Whiteacre which will block *B*'s view of the ocean. This is a negative easement, since it does not authorize *B* to go on *A*'s property, but allows *B* to restrain *A* from certain uses of *A*'s property. (The negative easement would probably be enforced by an injunction, but

might also be enforced by a suit for damages.)

B. Easements appurtenant vs. easements in gross: A second important distinction is between easements that are ***appurtenant*** to a particular piece of land, and those that are ***"in gross."***

1. Appurtenant easement: An easement ***appurtenant*** is one which benefits its holders in the use of a ***certain piece of land***.

a. Dominant and servient tenements: The land for whose benefit the appurtenant easement is created is called the ***dominant tenement***. The land that is burdened, or used, by the easement is called the ***servient tenement***.

Example: Blackacre, owned by S, stands between Whiteacre, owned by D, and the public road. S gives D the right to pass over a defined portion of Blackacre to get from Whiteacre to the road. This right of way is an easement that is appurtenant to Whiteacre. Blackacre is the servient tenement, and Whiteacre is the dominant tenement.

b. Test for appurtenance: For an easement to be appurtenant, its ***benefit*** must be intimately ***tied to a particular piece of land*** (the dominant tenement). It is not enough that the beneficiary of the easement happens to have an interest in a piece of land that is made more valuable by the easement. Most of the time, in order for the easement to be appurtenant, the dominant tenement will have to be ***adjacent*** to the servient tenement.

2. Easement in gross: An easement ***in gross***, by contrast, is one whose benefit is ***not tied to any particular parcel of land***. The easement is thus ***personal*** to its holder.

Example: O, the owner of Blackacre, gives his friend E the right to come onto Blackacre anytime he wants and use O's swimming pool. O grants this right purely out of his friendship for E, and without respect to E's ownership of any nearby land. This easement is in gross, and is personal to E, even if E happens to owns a nearby parcel.

a. Benefit tied to parcel: An easement appurtenant and an easement in

gross can usually be distinguished by analyzing the ***benefit*** which the easement confers. If it is a benefit which can ***only*** accrue to one who is ***in possession of a particular parcel*** (the dominant tenement), the easement ***must be appurtenant,*** rather than in gross.

Example: O owns three lots. Lot 3 is used as a filling station. O conveys Lot 2, but reserves a right of way over Lot 2 (which right of way O intends to use as a driveway to serve Lot 3). When O dies, she devises Lot 3 to her daughter, P. D eventually gains title to Lot 2. P sues for a declaration that she holds a valid easement over Lot 2.

Held, the easement is appurtenant, since the driveway could only be of use to the possessor of Lot 3. Therefore, the easement was automatically transferred when Lot 3 (the dominant estate) passed by will to P, and P has the full benefits of the easement. *Mitchell v. Castellaw*, 246 S.W.2d 163 (Tex. 1952).

b. Consequence of distinction: The principal consequence of the distinction between easements appurtenant and easements in gross relates to ***assignments*** and ***division***. Whereas an easement appurtenant passes with ownership of the dominant parcel (as in *Mitchell*, *supra*), an easement in gross is sometimes not assignable at all, and is frequently not divisible for use by several persons independently of each other. These issues are discussed more fully *infra*, p. 212.

3. Profit: A property interest related to the easement is the ***profit***, sometimes called the ***profit a prendre***. The profit is the right to go onto the land of another and ***remove the soil or a product of it***. Thus the right to mine ***minerals***, drill for ***oil***, or capture wild game or fish, are all traditionally called profits.

a. Functionally identical: Under American law, the rules governing profits are ***identical*** to those governing easements. Accordingly, all statements made below about easements are applicable to profits, unless the contrary is indicated. See Rest. Special Note to §450, stating that the Restatement does not use the term "profit" at all.

II. CREATION OF EASEMENTS

A. Five ways to create: There are five ways in which an easement may be created:

[1] by an ***express*** grant (which generally must be in writing);

[2] by ***implication***, as part of a land transfer;

[3] by strict ***necessity***, to prevent a parcel from being landlocked;

[4] by ***prescription***, similar to the obtaining of a possessory estate by adverse possession; and [5] by ***estoppel***.

We'll discuss each of these in turn.

B. Express creation: The most straightforward way of creating an easement is by a ***deed*** or ***will***. Thus *A*, the owner of Blackacre, could give *B*, the owner of Whiteacre, a deed expressly stating that *B* has the right to use a particular strip of Blackacre as a right of way, for a certain period of time.

1. Statute of Frauds: The express grant of an easement must, in all cases, meet the ***Statute of Frauds***, as it applies to the creation of interests in land. This means that there must be a ***writing***, signed by the owner of the servient estate. Also, any ***recording act*** (*infra*, p. 359) will apply, so that if the holder of the easement does not record, he may lose the easement as against a subsequent bona fide purchaser of the servient estate.

a. Short-term easement: Recall that, in most states, a *lease* for less than one year does not have to be in writing. However, most courts require that even a very short easement must be in writing; see Burby, p. 68.

i. Restatement rule: But Rest. §467, Comment f, requires a writing only where an estate of the same duration would have to be in writing.

b. Failure to satisfy statute: If the easement is one which must satisfy the Statute of Frauds, and the parties fail to do so, a ***license*** (similar to an easement except that it is revocable at the will of the licensor) will generally be created. See *infra*, p. 218.

2. Reservation in grantor: The owner of land may convey that land to someone else, and ***reserve for himself*** an easement in it. Thus *A* may give *B* a deed for Blackacre, with a statement in the deed that "*A* hereby retains a right of way over the eastern eight feet of the property." This is called an ***easement by reservation.***

a. Statute of Frauds: The Statute of Frauds normally requires a writing signed by the party "to be charged." Since an easement by reservation is enforceable against the grantee, not the grantor, it might be thought that the usual American form of deed (signed only by the grantor) would not be effective as to the reservation. But the courts have held that the grantee, by accepting the deed, and recording it, ***binds himself*** as to the reservation even without a signature. 2. A.L.P. 253.

3. Creation in stranger to deed: At common law, it was ***not*** possible for an owner of land to convey that land to one person, and to establish by the same deed an easement in a ***third person***. As the rule was sometimes stated, an easement could not be created in a ***"stranger to the deed."*** Burby, p. 71.

a. Modern view: Most modern courts have now ***abandoned*** this rule, and permit an easement to be created by a deed in a person who is neither the grantor nor grantee. Similarly, Rest. 3d (Servitudes), §2.6(2), permits the grantor to create an easement in a third party who is not the grantee.

b. Limited exception by other courts: Even among courts that pay lip service to the common-law "no easement in a stranger to the deed" rule, an exception is often made for a ***use made*** upon the property ***prior to the conveyance.*** See 2 A.L.P. 254-55, n. 2.

Example: O sells two lots (Lots 19 and 20) to *A*. Lot 19 has a building on it; Lot 20 is vacant, and is used by O's church as a parking lot. O's deed of Lot 20 to *A* is expressly made "subject to an easement for automobile parking during church hours for the benefit of the church. …" *A* records the deed to Lot 20, and then sells both lots to *B*. The deed received by *B* does not contain an easement. Several months later, *B* finds out about the easement clause in the first deed, and brings an action to quiet title against the church (i.e., to gain a declaration that the church has no valid easement.) He relies on the common-law rule that an easement may not be created in a stranger.

Held, for the church. The common-law rule against easements in a "stranger to the deed" is a product of feudal notions that have no relevance today. It not only frustrates the grantor's intent, but is also inequitable because the grantee has presumably paid a reduced price

for title to the encumbered property. Here, for instance, O testified that she discounted the price she charged *A* by one-third because of the easement. Nor has *B* relied upon the common-law rule, since he did not even read the deed to *A* until several months after buying the property. Therefore, the easement is valid. *Willard v. First Church of Christ, Scientist, Pacifica*, 498 P.2d 987 (Cal. 1972).

C. Creation by implication: The situation discussed just previously was that in which the owner of land expressly creates an easement. It may happen, however, that two parties are situated in such a way that an easement could be created, but no express language to that effect is used. If certain requirements are met, the court may nonetheless find that an easement has been created ***by implication***.

1. **Exception to Statute of Frauds:** Since an easement may normally be created only by compliance with the Statute of Frauds (*supra*, p. 197), creation of an easement by implication is in effect an ***exception to the Statute of Frauds***. For this reason, the requirements for creation of an easement by implication are designed to ensure that there is strong circumstantial evidence that the parties ***did in fact intend*** to create or reserve the easement.

2. **Summary of requirements:** For an easement by implication to exist, these three requirements must all be met:

   [1] Land is being ***"severed"*** from its ***common owner***. That is, it's being ***divided up*** so that the owner of a parcel is either selling part and retaining part, or is subdividing the property and selling pieces to different grantees. (See p. 199 for more about this.)

   [2] The ***use*** for which the implied easement is claimed ***existed prior to the severance*** referred to in [1], and was apparent and continuous prior to that severance. (See p. 200.)

   [3] The easement is at least ***reasonably necessary*** to the enjoyment of what is claimed to be the dominant tenement. (See p. 201.)

3. **Sewers:** One scenario in which an easement by implication can come into existence is where a common owner runs a ***sewer line*** from one house underneath another parcel to get to the public sewer main. The requirements of severance, prior use and reasonable necessity can be easily met in this scenario.

Example: O owns two vacant side-by-side lots, Blackacre and Whiteacre. Blackacre (but not Whiteacre) adjoins a public street that contains a public sewer main. O constructs a house on Whiteacre, and runs a sewer line from that house underneath Blackacre to the public main. O then sells Whiteacre to *A*, without mentioning the existence of the sewer line either orally or in the deed. Later, *A* sells Whiteacre to *B* and O sells Blackacre to *C*. *C* blocks the sewer line from Whiteacre as it enters Blackacre. *B* sues to have the blockage removed.

B will win, because O created an easement by implication, since (1) O owned both parcels simultaneously; (2) the use existed (i.e., the sewer line passed under Blackacre) while O still owned both; and (3) the easement remains reasonably necessary to the owner of Whiteacre.

4. **Severance from common owner:** As noted, an easement by implication constitutes an exception to the Statute of Frauds. To limit this exception, and to guard against false claims, an easement will only be implied where the owner of a parcel ***sells part and retains part***, or ***sells pieces simultaneously*** to more than one grantee. (This is called the requirement of ***"severance."***) One of the pieces then becomes the dominant tenement, and the other the servient tenement. This means that an ***easement in gross cannot be created by implication***.

Example 1: O owns a two-acre parcel, with a building on each half. The only access from the rear half to the street is by crossing the front half. O sells the rear half to E, and keeps the front half for himself. Provided that the requirements of prior use and reasonable necessity (discussed below) are met, E will gain an easement by implication over the front half, even though the deed from O to E is silent about any easement.

Example 2: *A* and *B* are neighboring landowners. A new street is built adjoining *B*'s property, and the only way *A* can get to it directly is by crossing *B*'s property. He crosses for several years along a particular portion of *B*'s property, and then sells his land to *C*. No easement against *B*'s property could have been created by implication, since there was no conveyance between *A* and *B*. If *A*, or *C* (or one after the other) uses the path long enough, an easement by ***prescription*** may be created

(*infra*, p. 203), but this is a completely different matter. Also, if the new road is the only public way, and at one time in the past the parcels owned by *A* and *C* were under common ownership, an easement by ***necessity*** (*infra*, p. 202) may exist. But in the absence of a conveyance between *A* and *B*, no easement by implication can exist.

Example 3: O, the owner of Blackacre, conveys the entire parcel to *B*, There is a swimming pool on the property, and as part of the transfer *B* promises O orally that O may use the swimming pool whenever he wants. No easement by implication is created, because O is selling his entire parcel, rather than selling part and retaining part. To put it another way, O's easement, if it existed, would be in gross, and no easement in gross may be created by implication. (Nor does O have an express easement, because the Statute of Frauds is not satisfied). O therefore has merely a license, which may be revoked by *B* whenever he desires. (See *infra*, p. 218.)

a. Must arise at time of severance: For an implied easement to be created, it must arise ***at the time of severance***, not subsequently.

Example: O owns a parcel, with a house on the rear half and a house on the front half. O conveys the rear half to *A*, but the deed explicitly provides that *A* may not use an existing driveway through the front parcel, and must instead use a rear exit to a different road adjoining the rear half. *A* then sells the property to *B*, and the deed purports to give *B* an easement over the front half. At the same time, O orally promises *B* that *B* may have an easement over the driveway.

No easement exists, however, either by implication or express grant. This is because an implied easement over the front half could only have been created at the moment the front half was severed from the back half, and the deed from O to *A* explicitly ruled out such an implied easement. Thereafter, it was too late for creation by implication, and not even O's promise (nor the statement in the deed from *A* to *B*) could create an easement. (Nor is O's oral statement sufficient to create an express easement, since it does not meet the Statute of Frauds. *B* might be able to argue that because of the statement, O is ***estopped*** to deny that any easement exists; however, this argument is unlikely to succeed.)

b. Prevented by express clause: As the above example indicates, an express provision in the deed to the effect that no easement exists will prevent creation of an implied easement, even if the circumstances are such that the easement would otherwise be created. Rest., §476, Comment d.

5. Prior use: Most courts require that the use for which the easement is claimed have existed ***prior*** to the severance of ownership. As the idea is sometimes put, there must have been a ***"quasi-easement,"*** in favor of one portion of the property and against the other portion, while both were under common ownership. The benefitted portion is called the ***quasi-dominant tenement***, and the burdened portion the ***quasi-servient tenement***.

Example: O owns two houses side by side on one parcel. To have access to the garage behind house 1 from the street, he builds a driveway which runs between the two houses. To the extent that the driveway runs on the property immediately adjoining house 2, this property is the "quasi-servient tenement"; the property on which house 1 (including the garage) is located is the "quasi-dominant tenement." There is thus a "quasi-easement." If O then conveys house 2, including part of the land and the driveway, to *A*, an implied easement in favor of house 1 will be reserved (assuming all other requirements of implied easements are met). Or, if O conveys house 1, an implied easement in favor of that house will be granted (again, assuming all other requirements are met).

a. Apparent use: To the extent that a prior use is required, the requirement is met only if the use is ***apparent***. That is, the use must be one which the grantee either ***in fact*** knew about when he received his interest, or ***could have learned about*** with ***reasonable inspection***.

i. Reasonably discoverable: "Apparent" is ***not*** the same thing as "visible," however. All that is required is that the existence of the use would be ***discovered by a reasonable inspection,*** even if not physically apparent to a casual observer.

Example: Recall (*supra*, p. 199) that a *sewer line* may cross a person's property by virtue of an easement by implication. Suppose that while House 1 and House 2 were under common

ownership, a sewer line ran underground from House 1 under House 2 and into the main sewer system. A court would likely hold that at that time, the quasi-easement under House 2 was "apparent" even though not visible, since a plumber could easily have ascertained that the pipes from House 1 ran under House 2. If so, at the moment ownership of House 1 was separated from that of House 2, House 1 received an implied easement for the pipes to run under House 2.

6. Reasonably necessity: According to most courts, an implied easement must be at least ***reasonably necessary*** to the enjoyment of what is claimed to be the dominant tenement.

a. Created by grant: Where the implied easement is created by ***grant*** (i.e., in favor of the grantee), most courts require *only* ***"reasonable"*** necessity. Thus the fact that the grantee could use his property to some extent even without the easement will not be fatal to his claim.

Example: *A* owns both Blackacre and, adjacent and to the east of Blackacre, Whiteacre. A driveway runs from the east side of Blackacre east across Whiteacre, and then to a well-traveled public road. *A* customarily uses this driveway to leave Blackacre. There is a separate much longer driveway running from the south side of Blackacre through a neighbor's land (covered by an express easement) to a much less-well-traveled and less-well-paved public road. *A* conveys Blackacre to *B*. The deed says nothing about any easement across Whiteacre.

A court would likely hold that *B* has an implied easement over Whiteacre to get to the more-travelled road. That is, the court would likely hold that *B* has a "reasonable necessity" for the easement — the fact that a much less convenient easement exists from the south to a different road probably won't prevent *B*'s necessity from being deemed sufficiently great.

i. Easement reserved: But where the easement is ***reserved*** (i.e., created in favor of the *grantor* rather than the grantee), most courts require that it be ***"strictly"*** or ***"absolutely"*** necessary.

Example: Same basic facts as above example. Now, however,

assume that *A* sells Whiteacre, while keeping Blackacre; *A* then claims that Whiteacre is now subject to an implied easement in favor of Blackacre. Since the claimed easement was created by "reservation" (in favor of the grantor, *A*) rather than by grant (i.e., in favor of the grantee, *B*), most courts would say that the easement must be "strictly necessary," not just "reasonably" necessary. Since the easement here is not strictly necessary (the owner of Blackacre can use the less-convenient south alternative), a court will likely conclude that the easement by implication does not exist.

7. **Easement of light and air:** A right to have one's ***view*** remain ***unobstructed***, commonly called an easement of ***"light and air," cannot, in most states, be created by implication***.

   Example: O owns a parcel which contains a house on one half and undeveloped land on the other half. O has intentionally refrained from building anything on the other half, so that he can keep the view from the house (which looks out over the vacant half onto the ocean) unobstructed. O then sells the half with the house to *A*. Most courts will *not* permit *A* to argue that he has received an implied easement of light and air over the vacant parcel, such that O may not build a structure on it which would block *A*'s view. To allow such an easement to be implied "would seriously hamper land development." Burby, p. 74-75. (But such an easement of light and air may be created by express grant.)

   a. **Solar energy:** An easement to receive sunlight for the purpose of deriving ***solar energy*** might more likely be created by implication than an easement merely to "enjoy" sunlight. For instance, if O in the above example had installed solar collectors in the house he sold to *A*, *A* might prevail in his claim that O cannot now block the sunlight by building a large structure on the vacant piece.

D. Easement of necessity: Two parcels may be so situated that an easement over one is ***"strictly necessary"*** to the enjoyment of the other. If so, the courts are willing to find an "easement by necessity." Unlike the easement by implication, the easement by necessity does ***not require that there have been an actual prior use*** before severance. But three requirements must be

met:

[1] The necessity must be ***"strict"*** rather than "reasonable" (the usual standard for implied easements);

[2] the parcels must have been under ***common ownership*** just before a conveyance; and

[3] the necessity must ***come into existence at the time of,*** and be ***caused by***, the ***conveyance*** that breaks up the common ownership.

Cf. Rest. 3d (Servitudes), §2.15

1. **Landlocked parcels:** The most common example of such an easement is where a parcel is ***"landlocked,"*** and access to a public road can only be gained via a right of way over adjoining property.
2. **"Strict" necessity:** While courts say that the necessity must be ***"strict,"*** they don't mean that the property must have absolutely no use without the access. Instead, they mean that it must be the case that without the easement, the property must not be able to be ***"effectively"*** used ***without "disproportionate effort or expense."*** Rest. 3d (Servitudes), §2.15, Comment d. But it's clear that this is a tougher-to-meet standard than the "reasonably necessary" standard for easements by implication created by means of a grant (*supra*, p. 201).
3. **Pre-conveyance actual use not required:** As long as the need for the easement was created by the severance from common ownership, it does not matter that ***no actual use*** of the claimed right of way occurred before the conveyance.

   Example: O owns Blackacre and Whiteacre, two adjacent parcels. Blackacre has a house on it, and abuts the public road. Whiteacre is vacant, and is on the other side of Blackacre from the public road. O conveys Whiteacre to *A*, and the deed says nothing about any access from Whiteacre over Blackacre to get to the road. Since Whiteacre was vacant, while O owned it he had no occasion to create a path or driveway from it across Blackacre to the road. Assume that there is no other public road to which there is access from Whiteacre.

   A will have an easement by necessity over Blackacre to get from Whiteacre to the public road. *A* meets the three requirements for such an easement: (1) his need is "strict," not just "reasonable" (since there is

truly no other way to get to the road); (2) the dominant parcel (Whiteacre) and the servient one (Blackacre) were under common ownership just before a conveyance; and (3) the cause of *A*'s need for access is the very conveyance by which ownership of the two parcels was separated. Since these three requirements are met, it doesn't matter that prior to the conveyance, the proposed use never actually existed (i.e., O never crossed from Whiteacre to Blackacre).

4. **Need must be caused by conveyance:** For the easement by necessity to exist, the ***necessity*** must ***exist at the moment of the conveyance***, and be ***caused by*** that conveyance — a necessity that comes into existence ***post-conveyance*** will ***not*** suffice. See Rest. 3d (Servitudes), §2.15, Comment c ("Servitudes [by necessity] will be implied only in conveyances that cause the necessity to arise").

   a. **Alternative exists, then disappears:** So if the would-be dominant parcel has some ***alternative means of access*** at the time of the conveyance, and that alternative means ***disappears at some later date***, the dominant holder does not get an easement by necessity.

      Example: *O* owns Blackacre and Whiteacre. The eastern border of Blackacre adjoins the western border of Whiteacre. In 2008, *O* conveys Whiteacre to *A*, with the deed silent as to any right of *A* or his successors to cross Blackacre. At the moment of the conveyance, there are two public roads that serve the parcels: Main Street runs North South along the western border of Blackacre, and Broadway runs east-west along the northern border of both Whiteacre and Blackacre. (Therefore, prior to the conveyance nobody on Whiteacre ever needed to cross Blackacre to get to Main Street — they would leave the parcel by using Broadway instead.) In 2010, the city unexpectedly closes Broadway completely. *A* now sues *O* for a declaration that *A* has an easement by necessity to cross Blackacre to get to Main Street.

      A will lose. An easement by necessity will only be found to exist when the necessity (1) exists at the *moment of conveyance* by the joint owner of the two properties, and (2) is *caused* by that conveyance. Here, because the necessity did not exist at the moment of the conveyance (due to the availability of access via Broadway), *A* is out of luck. Cf. Rest. 3d (Serv.), §2.15, Illustr. 8.

E. Easement by prescription: Recall the a possessory estate in land may be gained by ***adverse possession*** (*supra*, p. 27). An easement may be created by similar means. Such an easement is called an easement by ***prescription***.

1. **Fiction of "lost grant":** At early common law, courts were reluctant to acknowledge that an easement could be gained without there ever having been consent between the parties. Therefore, they employed the fiction of a ***"lost grant"***, by which, in the distant past, it was assumed, the holder of the claimed servient estate granted an easement to the holder of the claimed dormant estate. This "lost grant" could be presumed whenever it would be shown that a particular use had been made from "time immemorial".
2. **Use of statute of limitations by analogy:** Virtually all states refer to the ***statute of limitations*** applicable to adverse-possession actions, and apply it ***by analogy*** to easements.

   Example: In state *X*, the statute of limitations on actions to recover possessions of real estate is 21 years. That is, an owner of record loses his rights to sue an adverse possessor after this time and the latter gains title. *A*, the owner of Lot 1, uses a path over Lot 2, owned by *B*, for 21 years. Assuming that the nature of the use meets the requirements discussed below, after the 21 years *A* has gained an easement by prescription, and may use the path as a right of way forever afterwards.

3. **Use must be adverse, not permissive:** Just as possession must be adverse in an adversepossession case, so the ***use*** must be ***adverse*** to the rights of the holder of the servient tenement, and not with the latter's ***permission***.
   a. **Not in subordination:** For a use to be adverse, it must not be in ***subordination*** to the servient owner's rights. Thus if the dominant owner acknowledges that his use is only valid because of the servient owner's consent, the use is not adverse.

      Example: P and D are next-door neighbors. Because he believes in being a good neighbor, and to help P, D agrees that P may use D's driveway to get to P's garage. P thanks D for this, and gives no indication that he is asserting an actual legal right to use the driveway.

P's use is clearly in subordination to D's rights, and is therefore not adverse. Even if the usage continues longer than the statute of limitations period, no easement by prescription will be gained. Instead, the use is merely a *license*, which is revocable at will by D.

i. **Unilateral consent by servient owner:** But a subordination occurs only if ***both*** parties agree or appear to agree to it. For instance, assume that in the above example, P claims (even completely without merit) that he has a legal right to use D's driveway. The fact that D agrees to tolerate this use does not convert P's use into a subordinate one. P's use is therefore adverse, and at the end of the statutory period an easement by prescription will be created. This will occur even if D expressly reserves the right to terminate his permission, so long as P does not acknowledge that such a revocation of permission would be binding upon him. This makes sense, since D is at all times free to change his mind, revoke his permission, and start a lawsuit against P if P continues to make his use. If D does not do so during the whole statutory period, it is not unfair to burden him with the use that he has tolerated for so long.

b. "Hostility" not required: Although the use must be adverse, it does ***not*** have to be ***"hostile."*** If the parties make an arrangement which the dominant owner is justified in regarding as permanent, this may be enough to make his use adverse even though there are no ill feelings between the two owners.

Example: Suppose that *A* and *B* are adjoining homeowners. They agree to build a 10 foot-wide driveway between the two houses that will rest half on *A*'s property and half on *B*'s. They split the expenses and create a paved, permanent driveway. Both parties use the driveway continuously. Twenty-five years later, after *A*'s house has been bought by P, and *B*'s house by D, P sues to prevent D from using P's portion of the common driveway.

A court might well hold that, because the driveway was wide and paved, each party intended a more permanent arrangement than simply a license revocable at the will of either. If so, the use by both *A* and *B* would be held to be adverse, and to have ripened into an easement by prescription at the end of the statutory period.

c. Shift from permissive to adverse: It is possible for a use to begin as a permissive one (i.e., under a license), and then shift to an adverse one. However, for such a shift to occur, the licensee must openly ***renounce*** the license and bring home to the licensor that the former's use henceforth is not subordinate.

d. Shift from adverse to permissive: Conversely, a use may begin as adverse, and then become permissive if the parties so agree. If the use once again becomes adverse, the statutory period must ***elapse all over again***, since the existence of the permissive interval prevents the first and second adverse periods from being "continuous and uninterrupted" (as discussed *infra*).

4. **Open and notorious:** The use must be ***"open and notorious"*** throughout the statutory period. That is, the use must be such that the owner of the servient tenement is put on notice that the use is occurring. See the analogous open-and-notorious requirement in the context of adverse possession, *supra*, p. 28.

5. **Continuous and uninterrupted:** The use must be ***continuous and uninterrupted*** throughout the statutory period. A similar requirement exists in the context of adverse possession, but since possession is involved there, the would-be adverse possessor must literally maintain possession continuously. An easement, on the other hand, involves only use, rather than possession; therefore, all that is required is that the ***attitude*** of ***non-subordination*** on the part of the user must be continuous, and the use itself must at least be reasonably continuous measured by the needs of the user. Thus in the case of a right of way over a driveway, the continuity requirement would not be violated if the user was out of town for a month, so long as he made reasonably frequent use when he was present.

   a. Occasional use not sufficient: The continuity requirement serves the same purpose as the "adverse use" requirement, i.e., to prevent a helpful neighbor from unwittingly encumbering his property by tolerating permissive uses or occasional trespasses. Thus if the use is so ***infrequent*** that ***a reasonable landowner would not be likely to protest***, and would view the matter as an occasional minor trespass, the continuity requirement is not satisfied.

   b. Use not necessarily exclusive: Since an easement is merely a use,

rather than a possession, the use does ***not*** have to be ***exclusive***. Thus if *A* uses P's driveway frequently and adversely, the requisite continuity is not destroyed by the fact that *B* also uses the driveway just as often. This stems from the idea that only the attitude of non-subordination, not the physical use, must be continuous. See Rest. §459(1).

c. Protest by servient owner: If the servient owner is able to compel the dominant owner to stop the use, either by suit or other means, the requirement of continuity is obviously not satisfied. But if the servient owner merely ***protests***, or brings an ***unsuccessful lawsuit***, this will ***not*** be sufficient to interrupt the use. (However, if a lawsuit is brought before the end of the prescriptive period, and the plaintiff ultimately gains a judgment, this will "relate back" to the start of the suit, preventing a prescriptive easement from arising.)

d. Same person owns dominant and servient estates: One way the "continuous and uninterrupted" issue can arise is if, at some point during the prescriptive easement period, the ***dominant*** tenement comes to be ***owned by the same person who owns the servient tenement.*** In that case, even if a tenant on the dominant property uses the easement, this use will not be "hostile," and the requisite hostile use will therefore be interrupted rather than continuous.

Example: Starting in 1990, O owns Blackacre; *A* owns the next-door parcel Whiteacre. *A* uses a path over Blackacre in an open, hostile and continuous manner for 8 years (the statutory period is 10 years). O then buys Whiteacre and holds it for 1 year. During that year *A* continues to occupy Whiteacre as O's tenant and continues to use the path. Then, O sells Whiteacre to *B*, who uses the path for another 7 years. The issue is whether by 2006, *B* has obtained a prescriptive easement on the path. The answer is "no." That's because, during the 1-year period when O owned Whiteacre (the dominant parcel), *A*'s use was not "hostile" (since it would be deemed to be with the permission of O, now the landlord). Therefore, there will be no tacking from *A* to O to *B*, and *B* will not be deemed to have completed the 10-year continuous-and-hostile-use period by 2006.

6. Tacking: Recall that the statute of limitations in adverse-possession

cases may be satisfied by combining, or ***tacking***, the possession of more than one person, provided that they are in privity with each other. The concept of tacking similarly exists in the context of prescriptive easements. Rest. §464.

a. Appurtenant easements: Where the easement is ***appurtenant***, the privity required between the users is virtually the same as is required in adverse-possession cases; thus grantor and grantee, landlord and tenant, life tenant and remainderman, or testator and legatee, would all be pairs as to whom tacking would apply.

b. Easements in gross: Where the easement is ***in gross*** (which is possible though unlikely to occur in practice), it is hard to say what kind of privity is required; a caveat to Rest. §463 takes no position on this question.

7. Difficulty of ascertaining: How can the lawyer for a purchaser of land tell whether the land her client is about to buy is burdened by any prescriptive easements? There is no easy, sure-fire, way to do this.

a. Physical inspection: The lawyer could have her client check the property physically, to see whether there are any indications of an adverse use (e.g., a path cut across the back yard, leading from a neighbor's house to the street). Also, the client could ask nearby residents whether they knew of any use. But since a prescriptive easement, once it has been created, need no longer be actively used (so long as it is not affirmatively abandoned; see *infra*, p. 218), this will not be foolproof.

b. Warranty: Another solution is for the buyer's lawyer to attempt to insert into the deed a warranty by the seller that there are no easements, whether prescriptive or otherwise. Then, if a prescriptive easement does exist, at least the buyer can sue.

F. Easement by estoppel: One last way an easement may be created is by ***"estoppel."*** An easement by estoppel is created where *A* allows *B* to use *A*'s land under circumstances where *A* should reasonably foresee that *B* will ***substantially change position*** believing that this permission will not be revoked, and *B* in fact changes position. An easement can come into existence by this method even though the parties never mention the word "easement," or mention the possibility of revocation. See Rest. 3d Property (Servitudes), §2.10 (allowing easements to be created by estoppel, but only

if that is the only way to avoid injustice).

> **Example:** O owns Blackacre, which has access to a public road. *A* owns the adjacent Whiteacre, a vacant parcel, which has no such access to any public road. O orally gives *A* permission to use a roadway running across Blackacre in order to get from the public road to Whiteacre. O and *A* don't mention the word "easement" when they work out this arrangement. At the time of this conversation, O knows that *A* plans to build a house on Whiteacre. *A* then indeed builds a house. A court would probably hold that O has given *A* an easement by estoppel. That's because: (1) O should reasonably have foreseen that *A* would substantially change his position in reliance on the belief that O would not revoke his permission; (2) *A* has indeed substantially changed his position in that reliance; and (3) treating the permission as permanent (i.e., making it an easement) is the only way to prevent injustice. See Rest. 3d (Servitudes), §2.10, Illustr. 2.

1. **Can be oral:** An easement by estoppel may occur ***even where there is no writing.*** In other words, the usual Statute of Frauds for easements (see *supra*, p. 197) does not apply to easements by estoppel. See Rest. 3d (Servitudes), §2.9. The above Example — in which an easement by estoppel occurs based on O's oral grant to *A* of permission to use the road across Blackacre — is an illustration.

G. Tidelands and the "public trust" doctrine: Apart from the methods described above for creating a formal easement, the ***public as a whole*** has something like an easement on the ***navigable waterways*** and on ***seashores***. Under the ***"public trust"*** doctrine, the state holds title to navigable waterways and ***tidelands*** in trust for the public, and must safeguard the public's interest in these lands. RKK&A, p. 783.

1. **Derived from federal law:** The public trust doctrine derives from federal law. But it has been left mainly to ***state law*** to apply the doctrine, so there is variation from state to state.
2. **Access to seashore:** The most important aspect of the public trust doctrine is that, in states that apply it, the doctrine guarantees to members of the public the right to ***use*** the "tidelands" portion of the ***ocean shore*** for ***swimming***, ***bathing***, and other ***recreational purposes***.

Tidelands (or the "foreshore") are the shore lands covered by the tides, i.e., the land between the mean high-tide mark and the mean low-tide mark of the ocean. RKK&A, p. 784.

a. Applies even if property is in private hands: The state is required to preserve these public trust rights even if the state has transferred the property to ***private hands***. Thus even if a municipality were to transfer a particular stretch of ocean tidelands to a private buyer, the public would have a quasi-easement to continue to swim in the tidelands for recreation.

b. Right of access through private lands: Most courts applying the public trust doctrine have not just given the public the right to swim in the tidelands, but have held that for this right to be meaningful, the public must have an easement-like ***right of access***, ***through private dry-sand property,*** to ***get to*** the tidelands. Such courts typically grant the public *both*:

[1] a ***"vertical"*** right of access (i.e., the right to walk on a path ***perpendicular*** to the water, running from the street, across the privately-owned dry-sand beach, to the start of the tidelands); and

[2] a ***"horizontal"*** right of access (i.e., the right to walk parallel to the ocean on, say, a 3-foot-wide strip of the privately-owned dry sand immediately adjacent to the tidelands, so the public can cross the privately-owned beach to get from one public beach to another).

c. Right to use beach on private property: The highest court of at least one state, New Jersey, has gone further. That court gave the public a right to use (not just cross) the ***entire dry-sand area*** of a privately-owned beach. See *Raleigh Avenue Beach Ass'n. v. Atlantis Beach Club*, 879 A.2d 112 (2005).

III. SCOPE OF EASEMENTS

A. General rules: Once it is established that an easement exists, questions arise as to the ***types*** of uses to which it may be put by the holder of the easement, and the rights of the owner of the servient tenement. The manner in which the easement was created often has an important bearing on these

questions.

1. **Expressly created easement:** Where the easement is created by an ***express*** written conveyance, the terms of that conveyance will normally control. Such a grant will usually spell out not only the physical area involved (e.g., "a ten-foot strip along the entire southern border of the property"), but will also generally spell out the allowable use (e.g, as a right of way for the delivering of coal to the coal chute at the back of *A*'s property"). If the conveyance is ambiguous, the court will look at the circumstances surrounding its making to determine the parties' intent.
2. **Implied easement:** If the easement is created by ***implication***, the court will look to the use as it existed prior to the conveyance. That use, and any similar use which the parties might reasonably have expected, will be permitted. Burby, p. 83.
3. **Prescriptive easement:** When the easement was created by ***prescription***, the allowable use is determined by reference to the adverse use that continued during the statutory period and created the easement. The holder of the easement is not restricted to the precise use which occurred during the prescriptive period; he is, however, limited to the same ***general pattern*** of use. Rest. §478, Comment a. Another way of putting the test is that the present use must be sufficiently similar to the older use that the court may conclude that the property owner ***would not have objected*** to this new use (just as he did not object to the old one).
   a. **Increase in burden:** One important factor is whether the new use represents a ***greater burden*** on the servient tenement than the old use. The bigger the increase in burden, the less likely the court will be to permit the new use.

      Example: A right-of-way easement is created by prescription in favor of the sole house then located on a dominant tenement. After the easement is created, two more houses are built on the dominant property.

      Held, the residents of all three houses may use the right of way, since the basic use (as a pedestrian right of way) remains unchanged, and the increased burden is slight or nil. *Baldwin v. Boston & M.R.R.*, 63 N.E. 428 (Mass. 1902).
4. **Enlargement by prescription:** Regardless of the original use, an

easement can always be ***enlarged by prescription***. For instance, suppose that a conveyance grants an easement as a right of way "solely for pedestrians." If the path is used by an adjoining landowner as an automobile right of way for longer than the statute of limitations period, the use will have been expanded by prescription to include automobiles. See Burby, p. 86. (But the new use must be sufficiently different from the old one that the owner of the servient tenement is placed on notice that an expanded right is being claimed.)

B. Development of dominant estate: It frequently happens that the dominant estate undergoes a general ***change in use***. The question then arises whether such a change justifies a corresponding change in the use to which the easement may be put.

1. **Normal development:** The court will usually allow a use that arises from the ***normal, foreseeable, development*** of the dominant estate, where this would ***not impose an unreasonable burden*** on the servient estate. See Rest. §§479 and 484. The *Baldwin* case, *supra*, is an example of this, since it was reasonably foreseeable that the dominant parcel would someday have more than one dwelling on it.
2. **Excessive use:** On the other hand, an increased use that ***unreasonably interferes with the use of the servient estate,*** viewed in light of the parties' original understanding about how the easement would be used, will ***not*** be allowed.

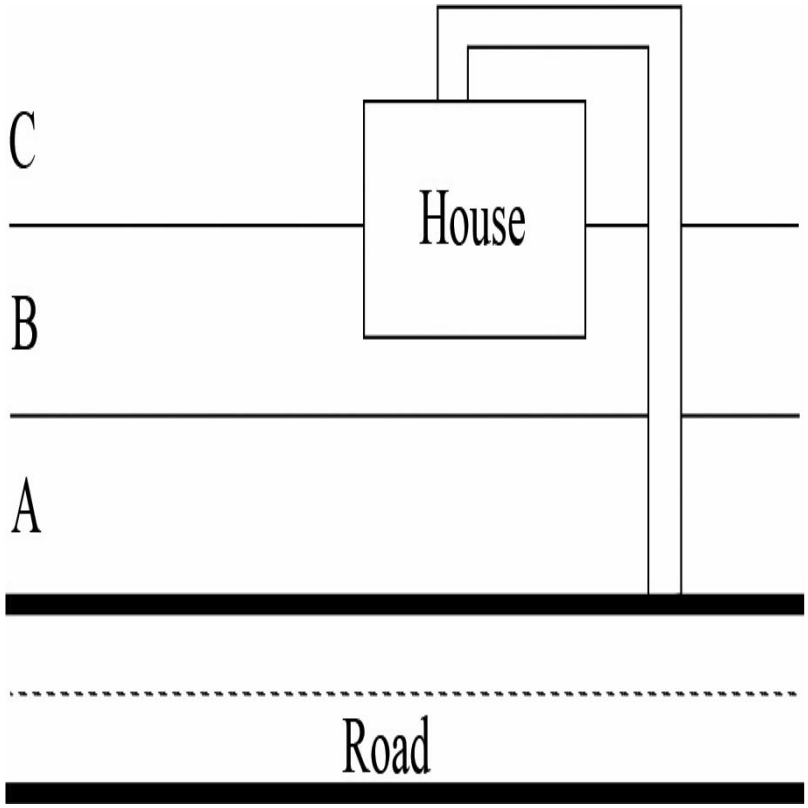
   Example: Suppose Steve owns Whiteacre, and Don owns the adjacent Blackacre. Each has a single-family house located on a 1/4 acre parcel. Both parcels are zoned single family. Steve gives Don a 10-foot wide easement to drive to the public way abutting Whiteacre. Years later, Don's property is re-zoned to allow a 40-story apartment building. Don erects a 39-story building with 300 apartments. Tenants use the easement to cross Steve's property an average of 400 times per day, including late at night. A court would probably hold that the expanded use is so beyond that contemplated by the parties, and so unreasonably interferes with Steve's use of the servient tenement, that it is beyond the scope of the easement.

3. **Remedy for misuse is injunction or damages, not forfeiture:** Even

where the holder of the dominant estate misuses the easement (by excessive use, or by a use that is at odds with the purpose of the easement), the servient holder's proper remedy will be an injunction against further misuse, or damages, ***not forfeiture*** of the easement.

C. Use for benefit of additional property: An easement appurtenant is, by definition, used for the benefit of a particular dominant estate. The holder of that dominant estate will normally ***not*** be allowed to extend his use of the easement so that ***additional*** property owned by him (or by others) is benefitted. This is true even if the use for the benefit of the additional property does ***not*** increase the ***burden*** on the servient estate.

Example: D owns parcel *A* and P owns parcel *B*. Parcel *A* stands between parcel *B* and the roadway. Parcel *C* is on the other side of parcel *B*, even more landlocked. An easement has long existed across parcel *A* for the benefit of parcel *B*. (Thus parcel *A* is the servient tenement and parcel *B* is the dominant tenement.) P now builds a house that is located partly on parcel *B* and partly on parcel *C*. P also builds a driveway leading from the easement across *B*, then across C, then back to the house:



D asserts that P has no right to use the easement for the benefit of parcel C, and therefore blocks the easement. P sues to have the obstruction removed, and D counterclaims for trespass.

Held, for D. "[A]n easement appurtenant to one parcel of land may not be extended by the owner of the dominant estate to other parcels owned by him, whether adjoining or distinct tracts to which the easement is not appurtenant." The express grant of easement from D's predecessor to P's predecessor made it clear that only parcel *B*, not parcel C, was to be the dominant tenement. Therefore, when P built the house partly on parcel C, and built the driveway so that it crossed parcel *C* on the way to the house, P was attempting to misuse the easement by extending it to cover another parcel. This amounted to trespass, for which D can recover damages. This is true even though the burden on parcel *A* was not increased by this scheme (since the easement previously served a house located solely on parcel *B*, and that house was replaced by a single house straddling the *B*-*C* boundary). However, D may not be given an injunction against P's continued use of the easement, because the appellate court will respect the trial court's finding that there was no "actual and substantial injury" to D, one of the requirements for an injunction. (A dissent argues that an injunction should be given to D against trespass, even though the burden to D's property has not been increased by the misuse.) *Brown v. Voss*, 715 P.2d 514 (Wash. 1986).

D. Use of servient estate: To the extent that the holder of the easement gains rights over the servient tenement, the owner of that servient tenement loses the ability to make unrestricted use of his property. However, he may nonetheless make ***any use of the servient tenement*** that does ***not unreasonably interfere*** with the easement. S&W (3d), §8.9, p. 459.

1. No right to relocate easement traditionally: If the easement is for a ***particular portion*** of the servient tenement, the traditional common-law rule has been that the servient owner may ***not relocate*** the easement, by forcing the easement holder to use a ***different*** portion of the servient estate.

a. Modern view is different: But the traditional rule that the servient owner may not force the easement holder to relocate the easement seems to be ***giving way.*** Thus the Third Restatement (Servitudes), in §4.8, Comment f, says that the servient owner ***may*** change the

location if the change ***does not "significantly lessen the utility*** of the easement, ***increase the burdens*** on the holder of the easement in its use or benefit, or ***frustrate the purpose*** for which the easement was created." Cf. DKA&S, p. 725 (the Restatement rule is "gaining adherents").

IV. REPAIR AND MAINTENANCE OF EASEMENTS

A. Servient owner not obligated to maintain: The owner of the ***servient estate*** is ***not required to repair or maintain*** the property used in the easement (e.g., a road or driveway), unless the parties expressly provide otherwise.

> **Example:** *A*, the owner of Blackacre, grants an easement to *B*, the owner of the adjacent Whiteacre, whereby *B* may use a 10-foot strip of Blackacre to drive his car from Whiteacre to the public road. At the time the easement is granted, there is a bridge that the strip crosses. The easement document is silent about repairs. After the grant of the easement, the bridge washes out. *A* has no obligation to restore the bridge, even if the lack of maintenance means that *B* cannot use the easement as the parties intended. Rest. 3d (Serv.), § 4.13(2).

B. Dominant owner has right to maintain: Conversely, the ***holder of the easement*** has an implied ***right*** to maintain the property used in the easement, if that maintenance is compatible with the intended use of the easement and does not unreasonably interfere with the servient owner's use of the servient estate. Rest. 3d (Serv.), § 4.10, Comm. e.

> **Example:** Same facts as in the above example. *B*, the holder of easement, has a right to rebuild the bridge at his own expense.

1. Limited right to contribution: If the holder of the easement *does* exercise his right to spend money to repair the easement property, normally that holder has the right to ***contribution*** from the holder of the servient estate, but only in an amount that is proportional to the servient

holder's ***share of the overall usage benefit*** from the repairs. Thus if all the benefits from using the easement are enjoyed by easement holder, the dominant holder will have no reimbursement obligation. Rest. 3d (Serv.), § 4.13(3).

> **Example:** The same facts as in the above two examples. After *B* (the easement holder) spends $50,000 to repair the bridge, *A* (the servient owner) rarely drives across the restored bridge. *A* has no duty to reimburse *B* for any portion of the repairs. But if *A* uses the bridge as often as *B*, *A* will likely be found to have an obligation to reimburse *B* for half of the $50,000 expenditure.

V. TRANSFER AND SUBDIVISION OF EASEMENTS

A. Transfer of burden: When title to the ***servient estate*** is transferred, the burden of the easement ***remains*** with the property. An easement is just like any other encumbrance upon real estate (e.g., a mortgage) in this respect.

Example: O, the owner of Blackacre, gives *A*, a neighboring landowner, a right of way over Blackacre. O then sells Blackacre to *B*. Following the sale, the easement remains valid against Blackacre; that is, it runs with the land, rather than being personal to O.

1. Subdivision: Similarly, if the servient estate is ***subdivided***, the burden of an easement still attaches to the same parts of the land as before. Of course, the easement may only burden a portion of a larger parcel; after the subdivision, only the portion containing the burdened land will be encumbered. Thus in the above example, if O sold half his property (the half containing the right of way) to *B*, and the other half to C, only *B*'s portion would be subject to the easement.

B. Transfer of benefit: Most of the questions regarding transfer and subdivision involve the ***benefit side***.

1. Transfer of easements appurtenant: An easement ***appurtenant*** will normally ***pass with the transfer of the dominant estate***. The new owner of the dominant estate has full rights to the easement, and the transferor

loses his rights to the easement. Rest. §487.

a. Where deed is silent: This rule — that the easement appurtenant passes with the transfer of the dominant estate — applies even if the deed of transfer ***does not mention the easement.***

Example: O owns two adjoining parcels, Lot 1 and Lot 2. He sells Lot 1 to *A*, and in the deed grants *A* the right to use a driveway on Lot 2. *A* then sells Lot 1 to *B*. The deed from *A* to *B* does not mention the easement. Because the easement is appurtenant to Lot 1, the easement automatically passes with the transfer of Lot 1 to *B*.

b. Exceptions to automatic transfer: The general rule that an easement appurtenant is automatically transferred together with the dominant estate, applies ***unless there is a contrary agreement***. Such a contrary agreement may occur either at the time the easement is created, or at the time the dominant estate is transferred.

Example: Same facts as above example. This time, however, O's deed to *A* expressly provides that this right of way will exist only so long as Lot 1 continues to be owned by *A* himself. When *A* sells Lot 1 to *B*, the easement will be extinguished.

c. Sub-division: Similar rules apply to an easement appurtenant where the dominant estate is ***sub-divided*** into smaller lots, rather than transferred as a whole. That is, if the physical layout of the dominant estate is such that the owners of two or more of the sub-divided lots can take advantage of the easement, each will normally have the right to do so. But if only one part of the dominant estate can benefit, that portion will become the only dominant estate after the subdivision.

Example: *A* owns Lot 1, and X owns adjacent Lot 2. A private road runs from a garage on Lot 1 through Lot 2 to a public road. *A* subdivides Lot 1 into a parcel bought by *B* and a parcel bought by *C*. If the parcels bought by *B* and *C* are laid out such that each one can have access to the private road without going on the other's land, each will have the right to the easement (and there will thus be two dominant tenements). But if *B* can get to the private road only by

going over *A*'s portion, he will not have a right to the easement, and *A*'s parcel will be the only dominant tenement.

2. **Easements in gross:** Traditionally, the principal distinction between an easement appurtenant and an easement ***in gross*** is that whereas the former is assignable, the latter is ***not transferable***. Burby, p. 67. The rationale for this distinction is that an easement appurtenant can only be assigned or divided in the same way that the dominant tenement is, a selflimiting feature that is not present in the easement in gross.
   a. **Modern view:** Modern courts are much more ***willing*** to allow assignment and transfer of easements in gross than were 19th century courts.
      i. **Commercial/personal distinction:** Some modern cases distinguish between easements that are primarily ***commercial*** (i.e., for economic benefit) and those that are primarily ***personal*** (for enjoyment rather than personal satisfaction). These courts allow assignment of commercial easements, but not assignment of personal ones.
      ii. **Majority view that all are assignable:** But most modern cases have tended to ***reject*** this commercial/personal distinction, and hold that easements in gross ***are assignable*** if that is what the parties intended, ***even where the easement is of a non-commercial nature.*** D&K (2002), p. 830. The Third Restatement (Servitudes) follows this modern approach: all easements in gross are "freely transferable," unless the circumstances indicate that the parties would not reasonably have expected that the benefit would pass to an assignee. §§ 4.6(1)(c) and 4.6(2).
         (1) **Exception:** But even under the liberal Third Restatement rule, if the holder of the easement in gross is a ***close personal friend*** of the servient owner, and/ or the easement is made for ***no compensation,*** a court is likely to conclude that the parties intended that the easement be non-assignable. See Rest. 3d §4.6(2), making easements and other servitudes (whether in gross or not) non-assignable if "the ***relationship*** of the parties, ***consideration paid***, nature of the servitude, or other circumstances indicate that the parties ***should not reasonably***

have expected that the servitude benefit would ***pass to a successor*** to the original beneficiary."

Example: *A* owns property abutting a lake, with a path running from the public road to the lake. *A* gives to his close friend *B*, who lives 10 miles away, a free easement to drive along *A*'s driveway from the road to the lake, and park at the end of the driveway, so that *B* can swim and boat. Even under the more liberal Third Restatement rule — under which easements in gross are generally assignable whether of a commercial nature or not — the close personal relationship between *A* and *B*, and the lack of consideration, would lead to the conclusion that *B* cannot assign his easement to *C*, since *A* and *B* probably intended that the easement would remain personal to *B*. Cf. Rest. 3d, §4.6, Illustr. 2.

b. Divisibility: The traditional view, insofar as it prevented even transfer of easements in gross, necessarily prohibited the ***division*** of such an easement into smaller parts.

i. Restrictions under modern view: Under the modern view, even those easements in gross that *would* be alienable (i.e., typically, commercial ones) are ***not necessarily divisible***. Such an easement may be assigned to more than one person, but they may ***not generally make separate uses***; instead, they must hold ***"as one."***

Example: O holds the exclusive right to fish and boat on the waters of a particular lake. He conveys to his brother, *A*, a one-fourth interest in these rights. O and *A* then set up a partnership, in which they operate boat and bath-houses, and rent boats to persons wishing to use the lake. After *A*'s death his heirs purport to assign to D (a church group) the right to have its members use the lake. O sues to block D from using the lake.

Held, for O. The easement owned by O was in gross. It was an alienable right (since the conveyance of the rights to O included a reference to his heirs and assigns). But it was not divisible, in the sense that O and *A* each had the right to make separate uses, and

grant separate licenses. Therefore, the license to D issued by *A*'s heirs was not valid without the consent of O. *Miller v. Lutheran Conference & Camp Ass'n*, 200 A. 646 (Pa. 1938).

3. **Profits in gross:** Courts have always been ***willing to permit the assignment*** of most ***profits*** in gross (i.e., the right to ***remove timber, water, minerals*** or other items from the ***soil***). This is perhaps because most profits in gross, unlike most easements in gross, are of a commercial nature, and it is likely to be the parties' intent that they be assignable.

   a. **Division:** But as with the modern view of easements in gross, courts are more reluctant to permit ***division*** of a profit in gross. If the profit is ***non-exclusive***, so that the servient owner may also take the products of the land, division of use by the holder of the profit is likely to be much more burdensome to the servient owner.

      i. **Exclusive profit with royalty:** If, by contrast, the profit is ***exclusive*** (i.e., only the dominant owner, not the servient owner, can take the items), and provides for a ***royalty*** to the servient owner based upon use, the court is quite likely to ***allow*** apportionment, since this is theoretically to the servient owner's benefit. The right to mine coal from the servient land, for instance, which is to be paid for on a per ton basis, would probably be apportionable, unless there was a clear intent to the contrary. See Rest. §493, Illustration 1.

VI. TERMINATION OF EASEMENTS

A. Introduction: There are a variety of ways in which an easement may terminate. The more important of these are discussed below.

B. Natural expiration: If the term of the easement is not specified, the easement will be for an ***unlimited duration*** (subject to the exceptions discussed below, such as abandonment).

1. **Agreement otherwise:** But the parties may always ***agree*** that an easement is to have a less-than-perpetual duration. Thus O might give *A* a 20-year easement to use his driveway as a right of way, or the parties might limit the easement to *A*'s lifetime. At the end of this period, the easement would simply cease to exist, and would no longer be an

encumbrance.

2. **Purpose no longer applies:** Or, the easement might be for a certain purpose, and will terminate when that purpose is no longer relevant; thus if O gave *A* an easement to run his sewer line under O's property, this easement would cease if *A* was subsequently able to make a direct hookup to the street.

C. Merger: An easement is, by definition, an interest in the land of another. Therefore, if ownership of a servient estate and of the appurtenant dominant estate come into the hands of one person, the easement appurtenant is ***destroyed by merger***. This destruction is permanent, even if a severance of the dominant and servient interests subsequently occurs.

Example: O gives a right-of-way easement to *A*, his next-door neighbor. O then buys *A*'s property. This will cause a merger between the dominant and servient estate, and the easement will be extinguished. Then, if O re-sells what was formerly *A*'s property to *B*, the easement will not be revived (although a new easement by implication or by prescription might arise). See Rest. §497.

1. **Easement in gross:** Similarly, if the holder of an easement in gross acquires the servient estate, this will cause an extinguishment of the easement by merger. Rest. §499.

D. Destruction of servient estate: The easement will sometimes involve use not just of the servient land, but of a ***structure*** on that land. If so, ***destruction*** of the servient building by fire, other act of God, or the act of a third person, will terminate the easement.

E. Prescription: Just as an easement may be created by ***prescription***, so it may be extinguished by this means. That is, the servient owner or a third person may use the servient property in a way inconsistent with the easement, for the statute of limitations period.

Example: O gives *A* a right of way over O's property, and later builds a fence blocking the right of way. The easement will be destroyed by prescription after the fence has been in place for the statute of limitations period.

F. Release: The easement holder may execute a ***release*** in writing, surrendering the easement.

G. Estoppel: Even if the holder of the easement does not intend to abandon it (see *infra*, p. 218), his conduct may be such that he is ***estopped*** from subsequently exercising his easement rights. This will occur if (1) the holder's conduct or words are ***reasonably likely to lead the owner of the servient tenement to change his position in reliance***, and (2) the latter in fact does so. See 2 A.L.P. 305.

Example: E holds an easement to use a driveway running over O's land. E then builds his own driveway, and uses it instead of O's driveway for ten years. O, who assumes that E has abandoned his easement of O's driveway, tears up the driveway and plants a lawn. A court will probably find that E should reasonably have foreseen that his building of his own driveway, and his using it instead of O's for ten years, would cause O to think that E was abandoning his easement. Assuming that O's filling in of his own driveway was in direct reliance upon this mistaken impression, the court will hold that E is estopped from demanding his easement rights now.

Table 9-1
***CHECKLIST:* Easements**

Use this checklist to help you spot issues in analyzing easements. Where the easement is appurtenant, the dominant tenement is "D-acre," and its holder (the beneficiary of the easement) is "D." Whether the easement is appurtenant or in gross, the servient tenement is "S-acre," and its holder is "S." A predecessor who owns both D-acre and S-acre is called "O."

Issue	Rule	Examples
[1] Was an easement ***validly created?***	S (or predecessor O) must have somehow given D a ***privilege to use S-acre***. The only methods by which an easement could have been created are:	**Examples**
	1. **Express** easement (requires: specific words in a deed or will); can be by ***grant*** or by ***reservation***.	**Express (by reservation):** O conveys S-acre to S; deed reserves to O right to cross S-acre to get to D-acre. O then conveys D-acre to D.
	2. Easement by **implication** (requires: severance of D-acre from S-acre; use prior to severance; and use that's "reasonably necessary" to the enjoyment of D-acre).	**Implication:** While O owns both parcels, D-acre has house, and S-acre has underground sewer pipes connecting D-acre's house to public sewer in roadway. O conveys S-acre to S; deed silent about pipes. O then conveys D-acre to D. D has easement to use pipes to get to public sewer.
	3. Easement by **necessity** (requires: co-ownership of D-acre and S-acre by same person [O] at some past time; easement is "strictly necessary" for D's enjoyment of D-acre; conveyance by O that separated D-acre and S-acre created the necessity).	**Necessity:** While O owns both parcels, S-acre has house abutting the road, and D-acre is vacant (on non-road side of S-acre). While O owns both, he never enters D-acre. O conveys D-acre to D. (Deed is silent on access to road.) D builds house that is now land-locked and needs road access across S-acre. Even though there was no road access use across S-acre prior to O's conveyance, D has easement to cross S-acre to get to road.
	4. Easement by **prescription** (requires: open assertion by D [or predecessor] of an easement over S-acre; continuously for the length of the adverse-possession statute of limitations).	**Prescription:** D-acre and S-acre have always been separately owned. Statute of limitations for adverse possession is 10 years. Starting in 1990, D's family continuously and openly uses a path across S-acre as a quicker way to get to the road (another way is available). S tolerates this. By 2000, D has easement by prescription.
	5. Easement by **estoppel** (requires: S allowed D to use S-acre in such a way that S should reasonably have foreseen D's substantial change of position in reliance on use; D actually substantially changed position in reliance on the permission).	**Estoppel:** D-acre and S-acre are separately owned. D-acre is land-locked and vacant. S knows that that D is about to build a house whose inhabitants will need to cross S-acre for road access. S gives oral permission for such crossing. D builds the house. D has easement by estoppel.
[2] Has easement holder ***exceeded the proper scope of use?***	General rule on scope depends on type of easement: 1. **Express** easement: Scope controlled by document creating easement. **(cont. on next page)**	**Examples** **Express:** If conveyance gives D the right to "use the path for pedestrian access," D does not have the right to pave the path for vehicular traffic.

Table 9-1 (cont.)
***ISSUES CHECKLIST:* Easements**

Issue	Rule	Examples
[2] (cont.) Has easement holder ***exceeded the proper scope of use?***	2. **Implied** easement: Scope controlled by use prior to severance (plus similar foreseeable uses).	**Implied:** Easement for sewer pipes. If the house on D-acre expands, probably bigger pipes can be installed across S-acre if reasonably necessary.
	3. Easement by **necessity**: Scope controlled by the extent of the necessity.	**Necessity:** Easement for access to public road. If another road is built, allowing access from D-acre to the new road without crossing S-acre, easement across S-acre terminates.
	4. Easement by **prescription**: Scope = same general pattern as use occurring during statutory period.	**Prescription:** Easement for pedestrian access to get to road (the use that was made during the prescription period). The easement probably cannot now be expanded to cover auto access.
	5. Easement by **estoppel**: Scope = use by D that was foreseeable to S at time of estoppel.	**Estoppel:** S foresees that D will build single-family house needing access to road; S gives oral permission. If D builds 100-unit apartment building instead, S is probably not required to give access.
	Special rules on scope:	
	1. Uses that expand due to ***normal development*** of D-acre are ***OK***, if they don't ***unreasonably interfere*** with use of S-acre.	**Example:** D-acre has 5 acres, 1 small house. O sells D-acre to D; easement by implication occurs, to let house owners on D-acre cross S-acre to get to road. If 3 more houses are built on D-acre, probably all have right of access, since that's due to normal/foreseeable development of D-acre.
	2. Use by D to benefit ***additional property*** owned by D (other than D-acre) is ***not allowed***, even if it doesn't materially increase the burden on S-acre.	**Example:** D owns D-acre, which has express easement to cross S-acre to get to the road. D buys X-acre, located on the opposite side of D-acre from S-acre. Probably D has no easement to cross S-acre to get from X-acre to the road, even if this would not materially burden S-acre.
[3] Who has the burden and/or right to ***maintain & repair*** the easement?	1. S has ***no duty to maintain*** easement over S-acre, unless parties have expressly so agreed.	**Example:** D has easement by implication to cross a driveway on S-acre to get to road. If driveway is damaged in storm, S has no obligation to repair it. D has right to repair it. If S also uses the driveway, D has the right to pro-rata contribution from S for the repair cost. But if S doesn't use the driveway at all, D has no right to contribution from S.
	2. D has ***implied right to maintain*** easement, if this doesn't unreasonably interfere with S's use of S-acre. D has right to ***contribution*** from S if S also uses the easement.	
[4] Does a transferee from D ***get the benefit*** of the easement?	1. If easement is ***appurtenant***, it will ***automatically pass*** with transfer of D-acre, even if deed is silent.	
	2. If easement is in ***gross*** (i.e., there's no D-acre, just D's right to access S-acre), modern view is that easement is transferable unless a close personal relationship between D and S suggests that parties didn't intend for D to be able to assign.	**Example (easement in gross):** S gives close friend D (who owns house 2 blocks away) written right to use S's pond in perpetuity. Probably this right is not assignable by D to X, who does not know S, since S and D probably didn't intend for D to have a right of assignment.

1. **Extent necessary for protection:** But the estoppel will only occur to the ***extent necessary to protect*** the servient owner's reliance interest. Suppose, for instance, that in the above example, O, after filling in and planting his driveway, later decides that he wants to restore the driveway. Once he rebuilds the driveway, E will probably regain his easement rights. 2 A.L.P. 307.

H. Abandonment: Normally, an estate in land cannot be destroyed by ***abandonment***; this is certainly true of the possessory estates. But an easement is merely a use rather than a possessory interest. Accordingly, courts permit it to be terminated by abandonment in certain circumstances.

1. **Words alone insufficient:** The easement holder's ***words alone*** will ***never*** be sufficient to constitute an abandonment. Thus if O gives *A* a right of way over O's property, no oral or written statements by *A* that he doesn't want the easement any longer, or that he abandons it, will be sufficient to destroy it. (However, if the writing is signed by *A*, it may be a valid release, as distinguished from an abandonment.) Rest. §504, Comment c.

2. **Intent plus conduct:** For the easement to be abandoned, there must be an ***intent*** on the part of the easement holder to abandon it, coupled with ***actions*** manifesting that intent.

   a. Mere non-use not enough: Mere ***non-use*** of the easement, even for a long period, is typically ***not enough*** to show the requisite intent to abandon. However, ***affirmative conduct*** by the easement holder, ***coupled with non-use***, *can* be enough.

   Example: *A* conveys to *B* the right to use a strip on *A*'s land as a driveway to get to the public road that abuts *A*'s property. Several years later, a different public road is built adjacent to *B*'s property. *B* stops using the driveway for a period of three years, during which *B* uses only the new public road.

   This cessation of use would probably *not* be enough to constitute abandonment, because it does not constitute unequivocal evidence that *B* intended to relinquish the benefits of the servitude. If, however, *B* also built a masonry wall between his property and *A*'s, blocking *B*'s access to the driveway over *A*'s property, this act would be unequivocal enough to constitute abandonment, and the easement would be extinguished. Rest. 3d (Serv.), § 7.4, Illustr. 1 and 2.

I. Revocation: An easement is a full-fledged interest in property (albeit, a non-possessory, "incorporeal" one). Therefore, it is ***not revocable*** at its grantor's will. What would otherwise be an easement will, if it is revocable, generally be a ***license*** (discussed immediately *infra*).

VII. LICENSES

A. Nature of license: A ***license*** is a right to use the licensor's land that is ***revocable*** at the will of the licensor. This quality of revocability is the main

feature which distinguishes licenses from easements. (But there are two special types of licenses which are not fully revocable; these are discussed *infra*, p. 220.)

B. How license created: A license, since it is revocable, is considered a relatively insignificant interest. Therefore, it is ***not required*** to satisfy the ***Statute of Frauds***, and may be created orally.

Example: O, the owner of Blackacre, orally tells *A*, his next-door neighbor, that *A* may use O's pool any time he wishes. O has created a license in *A* to use the pool; O is the licensor and *A* is the licensee. If *A* uses the pool, he is absolved from liability for trespass. But O has the right to revoke the license at any time, and any use of the pool by *A* after that is a trespass.

1. **Attempt to create easement:** One way in which a license may be created is where a landowner gives another a right to use for former's land, which use would be an ***easement*** if formal requirements (particularly the Statute of Frauds) were satisfied, and these requirements are not.

   Example: O orally tells *A* that *A* may use O's driveway as a right of way to get from *A*'s land to the public highway. The parties believe that this oral agreement is sufficient to give rise to an easement, and intend that it be irrevocable. Nonetheless, because the Statute of Frauds, applicable to easements, has not been satisfied, only a license is created. O may revoke the license at any time.

2. **Oral agreement must produce a license, not an easement:** You'll sometimes be called upon to distinguish between a license and an easement. One thing you can rely on that if the understanding is ***oral***, it ***must be a license rather than an easement*** (since licenses can be oral but easements must meet the Statute of Frauds). Therefore, you can deduce that any oral grant of the right to use the grantor's property must, if it is valid at all, be a license and thus ordinarily be revocable.[1]
3. **License that could never be easement:** Only certain uses of land are capable of being made easements. Other uses are so transitory, or so

different from the common-law notion of an easement, that even if they are created in writing, and involve the use of land, they are not easements. These uses will generally (though not always) be licenses, even if they are in writing.

a. Ticket: A ***ticket*** to a sports event, concert, or other public spectacle, is always considered a ***license*** rather than an easement. Thus even if the ticket were considered to be a writing of a type sufficient to meet the Statute of Frauds, and stated that the right to attend was irrevocable, it would still only be a license. Thus a ticket will normally be ***revocable*** at the will of the licensor (though the doctrine of unjust enrichment may require that the licensor refund any money paid by the licensee for the ticket).

b. Right to park: Similarly, the right to use a ***parking lot*** is generally only a license, not an easement or a lease.

c. Right to post sign: Where the owner of land gives another person the right to ***erect a sign*** on the former's premises, this right may be either a lease, license, or easement, depending on the wording and intent of the parties.

4. Intent to make revocable: An easement, as noted, can never be revocable at the will of the grantor. Therefore, if the parties create what would otherwise be a valid easement, but they provide that the easement is revocable at the grantor's will, a license results. See Rest. §514, Comment c and Illustration 2.

5. Distinguished from lease: You may also sometimes have to distinguish between a license and a ***lease*** (or sublease). The basic distinction is that a license merely confers the ***non-exclusive right*** to "use" the premises in a particular way, whereas a lease gives the lessee ***exclusive possession*** of specified premises for a stated time, typically without very narrow limitations on use.

a. Particular type of use: So look to whether the person is getting non-exclusive rights ***limited to a particular kind of use*** (likely to be a license) or is instead getting the right to occupy defined premises coupled with the right to exclude others from the premises (probably a lease or sublease).

b. Tight definition of premises: Another factor you should look to is

whether the "premises" to which the arrangement applies are ***tightly defined***: if they are, a lease is more likely, and if they are not, a license is more likely.

Examples: Thus a right to come onto the property to engage in a recreational activity like hunting will typically constitute only a license, whereas the right to store goods under lock and key in a particular structure will typically rise to the level of a lease or sublease.

C. Exceptions to revocability: As noted, a license is normally revocable at the licensor's wish, even if the parties have agreed otherwise. But there are some situations where the courts restrict or eliminate the revocability of a license.

1. Oral license acted upon: The most important case where a license may be irrevocable is that in which the use ***would have been an easement*** except that it did not meet the Statute of Frauds, and the licensee makes ***substantial expenditures*** on the land in ***reliance*** on the licensor's promise that the license will be permanent or of long duration. Most (though not all) courts will give the licensee at least limited protection from revocation. See Rest. §519(4).

a. Limited extent: In the reliance scenario, the license will be irrevocable ***only to the extent necessary to protect the licensee's reliance interest***, i.e., his investment in the improvements.

Example: O orally gives *A*, an electric company, the right to build whatever power lines it needs over a strip of O's property. *A* builds one line, and O then revokes. A court might allow *A* to keep the existing power line as long as it needs it, but would probably not permit *A* to build any additional lines, even though the license contemplated these; only maintenance of the original line is necessary to protect *A*'s reliance interest. See Rest. §519, Illustration 3.

VIII. COVENANTS RUNNING WITH THE LAND

A. Definition: Like easements, ***"covenants"*** may under some circumstances run with the land. A covenant running with the land is simply a ***contract***

between two parties which, because it meets certain technical requirements, has the additional quality that it is ***binding against one who later buys the promisor's land***, and/or ***enforceable by one who later buys the promisee's land***.

1. **Legal relief:** When we use the term "covenant," we are talking about a promise that is subject to ***legal*** rather than equitable relief. That is, when a covenant is breached the relief granted is ***money damages***, not an injunction or decree of specific performance.

   Example: When members of a ***condominium association*** or ***homeowners association*** promise the association that they will ***pay maintenance fees***, these promises are covenants running with the land. If the promise is violated, the association's remedy will be a judgment for damages against the member (a "legal" rather than "equitable" remedy).

   a. **Building restrictions:** By contrast, when the promise is that the promisor's land will ***not be used in a certain way***, the promisee will generally be interested in gaining an ***injunction*** from a court of ***equity***, not in recovering money damages. For instances, if the promisor covenants that he will ***not build a non-residential structure*** on his property, the promisee will generally wish to block construction of a commercial building, not merely wait for the building to be built, and recover damages. Such land-use restrictions are called ***"equitable servitudes,"*** and are discussed *infra*, p. 226.

B. Statute of Frauds: For a covenant to run with the land, it must be ***in writing***.

Example: D, a developer, sells a parcel of land to O. As part of the sale transaction, O promises that it will pay D $100 per year for maintenance of a private road and private recreational facilities for the benefit of O's land and other land in the subdivision. If O's promise is to run on the burden side (i.e., be binding upon X, who later buys O's land), the promise must be in writing (though not necessarily signed by O). It is not clear whether the promise is binding on O himself if it is not in writing.

1. **Acceptance of deed poll:** Most property sales are made by a ***deed poll***,

i.e., a deed signed by the grantor but not by the grantee. Where the covenant is one that is made by the grantee, nearly all courts hold that the grantee's ***acceptance of the deed poll*** containing the promise satisfies the Statute of Frauds, with respect to any promise made by the grantee that is recited in the deed. 2 A.L.P. 365.

C. Running with the land: The main question about covenants is, When do they ***run with the land***?

1. Running of burden and benefit: More specifically, we want to know: (1) When does the ***burden*** run (so that the promisor's assignee is bound)? and (2) When does the ***benefit*** run (so that the promisee's assignee can sue for damages if the covenant is breached)?

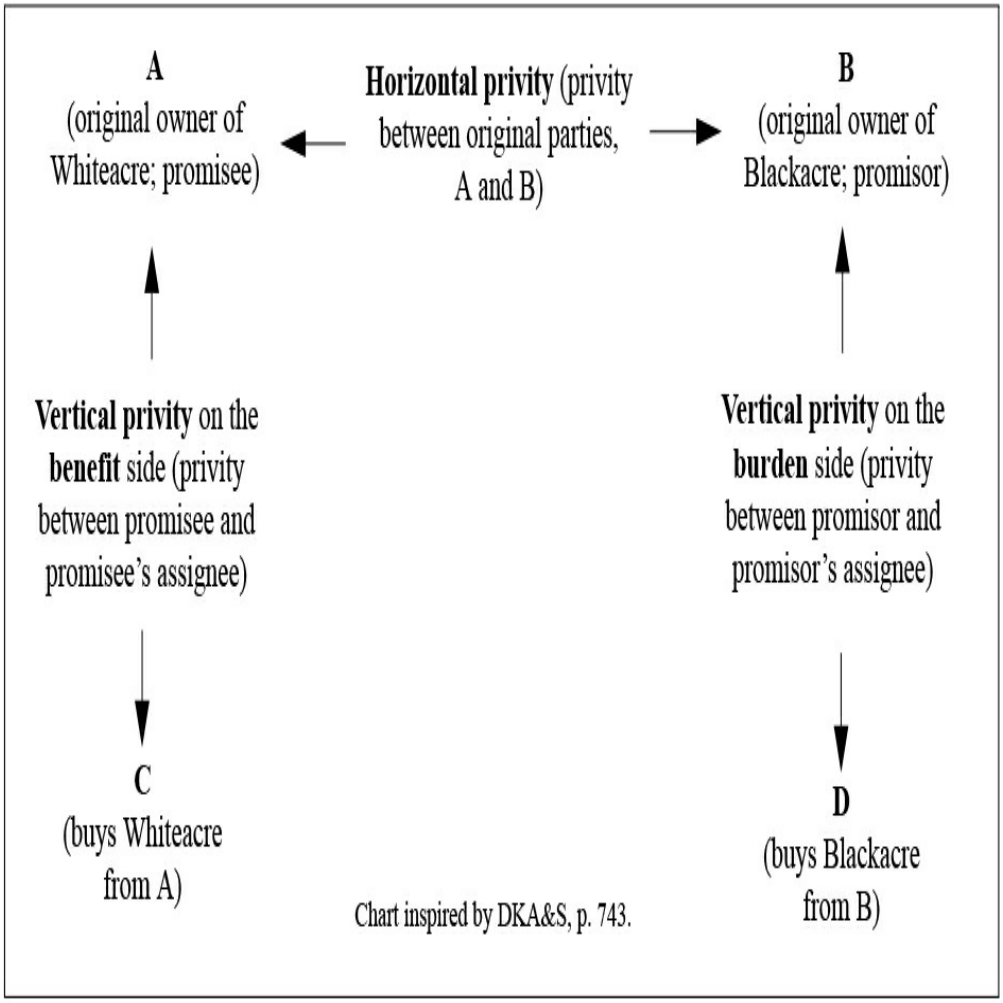
To answer these two questions, we have to worry about: (1) the ***"touch and concern"*** requirement; and (2) the requirement of "***privity***."

a. "Touch and concern": For the burden to run, under the traditional rule the burden must ***"touch and concern"*** the promisor's land. Similarly, for the benefit to run, under the traditional rule the benefit must "touch and concern" the promisee's land. For our detailed discussion of "touch and concern," see *infra*, p. 224.

i. Modern approach abandons requirement: But the modern approach — as exemplified by the Third Restatement — ***abandons*** the "touch and concern" requirement entirely.

b. Privity: Also, for the burden to run, there must traditionally be ***"privity of estate,"*** which usually means both a land transfer between the promisor and promisee ("horizontal" privity) plus a succession of estate from promisor to promisor's assignee ("vertical" privity). For the benefit to run, horizontal privity is sometimes required, but vertical privity is generally not. (For our detailed discussion of privity, see p. 222-224 below.)

2. Diagram: To aid in our discussion, here is a diagram showing how the terms "horizontal" and "vertical" privity are used:



On the facts as diagrammed, *B* has promised *A* that *B* and his "assigns" will never use Blackacre in a certain way (e.g., for retail purposes), and that if they do, they'll pay damages. The issues are whether *B*'s assignee, *D*, is burdened by this promise (i.e., can be liable for damages), and whether *A*'s assignee, *C*, is benefitted by it (i.e., can sue for damages).

3. Privity between promisor and promisee ("horizontal" privity): Where a court requires ***"horizontal" privity***, it means that there must be ***some land transfer between the original promisor and the original promisee.***

a. Running of burden, under traditional rule: In America, ***horizontal privity is traditionally required in order for the burden to run***. This mainly means that if the original parties are ***"strangers to title,"*** the burden will not run. Thus traditionally, two ***neighboring landowners*** could not get together and agree that neither would use his property

for a certain purpose, and have this restriction be binding on a subsequent purchaser from either of them.

Example 1: In our diagram, assume that *A* and *B* have never had any land transaction between them other than *B*'s promise to *A* that *B* and his assign won't use Blackacre for retail purposes. *B* sells to *D*, who builds a store on Blackacre. Under the traditional rule, *A* can't sue *D* for damages for breaching the *B*-to-*A* covenant. This is so because there was never any land transfer between *A* and *B*, and thus no horizontal privity between them.

i. **Requirement satisfied:** But the horizontal requirement is satisfied (even under the traditional rule) if the original promisor and promisee have some land-transfer relationship.

Example 2: Same basic fact pattern as Example 1 above. Now, however, assume that *A* originally owned both Whiteacre and Blackacre. Then, *A* sold Blackacre to *B*, and the deed recited *B*'s commitment (on behalf of himself and his assigns) not to use Blackacre for retail purposes. Again as above, *B* conveys to *D*, who builds a store. Now, *A can* sue *D* for damages, because there was horizontal privity between *A* and *B*, in the sense of a land transfer between them.

ii. **Modern/Restatement approach abandons requirement:** But the ***"modern"*** approach — used by the Third Restatement — ***abandons*** the requirement of horizontal privity entirely. Thus under the Restatement, in Example 1, *A* could recover damages from *D* even though there never was a property transaction between *A* and *B*.

b. Running of benefit: Most courts traditionally hold that there must also be horizontal privity for the ***benefit*** to run. (Nearly all courts hold that the same privity rule that applies to running of burden applies to running of benefit; since most courts have traditionally required horizontal privity for running of burden, they have also required it for running of benefit.)

Example: In terms of Example 1 above, assume that *A* conveys

Whiteacre to *C*, with no prior property transfers having occurred between *A* and *B*. *B* builds a store on Blackacre. If the state follows the traditional rule that horizontal privity is required for the burden to run, the state will probably also require horizontal privity for the benefit to run. In that instance, *C* won't be able to sue *B* for damages, because the benefit won't run due to the lack of horizontal privity between *A* and *B*.

i. Restatement abandons: Again, the modern/Third Restatement approach is ***not*** to require horizontal privity for the running of the benefit any more than for the running of the burden. So under the Third Restatement, in the above example, *C can* sue *B* for damages.

4. Privity on promisor side and on promisee side ("vertical" privity): When a court requires ***"vertical"*** privity, this refers to the relationship between the ***promisor*** and his ***successor*** in interest, or the relation between the ***promisee*** and *his* successor. So in terms of our diagram on p. 222, the issue is whether *A* and *C* are in vertical privity, and whether *B* and *D* are in vertical privity.

a. Running of burden: For the ***burden to run***, the traditional rule is that the party against whom it is to be enforced must succeed to the ***entire estate*** of the original promisor, in the durational sense.

i. Usually not a problem: In most law school problems that you will see, vertical privity on the burden side will ***not*** be a problem. For instance, in our main example/diagram on p. 222 *supra*, *B* sold his entire interest in Blackacre to *D*, so *B* and *D* were in vertical privity. Therefore, even under the traditional rule there would be no problem with either *A* or *C* (after *C* took Whiteacre from *A*) suing *D* for money damages if *D* built a store on Blackacre. (But if *D* merely ***leased*** the premises for 20 years from *B*, and built the store, then according to the traditional rule *A* or *C* couldn't sue *D* on the promise, because *D* would not be deemed to be in full vertical privity with *B*.)

ii. Third Restatement's rule: In any event, many courts today, and the Third Restatement, ***abandon the requirement of vertical privity*** for the running of the burden as to ***negative covenants,*** but

not generally as to affirmative covenants.

b. Running of benefit: The vertical privity requirement has even less bite on the ***benefit*** side. Even under the traditional rule, the benefit may be enforced by anyone who has taken ***possession*** of the promisee's property with the promisee's permission.

Example 1: On the facts of our main example on p. 222, if *A* gave a long-term lease to *C*, *C* could sue *B* for damages if *B* built a store on Blackacre.

Example 2: Dev, a developer of a subdivision, causes each buyer to promise in his deed to pay a monthly charge to cover the cost of maintaining common areas of the development. Dev sells a lot to *A* and extracts such a promise. Later, Dev assigns his interest in collecting the common charges to a newly-formed ***Homeowners Association*** (HOA). *A* doesn't pay her common charges, and the HOA sues her to recover the back charges.

The HOA will win, even though the association owns no property in the development. Thus the requirement of vertical privity is almost completely relieved in this instance, even under traditional rules.

5. "Touch and concern" requirement: Courts have traditionally required in some circumstances that the promise ***"touch and concern"*** particular land.

a. Running of benefit: For the ***benefit*** to run, the traditional rule is that the benefit must ***touch and concern*** the promisee's land. But this requirement does not have too much practical bite — most kinds of covenants that have anything to do with real estate (e.g., promises to make repairs, promises not to demolish, promises to pay money to a homeowners association, etc.) are found to "touch and concern" the promisee's land (as well as the promisor's land).

i. Burden in gross: If the benefit touches and concerns the promisee's land, the benefit will run ***even though the burden does not***. That is, ***the benefit can run even if the burden is "in gross,"*** i.e., personal to the promisor.

Example: *D* sells land containing a restaurant to *P*. As part of the

transaction, *D* promises not to operate a competing restaurant within a two mile radius. (Assume that the state holds that a non-compete promise "touches and concerns" the promisee's land.) *P* then conveys the property to *X*. *X* can sue *D* for breach of the promise — since the benefit touches and concerns the *P*/*X* land, the benefit can run even though the burden is "in gross," i.e., personal to *D* and not tied to any particular land owned by *D*.

b. Running of burden: For the ***burden*** to run, the traditional rule is, again, that the burden must "touch and concern" the promisor's land.

i. Running of burden when benefit is in gross: Furthermore, about half of the courts following the traditional requirement of "touch and concern" impose an additional significant requirement: these courts hold that the burden will not run if the ***benefit*** does not touch and concern the promisee's land. (That is, half the courts say that ***the burden may not run when the benefit is in gross.***)

Example: *A*, the owner of Blackacre, sells it to *B*. *B* promises not to operate a liquor store on the property so as not to compete with any similar store that may be owned by *A* from time to time anywhere within a 10-mile radius of Blackacre. Assume that the court is one which holds that such a "territorial" non-compete promise does not touch and concern the promisee's land. *B* then sells Blackacre to *C*. About half of such courts would hold that *A* cannot sue *C* for breach, because the burden will not run where the benefit is in gross, i.e., personal to *A*.

c. Restatement Third eliminates rule: The Third Restatement entirely ***eliminates the "touch and concern" requirement,*** as to the running of both the burden and the benefit.

Example: On the facts of the prior example, it won't matter whether *B*'s non-compete promise is deemed to touch or concern the land of *A* (the promisee) — if *B* sells to *D*, and D opens a liquor store on the property, *A* can sue *D*, according to the Third Restatement.

IX. EQUITABLE SERVITUDES / RESTRICTIVE COVENANTS

A. Building restrictions: A suit at law on a covenant running with the land can only culminate in ***money damages***, as we have seen. This relief is generally adequate where the covenant is a promise to pay for benefits received on the land (e.g., a promise to pay dues to a homeowners' association) or an affirmative promise to take certain acts on the land (e.g., a promise to maintain a fence). But where the promise is a ***negative*** one, involving a ***restriction on building***, money damages are not usually the desired relief. Rather, an ***injunction*** against the forbidden construction is the relief generally desired by the promisee.

1. Technical requirements: Furthermore, as we have seen, the enforcement of a covenant at law, particularly against an assignee of the original promisor, is fraught with technical difficulties. Traditionally, there needed to be privity of estate between the promisor and the promisee (*supra*, p. 222), as well as between the promisor and the latter's successor (*supra*, p. 223). Furthermore, traditionally the covenant had to "touch and concern" the land, at least that of the promisor (*supra*, p. 224). These requirements may prevent the obtaining of money damages against the person now in possession of the promisor's estate, even where money damages would be adequate relief.

B. *Tulk v. Moxhay:* The inadequacy of legal remedies for breach of a building restriction led to the famous English case of ***Tulk v. Moxhay***, 41 Eng. Rep. 1143 (1848).

1. Facts of *Tulk:* In *Tulk*, P was the owner of an empty piece of ground in Leicester Square, as well as of several houses surrounding it. He sold the vacant ground to Elms; the deed to Elms contained Elms' promise to maintain the vacant ground as a garden, with no structure on it. Title to the ground eventually passed to D, whose deed contained no such promise, but who conceded that he knew of Elms' original covenant. P sued D for an injunction to prevent him from building on the garden.

2. No remedy at law available: Even if P had wished, he could not have waited until D destroyed the garden, and then sued for monetary damages. The reason for this was that under the English interpretation of the requirement of horizontal privity, there must be a continuing

property relationship between promisor and promisee, thus making it impossible for a grantor in fee to impose a running covenant on his grantee.

3. **Equitable relief:** English courts prior to *Tulk* had apparently held that if a covenant was not enforceable at law, it could not be enforced at equity either. But the court in *Tulk* ***granted P an injunction even though the covenant was not enforceable at law***.

4. **Effect of notice:** The court stressed that D had had ***actual knowledge*** of the promise made in the deed to Elms. It seems probable that the restriction would ***not*** have been binding on D had he taken without actual or constructive knowledge; later cases have indeed imposed a notice restriction (see *infra*, p. 229).

C. Equitable servitudes: Since *Tulk v. Moxhay*, equity courts in both England and America have been willing to enforce land-use agreements as ***"equitable servitudes"*** against the burdened land, as to subsequent purchasers who took with ***actual or constructive notice***. They have done so ***whether or not*** the agreement constituted a valid ***covenant running with the land*** at law. (See the discussion *infra*, p. 228 as to privity and the "touch and concern" test where equitable relief is at issue.) See 2 A.L.P. 403.

Example: *A* and *B* own adjacent lots with houses on them, Blackacre and Whiteacre, respectively, which have never been under common ownership. One day, *A* and *B* sign a document in which each promises, on behalf of himself and his assigns, never to permit his property to be used for purposes other than as a single-family residence. They file this document in the land records pertaining to both parties. *A* then sells to *C* and *B* sells to D. D files plans to tear down the house on Whiteacre for the purpose of constructing a medical office building. *C* sues for an injunction against construction of the medical building.

The court will almost certainly grant *C* the requested injunction. *A* and *B* have each agreed to an "equitable servitude" on their property. The burden of each promise would be found to run to any successor who took with actual or constructive notice (as D did here, given that the restriction was shown in the land records for Whiteacre). Even in a state that requires "horizontal privity" for the running of a legal covenant (see

supra, p. 222),[2] the court would enforce the restriction as an equitable servitude, by granting the injunction.

1. **Theory for enforcement:** Courts are not completely in agreement on the theory for granting equitable relief (usually an ***injunction***). Most courts hold that the agreement creates an ***"equitable property interest"*** in the burdened land, similar to an easement. As a consequence of this theory, the promisee may enforce the agreement without showing that appreciable damage or injury to his property will occur from a breach (a showing that must be made in the usual suit for specific performance). See 2 A.L.P. 403-04.

D. Statute of Frauds: At least in those courts following the majority view that an equitable servitude is a property interest, the servitude must ***satisfy the Statute of Frauds***.

1. **Acceptance of deed poll:** As with covenants at law, an equitable servitude will meet the Statute of Frauds requirement if it is contained in a ***deed poll*** that is accepted by the grantee/promisor (but not signed by him). 2 A.L.P. 407.

2. **Reference to filed plat:** Restrictions on building are frequently contained not in the deed, but in a ***plat*** of a ***subdivision***. (See *infra*, p. 289.) If the plat is recorded, and the deed makes reference to the plat (even if only as a means of identifying the property conveyed), the Statute of Frauds is satisfied as to the restrictions. 2 A.L.P. 408.

3. **Implied reciprocal servitude:** Suppose that the deed given to a grantee contains a promise by him to obey certain restrictions on use. If the grantor (probably a developer) agrees orally that he will ***insert similar restrictions in other deeds*** given to subsequent buyers, does this oral promise satisfy (or constitute an exception to) the Statute of Frauds? The courts are ***split*** on this issue, which is discussed further *infra*, p. 231. See particularly *Sanborn v. McLean*, *infra*, p. 232.

E. Affirmative covenants: Most of the agreements for which equitable enforcement is sought are ***negative*** in nature; they generally are agreements not to violate certain building restrictions.

1. **American view:** But the ***vast majority*** of ***American*** courts are ***willing*** to grant equitable enforcement of ***affirmative*** as well as negative agreements.

Example: At the time *A* sells Blackacre to *B*, *B* promises *A* in writing that *B* and his assigns will maintain a hedge at the edge of the property. *B* then conveys to *C*, who has actual knowledge of *B*'s promise. An American court would almost certainly order *C* to keep the hedge in place.

F. Requirements for running: The requirements for the ***running*** of an equitable servitude (i.e., enforcement by or against someone other than the original parties) are significantly more ***liberal*** than the traditional requirements for the running of a covenant at law:[3]

[1] ***Privity is not generally required***, either of the horizontal or vertical variety;

[2] Although the ***burden*** must in most courts ***"touch and concern"*** the land in order to run, in most courts the ***burden can run*** even though the ***benefit does not "touch and concern"*** the land;

[3] For the benefit to run, the original parties must be fairly ***specific*** about ***who may enforce*** the promise (i.e., what land was intended to benefit); and

[4] a subsequent purchaser from the promisor will be bound only if he had actual or constructive ***notice*** prior to taking.

We consider each of these aspects below.

1. Privity: The various requirements of ***privity***, so important to the enforcement of a covenant at law against and by successors to the original parties, are ***not applicable to an equitable servitude***.

a. Between original parties (horizontal privity): The lack of a privity requirement is most significant with respect to the ***original parties*** to the agreement creating the servitude. Whereas a covenant at law will traditionally run only if the original parties had some sort of property relationship (see *supra*, pp. 222-223), the servitude is binding on successors ***even if covenantor and covenantee were strangers to each other's title***.

Example: ***Neighboring landowners*** who have not had any other property transactions between them may agree that neither will make a particular type of use of his land; this agreement will create an

equitable servitude, enforceable against or by a purchaser from either. The example on p. 226 is an illustration.

2. **The "touch and concern" requirement:** Neither the benefit nor the burden of a restrictive covenant will run unless it can be said to ***"touch and concern"*** the promisor's (in the case of a running burden) or the promisee's (in the case of a running benefit) land. (This is the same rule as has traditionally applied to covenants at law; see *supra*, p. 224). But the courts' interpretation of what constitutes "touching and concerning" is somewhat more liberal than in the case of a covenant at law.

   a. **Promisor's land:** The vast majority of ***restrictions*** upon the ***promisor's*** use of his own land *will* be found to "touch and concern" that land. Since these use-restriction cases are the main situations where equitable relief is sought, the touch and concern requirement will nearly ***always be met on the burden side.***

   b. **Promisee's land:** On the ***benefit*** side, the equity courts are more liberal than courts interpreting a covenant at law have traditionally been.

      i. **Building restrictions:** In the usual case of an agreement that involves a ***building restriction***— and in fact any promise that affects the quality of a neighborhood or area — the promise will be held to "touch and concern" the land of ***any landowner*** in that ***neighborhood or area***, not just an immediately adjacent one. 2 A.L.P. 412-13. Thus if a lot owner promises that he will not construct a commercial building on his premises, ***any nearby landowner may sue for an injunction***. (But it must also be shown that the original parties ***intended*** the land of the plaintiff in question to be benefitted; the requirement of intent to benefit specific land is discussed *infra*, p. 229.)

   c. **Third Restatement eliminates requirement:** The Third Restatement, adopted in 2000, completely ***abandons the "touch and concern" requirement*** for equitable servitudes just as it does for covenants at law. See Rest. 3d Property (Servitudes), §3.2 ("touch and concern" requirement is eliminated for all "servitudes," defined to include equitable servitudes as well as covenants at law.)

   d. **Running of burden where benefit is in gross:** Recall that where the benefit is ***in gross***, courts are traditionally in disagreement about

whether the burden may run at law (*supra*, p. 225). The courts are similarly in disagreement about whether ***equity*** will enforce a burden where the benefit is in gross.

i. **Homeowners' association:** The issue of the running of the burden where the benefit is in gross is most important where a ***homeowners' association*** sues to enforce building restrictions. Since such an association often owns no property in the development, it could be argued that the restriction should not be enforceable at equity against an assignee of the original lot purchaser. But American courts by and large ***permit the association to obtain an injunction*** in this situation.

ii. **No problem under Third Restatement:** Again, the Third Restatement entirely eliminates the issue of whether the burden can run when the benefit is in gross. See Rest. 3d, §2.6 (benefits in gross are valid). So on this classic issue of whether a homeowner's association can sue to enforce building restrictions against an assignee of an original purchaser, the Third Restatement's answer is "yes" — it doesn't make any difference that the association does not itself own land (and thus holds the benefit of the restrictions "in gross").

3. **Intent to benefit particular land:** If the benefit is to run to a particular piece of land (so that its owner may enforce the promise), it is not enough that the agreement "touch and concern" that parcel. It must also be the case that the original parties ***intended*** to benefit that particular parcel, in a way that would permit later owners of the parcel to enforce the promise. 2 A.L.P. 415-16.

Example: *A* and *B*, next-door neighbors, agree that neither will build an outhouse on his property. *B* begins to build an outhouse, and *C*, his neighbor on the other side, sues for an injunction. Since there is no evidence that *A* and *B* intended their agreement to benefit other nearby parcels of land, *C* will not be able to obtain the injunction.

a. **External evidence about intent:** All states but California permit a showing of an intent to benefit a particular parcel by evidence ***external*** to the written agreement. Thus the court will hear evidence

about the geographical location of the burdened and allegedly benefitted lands, and the physical location of the buildings on them. But evidence of an oral agreement to benefit the particular land, without any other, more tangible, evidence, will probably not be sufficient to overcome the Statute of Frauds.

b. General development plan: The intent to benefit particular lands may also be shown from the fact that there was a ***general development plan***. The effect of such a plan on the intent requirement is discussed *infra*, p. 230.

4. Notice to subsequent purchaser: Equity will not enforce an agreement against a ***subsequent purchaser*** unless she had ***notice*** of the restriction before she took.

a. Significance of recording: The notice requirement is satisfied not only if the subsequent purchaser has actual knowledge, but also if she has ***"constructive"*** knowledge.

Constructive notice occurs most often where the restriction is ***recorded*** before the subsequent purchaser takes.

i. Two questions to ask: So in analyzing whether a restrictive covenant is binding on a subsequent purchaser of the burdened land, you must ask ***two questions***: (a) Did the purchaser have ***actual knowledge*** of the restriction? and (b) Was the purchaser on ***"constructive notice"*** of the restriction, perhaps by virtue of the restriction's being embodied in a deed in the purchaser's chain of title? If the answer to both questions is ***"no,"*** the purchaser ***won't be bound by the restriction.***

Example: Devel, a developer, owns a 40-lot subdivision. He intends to file a plat showing that all lots are limited to single-family use, but never gets around to doing so. He sells Lot 1 to *A* with a single-family restriction contained in the deed (and with a reciprocal promise in the deed that he, Devel, will also restrict his other 39 lots). He then sells Lot 2 to *B* without any restriction in the deed (and without *B*'s having an actual knowledge that any lot is burdened or promised to be burdened).

Even though Devel has created a single-family restriction on Lot

2 (and all other lots) by his arrangement with *A*, *B* will not be bound by that restriction, because he took without "actual" or "constructive" notice (both terms are discussed below) of the restriction on Lot 2.[4]

G. Significance of building plan: A developer will often formulate a ***general building plan*** or development plan, by which all or most of a subdivision is to be made exclusively residential, with provision for parks, roads, and other common areas. Usually this plan is embodied in a subdivision ***plat***, or map, which is recorded, together with the applicable restrictions and covenants. The purpose of such a plan is to assure each prospective purchaser that he will be buying into a planned residential neighborhood. Once the developer has sold off the lots, he typically disappears from the picture, at least as far as enforcing the covenants is concerned. Therefore, it becomes important to know the circumstances under which one lot owner may enforce the restrictions against another. The answer to this question depends upon several factors, particularly the wording of the restrictions, and whether the plaintiff seeking enforcement received his land before or after the party against whom he wishes to enforce the limitation.

1. **Enforcement by developer:** The ***developer*** himself, of course, will be ***able to enforce*** the restriction so long as he owns some of the remaining property. Enforcement by him does not involve the running of the benefit, so that he will always be able to enforce either against the original buyer (the promisor) or against an assignee from the promisor who takes with actual or constructive notice.
2. **Enforcement by subsequent purchaser from developer:** When enforcement is sought against a purchaser by a ***later purchaser*** from the developer, the latter will have to show that the earlier purchaser and the developer ***agreed that the benefit would run*** to the latter's land. (This is a general requirement for the running of the benefit of a servitude; see *supra*, p. 229.) This showing may be made in one of several ways.
   a. **Express provision in deed:** The deed from the developer to the earlier purchaser may itself ***expressly*** provide that enforcement may be obtained by any subsequent (or prior) purchaser of a different lot from the developer.
   b. **Existence of building plans:** Even where the deed from the

developer to the early purchaser does not say anything about the benefit, the ***mere existence of a general building plan*** will probably be enough to create a presumption that other purchasers whose lots fall within the terms of the plan were intended to be benefitted.

Example: Developer devises a residential development plan for the Happy Acres subdivision. He tells each prospective purchaser about the plan, including the fact that it will keep the community entirely residential. He then sells Lot 1 to *A*, with all the restrictions of the plan embodied in the deed. But the deed to *A* does not specifically refer to the plan, and does not indicate who may enforce the restrictions. Developer then sells Lot 2 to *B*. Since *B* can show that a general plan existed at the time of the deed to *A*, and that *A* knew of this plan, the court will presume that all subsequent lot purchasers were intended to be benefitted by the restriction in *A*'s deed.

i. **Evidence that other lots are restricted:** A general plan may be shown by evidence that all ***other lots*** in the vicinity contain similar restrictions. However, it must be shown that the general plan existed ***prior to the sale to the defendant*** (or to the defendant's predecessor in title). 2 A.L.P. 418. Therefore, a showing that restrictions were placed in ***subsequent*** deeds will not be relevant; only restrictions inserted prior to the sale to the defendant will show that a plan existed at the time the defendant bought.

3. **Enforcement by prior grantee:** Now consider the converse situation: an early grantee from the developer wishes to enforce a restriction against a ***later purchaser*** from the developer, or that later purchaser's assignee. Unlike the case of enforcement by a subsequent grantee, this is not a matter of the simple running of a benefit; the problem is that the plaintiff has by hypothesis received his land before the restriction against the defendant even existed. Nonetheless, there are several ways in which enforcement by the prior grantee may be available.

   a. **Express promise of restriction made by developer:** The developer may make an ***express written promise*** that his remaining land is subject to the same restrictions. If so, his retained land becomes immediately burdened, and this burden will simply run with the land when he conveys it to later purchasers. The prior purchaser will thus

have no difficulty in enforcing the restrictions against the later buyers.

b. Implied reciprocal servitude: Even if the developer has not expressly and in writing restricted his remaining land, the theory of ***"implied reciprocal servitude"*** is often used to allow an early purchaser of one lot to enforce against a later purchaser of a different lot. This theory holds that if the early purchaser acquires his land in ***expectation*** that he will be entitled to the benefit of subsequently created servitudes, there is ***immediately*** created an "implied reciprocal servitude" ***against the developer's remaining land***. 2 A.L.P. 426. (Sometimes the phrase "implied reciprocal ***easement***" is used, but it means the same thing.)

i. General plan must exist: Unlike the third-party beneficiary theory, this implied reciprocal servitude theory will usually apply only where it is shown that there was a ***general development plan*** in existence at the time the prior purchaser bought. Otherwise, there will normally be no way for the prior purchaser to show that he reasonably expected to have the benefit of such restrictions placed in subsequent deeds.

ii. Restrictions not inserted in later deeds: The implied reciprocal servitude theory is applicable if the developer inserts the promised restrictions in later deeds. But the theory's greatest value to the early purchaser is that some courts may apply it ***even if the restrictions are not inserted in the later deed***.

iii. No oral promise: If the developer has made an oral promise to the early purchaser that later sales will contain the restriction, the implied reciprocal servitude theory will probably be applied by most courts. But some courts have gone so far as to hold that ***even if there is no such oral promise*** made to the early purchaser, if that purchaser can show that a general plan of restrictions exists, the implied reciprocal servitude will arise against the developer's remaining land.

Example: Developer, who owns a large tract, sells numerous lots in it in 1892 and 1893. Each deed limits construction to residences costing more than $2,500. In late 1893, Developer conveys Lot 86 to X, without any restrictions. Part of Lot 86 eventually passes to

D, who begins to build a gas station. The Ps, owners of nearby restricted lots, sue for an injunction. There is no evidence that Developer made any explicit promises to the buyers of the restricted lots that he would impose similar restrictions on later purchasers.

Held, for the Ps. The mere fact that all of the earlier deeds contained identical residential-only restrictions, and that the entire neighborhood was residential, is enough to prove that Developer was following a common plan or scheme. Therefore, when he sold the early lots, his remaining land became subject to a reciprocal negative easement, with the same restrictions as those imposed on the lots already sold. Although D's own chain of title did not disclose this restriction, the nature of the neighborhood put him on inquiry notice that a reciprocal negative easement might exist, and he was under the duty to check other deeds from Developer. If he had done so, he would have discovered the restrictions, and therefore the reciprocal negative easement; consequently D had constructive notice of the restriction, and took subject to it. *Sanborn v. McLean*, 206 N.W. 496 (Mich. 1925).

iv. Statute of Frauds: Observe that the concept of implied reciprocal servitudes is in a sense an exception to the Statute of Frauds, since the theory is that the restriction on the developer's remaining land arises without any reference thereto in the deed. For this reason, many states will not permit the reciprocal servitude to arise without an explicit promise by the developer ***in the deed*** that he will subject his remaining lots to the same restriction. Note that in such a state, *Sanborn v. McLean* would probably turn out differently.

v. Plan must be in effect at earlier time: For the implied reciprocal servitude theory to apply, the prior purchaser must show that a general building plan existed ***at the time he bought***, since it is at that time that the implied reciprocal easement in the grantor's remaining lands must arise, if at all. Similarly, if the developer exacts ***stricter*** restrictions in later deeds, an earlier purchaser will probably not be able to enforce these more severe restrictions under the implied reciprocal servitude theory. 2 A.L.P. 426.

H. Selection of neighbors: Covenants and restrictions are sometimes used not to control land use, but to facilitate the ***selection of neighbors***. For instance, each deed executed by a developer may provide that the purchaser must become a member of the homeowners' association, and that he may not sell his land to anyone who is not a member of that association. If the association has untrammeled power to decide who may become a member, existing members (i.e., existing residents of the development) will have the *de facto* right to select their neighbors. Such arrangements are theoretically enforceable (either by damages for their breach or by an injunction against the forbidden sale), but they are likely to run up against one or both of the following obstacles to enforcement:

1. **Restraint on alienation:** First, the arrangement may be held to be an illegal ***restraint on alienation***. See the general discussion of restraints on alienation *supra*, p. 93.

   a. **Right of first refusal:** But if the Association has merely a ***right of first refusal***, rather than the outright power to block a transfer, this fact will probably save the arrangement from being an illegal restraint on alienation.

   b. **Co-ops and condos:** In the case of ***cooperative associations*** and ***condominium*** units, share restrictions usually take the form either of a requirement that the owners' association approve any proposed transfer, or a right of first refusal. These restrictions are usually ***upheld***, sometimes on the theory that an owner's board needs to assure that the new member will be financially responsible.

      i. **Reasonableness:** However, most courts hold that condo and co-op transfer restrictions will only be upheld if they are ***reasonable***. For instance, a provision stating that a condo board can veto the proposed deal and instead buy the unit for what the seller originally paid would be likely to be struck down as unreasonable.

      ii. **Preemptive option:** Many co-op and condo associations restrict transfers not by keeping the right of approval, but by instead keeping a ***right of first refusal***. That is, the association has a stated time in which it can match the proposed selling price and acquire the unit itself. Usually such “preemptive options” are upheld. D&K, pp. 933-34.

I. Restriction to single-family use: Covenants and restrictions often attempt

to preserve the residential quality of a development. Most significantly, covenants and restrictions often prohibit the construction of anything but ***single-family residences***, and prohibit anything but a single family from using each residence.

1. **Enforceable:** Generally, such restrictions are ***enforced*** by a court. For instance, a restriction limiting properties to single-family uses would generally be enforced to prevent operation of a retail store or a hospital on the premises.
2. **Broadening definition of "family":** However, courts in recent years have generally broadened the meaning of "family." For instance, an unmarried heterosexual couple, an unmarried same-sex couple, or a married couple caring for a large number of foster children, would all have a good chance of persuading a court that they are living as a "family unit" and thus not violating a single-family restriction. See the further discussion of the meaning of "single family residence" in the context of zoning laws, and of possible constitutional limits on zoning authorities' right to use a narrow definition of the term "family," *infra*, p. 283.

J. Restrictions on activities: Covenants and restrictions may affect not only the type of dwelling and who lives there, but also may police more narrowly the ***activities*** that take place. For instance, homeowners associations and condominium associations (see *infra*, p. 343) often enact ***rules and regulations*** governing such items as ***pets***, ***satellite dishes***, the ***parking of vehicles***, and other aspects of everyday life.

1. **Must be reasonable:** Generally, courts ***enforce*** such restrictions (assuming that they satisfy the requirements for covenants, listed above). However, most courts impose some sort of a requirement of reasonableness on use restrictions. Probably the most common approach is to apply a "mere rationality" standard, under which the restriction will be upheld unless it is ***"irrational"*** or ***"wholly arbitrary."*** This is generally a quite difficult standard for the person attacking the restriction to meet.

   Example: Lakeside Village is a large condominium development (530 units in 12 separate three-story buildings). Before the project is built, the developer places certain covenants and restrictions into a declaration

recorded in the real estate records. Those restrictions include a pet restriction, under which "no animals (which shall mean dogs and cats) … shall be kept in any unit." Ten years later, P buys a unit, and moves in with her three cats. D (the Condominium Association) demands that she remove the cats, and fines her. P sues to have the restriction ruled unenforceable as to her.

Held, for D. A California statute says that a use restriction set out in a recorded declaration is an enforceable equitable servitude "unless unreasonable." This language means that such a restriction shall be enforced unless it is "wholly arbitrary" (or else violates a "fundamental public policy" or "imposes a burden on the use of affected land that far outweighs any benefit.") The restriction here is not "wholly arbitrary," since the restriction is "rationally related to health, sanitation and noise concerns legitimately held by residents of a high-density condominium project. …" Many owners may have relied on the pet restriction in deciding to purchase at Lakeside Village. Furthermore, since the restriction could be repealed by a majority vote of owners, its continued existence reflects the majority's desire to keep it. *Nahrstedt v. Lakeside Village Condominium Assoc., Inc.*, 878 P.2d 1275 (Cal. 1994).

a. Third Restatement agrees: The Third Restatement agrees with the California approach, saying that activity restrictions, like other "indirect restraints," will be valid unless they ***"lack a rational justification"*** (comparable to *Nahrstedt*'s "wholly irrational" standard.) See Rest. 3d, Servitudes, §3.5.

2. Distinction between recorded restriction and later-enacted regulation: Notice that the restriction in *Nahrstedt* was contained in the ***original*** recorded subdivision plan, and was thus to be treated like an equitable servitude of which P had constructive notice. Courts often distinguish between use restrictions contained in this type of recorded servitude, and restrictions that are merely enacted ***after the fact*** as part of a ***property owner association's regulations.***

a. "Reasonableness" standard: In the latter situation, most states apply a ***"reasonableness"*** rather than "wholly arbitrary" standard, so it is much easier to get the court to strike down the restriction. The Third Restatement agrees with this distinction, holding that an owners' association has the obligation to ***"act reasonably in the exercise of its***

discretionary powers including rulemaking, enforcement and design-control powers." See Rest. 3d, Servitudes, §6.13(c).

K. Summary of the effect of equity on law: The willingness of courts to grant equitable enforcement (particularly injunctions) for covenants goes a long way towards making the traditional rules for covenants ***at law*** irrelevant.

1. **Third Restatement:** In fact, the Third Restatement (Servitudes), adopted in 2000, completely ***eliminates the distinction*** between equitable servitudes and covenants at law — the same rules apply to both types of land restrictions, which the Restatement collectively calls "servitudes." See D&K (2002), p. 869.

X. MODIFICATION AND TERMINATION OF COVENANTS AND SERVITUDES

A. Modification and termination generally: Covenants and servitudes can be modified or terminated under a number of circumstances. (For simplicity, we'll refer to modification or termination of a "servitude," but we mean "covenant or servitude.") We consider only a few of those circumstances here.

1. **Agreement by all parties:** The servitude can be ***modified*** or ***terminated*** if all parties to it so ***agree***. But they must do so in a document that satisfies the ***required formalities for creation*** of the servitude in the first place (e.g., it must be in writing, and in most states must be notarized). Typically, this means that an ***oral agreement***, even by all affected parties, to terminate or modify a servitude will ***not*** suffice, because the Statute of Frauds requires that the modification or termination be in writing, just as the original servitude had to be in writing.
2. **Abandonment:** The servitude can be extinguished by ***abandonment*** by the benefitted party. But abandonment is hard to establish, and requires unequivocal evidence of an intent to abandon. Mere ***cessation of use*** is typically ***not*** enough.
3. **Changed conditions:** The servitude may be modified or terminated by court order when ***conditions have so changed*** that it is ***impossible to accomplish the purposes*** for which the servitude was created.

Example: Developer owns 10 adjacent parcels, which he sells to 10 separate buyers. In each deed, he inserts a restriction that the property be used only for single-family purposes. Lots 1-8 are condemned for use as a public multilane highway. The resulting noise and traffic make Lots 9 and 10 no longer suitable for residential use. The owner of Lot 9 wants to transform his house into a retail store. The owner of Lot 10 wants both lots to remain residential. A court would be justified in terminating the servitude, because the purposes for which it was created (maintenance of a viable residential neighborhood) can no longer be accomplished. Rest. 3d (Serv.), § 7.10, Illustr. 1.

4. **No expiration from passage of time:** But the ***mere passage of time***, without more, will ***not*** cause a covenant or servitude to be extinguished.
   a. **Statutory limits on duration:** The ***Rule Against Perpetuities*** is generally held to be ***not applicable*** to covenants restricting land use. C&L, p. 1054. Yet such covenants and restrictions clearly fetter the alienability of land. For this reason, just as a number of states have restricted the duration of possibilities of reverter and rights of entry (see *supra*, p. 46), so some of these states have placed ***limits on the duration*** of covenants running with the land and equitable restrictions.

Quiz Yourself on
EASEMENTS AND PROMISES CONCERNING LAND

63. Orin owned a large country estate, Country Oaks, which contained a trout stream. Orin's friend and neighbor Norman, owner of an adjacent parcel, fished in the stream for several years with Orin's consent. Orin decided to sell Country Oaks to Alfred, but wanted to protect Norman's fishing rights. Therefore, with Alfred's consent, Orin's deed to Alfred contained an easement granting Norman and his successors the right to fish in the stream in perpetuity, as well as the right to get to the stream by a path running through the estate. Five years later, Alfred conveyed Country Oaks to Barbara. The Alfred-to-Barbara deed did not contain any easement for fishing.

(a) If the jurisdiction follows the traditional common-law approach to relevant issues, may Norman continue to fish in the stream?

_____

(b) In a jurisdiction following a contemporary approach to the relevant issues, may Norman continue to fish in the stream?

_____

64. Angela is the owner of Auburnacre. Burt is the owner of Blueacre. The two parcels are adjacent, and have never (at least as far as property records go back, which is 200 years) been under common ownership. A lake, located on public land and open to the public, borders the eastern edge of Auburnacre; the Auburnacre-Blueacre border is on the west side of Auburnacre. For many years, the lake had been useless because it was algae-infested. However, in 1995, the state redredged and reclaimed the lake, so that it is now usable for fishing. Beginning in 1995, Angela allowed Burt to cross Angela's property to get to the lake for boating. (Because the land is out in the country where few roads exist, Burt would have to drive for 25 miles in order to get to the lake if he were not permitted to cross Auburnacre.) No written agreement between Angela and Burt regarding Burt's right to cross Angela's land ever existed.

In 2011, Burt conveyed Blueacre to Carter. Shortly thereafter, Carter attempted to cross Auburnacre to get to the lake. Angela objected, and thereafter put a roadblock across the path, in the middle of Auburnacre, that Burt had formerly used. May Carter compel Angela to remove the roadblock so that Carter can cross over to use the lake?

_____

65. For many years, Daphne owned a 10-acre parcel of waterfront land known as The Overlook. The westernmost five acres of the property (called “West Overlook”) contained a house and a driveway leading to Main Street, a public road. The easternmost five acres (called “East Overlook”) consisted of a little-used summer house located on a peninsula jutting out into the western side of Lake Moon, a two-mile wide lake; East Overlook had a dock on the lake. The only land-based way to exit East Overlook would have been to use the driveway across West Overlook to get to Main Street. However, Daphne never left East Overlook by crossing West Overlook in this manner. Instead, if she wanted to leave East Overlook she always sailed from her dock in a small

motorboat across Lake Moon; at the opposite shore of the lake she used a car she kept adjacent to Smith Avenue, a public street.

In 2001, Daphne sold East Overlook to Frederika. The deed made no mention of any easement across West Overlook. As Daphne knew, Frederika was buying East Overlook to use it as a waterfront summer house; Frederika was happy with the limitation that to enter and leave, she would have to do so by some sort of boat crossing the lake between Smith Avenue and East Overlook. But then, in 2011, Frederika suffered a stroke that made it extremely dangerous for her to travel the two miles by boat. She asked Daphne to permit her to enter and exit by use of a van that would use the driveway over West Overlook to connect East Overlook with Main Street. Daphne refused. Frederika has now sued for a judicial declaration that she has an easement to cross West Overlook by van. Should the court find for Frederika? _____

66. Astrid and Ben were adjacent landowners. Astrid's property was valuable beach front property. Ben's property adjoined Astrid's on the side away from the ocean. From 1990 to 2010, Ben and his family continually (at least once a week in nice weather) got to the beach by walking along a beaten path crossing Astrid's side yard. (They could have driven to a public beach four blocks away, but preferred walking directly to the beach area behind Astrid's house.) Astrid never gave permission to Ben to use this path in this way, but she did not voice any objection either. Then, in 2010, Astrid sold her property to Charles. Charles immediately barred the path so that Ben could no longer use it. The statute of limitations for actions to recover real property in the jurisdiction is 15 years. Does Ben have a right to continue using the path to the beach?

_____

67. From Dunes Development Co., George purchased a house just off the 16th fairway of Sandy Dunes Country Club. The Club was constructed by Dunes Development Co. The deed from Dunes stated that George would have the right to free use of the Sandy Dunes Golf Course indefinitely, but was silent on whether the golf rights received by George were transferable. Two years later, George sold the house to Henry. The George-to-Henry deed was silent about the existence of any right to use the golf course. By the time of this conveyance, the course was no longer being operated by Dunes Development Co., but rather, by Ian, who bought it from Dunes. When Henry attempted to use the golf course for

free, Ian refused. If Henry brings suit against Ian to enforce the free-golf provision of the deed, will Henry prevail? _____

68. Quince owned a limestone quarry, and a manufacturing plant in which he worked the limestone into gravestones and monuments. A parcel owned by Pierce lay between the quarry and the manufacturing plant. Therefore, Quince purchased from Pierce an easement to drive his trucks along a 10-foot-wide strip of Pierce's land, so the stone could be taken from the quarry to the manufacturing plant. Quince's business grew over the years, and in 2010, Quince shuttered the plant, and built a newer, larger plant some miles away. At the time the old plant was shuttered, Quince told Pierce by telephone, "I won't be needing the easement across your land anymore." Shortly thereafter, Quince sold the quarry, as well as the shuttered plant and the land it stood on, to Raymond. Raymond immediately started driving his trucks from the quarry to the plant. If Pierce brings suit to stop Raymond from crossing Pierce's property, will Pierce be successful? _____

69. Abbott and Bingham were adjacent landowners, and fanatic tennis players. Abbott, the richer of the two, built a clay tennis court on his property. At the time of construction, he said to Bingham, "For as long as you own your property, you are free to use the court whenever you wish, so long as I am not playing on it." Bingham immediately sent Abbott a letter, stating, "I want to thank you for your generosity in allowing me to use your tennis court whenever I want (assuming you are not using it, of course) for as long as I stay in the house. I regard this as significantly enhancing the value of my own property." For 10 years, the arrangement worked well. Then, Abbott discovered one day that Bingham was having an affair with Abbott's wife. Abbott angrily wrote to Bingham, "I am hereby revoking your right to use my tennis court. Never set foot on my property again, under pain of prosecution for trespass." Bingham now sues for a declaratory judgment that he is entitled to use Abbott's court. The state where the land is located has a 25-year statute of limitation on adverse-possession actions.

(a) What property interest, if any, did Abbott grant to Bingham at the time the court was constructed? _____

(b) Should the court hold that Bingham has the right to use Abbott's court now? _____

70. Allison and Bertrand were neighboring land owners who owned fee simples in adjacent parcels of land. The parcels were separated by a fence which lay on Allison's property. Since proper maintenance of the fence was important to Bertrand's property as well as to Allison's, both parties agreed that when the fence needed repairs and painting from time to time, Allison would cause this to be done, and Bertrand would then reimburse Allison for half the cost. The agreement also provided that if Bertrand did not pay a debt that was properly owing, Allison could get a lien on his land for the unpaid debt. The agreement was embodied in a document signed by both parties, and filed in the local real estate records indexed under both Allison's and Bertrand's names. The document did not specifically give Bertrand any right to come upon Allison's land to make the repairs if Allison declined to do so.

Two years after this agreement, Bertrand conveyed his parcel to his daughter, Claire, in fee simple. Claire never explicitly or implicitly promised to pay for repairs to the fence. Five years after this conveyance, Allison spent $1,000 to have the fence extensively repaired and repainted. (There had been intervening repairs which occurred while Bertrand still owned his parcel, and which he paid for. The $1,000 was for work done to repair wear and tear that occurred after Claire took title.) Allison now seeks to recover $500 from either Bertrand or Claire. If both refuse to pay, will Allison's suit be successful against Claire, assuming that there is no special statute in force relevant to this question, and assuming that the commonlaw approach applies? _____

71. Same basic fact pattern as prior question. Now, assume that Bertrand never made the conveyance to Claire. Assume further that Allison, five years after her deal with Bertrand, conveyed her parcel to her brother Doug. If Doug sues Bertrand for enforcement of the promise, may Doug recover? _____

72. Same basic fact pattern as prior two questions. Now, assume that the original Allison-Bertrand document also contained a promise by Allison that she would not replace the wooden fence with a structure made of any other material (because Bertrand liked the look of natural wood). (This promise was contained in the document that was filed in the land records.) Assume that as in the prior question, Allison conveyed the property to Doug, and further assume that Bertrand conveyed his property to Claire. If Doug begins to replace the wooden fence with a shiny metal

one, may Claire get an injunction against Doug? _____

73. Harry and Isadore were adjacent landowners in a residential area. Each believed that swimming pools were "tacky." They therefore agreed, in a writing signed by both and made binding on each one's "heirs and assigns," that neither would ever permit his property to have a swimming pool placed upon it. Three years later, Isadore sold his parcel to James. At the time of purchase, James did not have actual knowledge of the Harry-Isadore agreement. A check by James of the real estate records failed to disclose the Harry Isadore agreement (because it had never been filed by either party). If James had asked Isadore, Isadore would have told him about the agreement, but James never asked, and Isadore never thought to mention it. James has now begun work to prepare his site to contain a swimming pool. If Harry sues to enjoin the construction by James, should the court grant Harry an injunction? _____

74. Developer, a residential real estate developer, purchased a farm and set about creating "Happy Farms," a planned residential community. Developer prepared a subdivision map (or "plat") for Happy Farms, which showed that all 36 lots on Happy Farms were to be used for residential purposes, showed where roads and sewers were to run, and contained other details indicating that the property would be a residential community. Developer then sold parcel 1 at Happy Farms to Kathy. In the deed from Developer, Kathy agreed that her parcel would be subject to the restrictions contained in the plat, which was filed in the real estate records. Developer did not state in the deed that other parcels later sold by him would be subject to similar restrictions, though Developer orally told Kathy, "Other buyers will be subject to the same limitations, so you'll be sure that you'll have a purely residential community with high standards."

Developer then sold parcel 2 to Lewis. Due to Developer's administrative negligence, the deed to Lewis omitted the restrictions contained in Kathy's deed. However, there is evidence that Lewis knew that a general residential plan had been prepared by Developer and filed in the real estate records. Several years later, Lewis attempted to open a candy store on part of his property. (This is allowed by local zoning laws, since the area is zoned mixed-use.) If Kathy sues Lewis to enjoin him from using his property for non-residential purposes, will the court grant Kathy's request? _____

Answers

63. (a) No. At common law, it was not possible for an owner of land (Orin) to convey that land to one person, and to establish by the same deed an easement in a third person. This was the rule against creating an easement in a ***"stranger to the deed."***

(b) Yes, probably. Most modern courts (and the Third Restatement of Property) have abandoned the common-law "stranger to the deed" rule, and allow an easement to be created by a deed in a person who is neither the grantor nor the grantee. This is especially likely where the easement relates to a use that existed prior to the conveyance. Since Norman fished in the stream prior to the Orin-to-Alfred conveyance, a modern court would probably uphold the easement in the deed to Alfred. Once that easement is recognized as valid, ***it burdened the land***, and therefore is still in force even though it was omitted from the Alfred-to-Barbara deed.

64. No, probably. Normally, an easement may be created only by compliance with the Statute of Frauds, which did not happen here. Therefore, the only kinds of easement that might have come into existence are (1) an easement "by implication"; (2) one "by necessity"; and (3) one "by estoppel." But an easement by implication will only come into existence if (among other requirements) the owner of a parcel sells part and retains part, or sells pieces simultaneously to multiple grantees (the requirement of ***"severance"***). Here, neither Angela nor her predecessors ever owned what is today Blueacre and thus never sold any part of it; consequently, the requirement of "severance" is not satisfied.

An easement by necessity doesn't exist, because the two parcels, Auburnacre and Blueacre, were never under common ownership, as required for such an easement. And an easement by estoppel doesn't exist because neither Burt nor Carter ever made any substantial or foreseeable reliance on the supposed easement (e.g., they didn't spend money building a boathouse). So Carter has no easement at all.

65. No. Frederika's best hope of establishing an easement is to show that the requirements for an ***"easement of necessity"*** are satisfied. For such an

easement, three conditions must be met: (1) The necessity must be "strict" rather than "reasonable"; (2) the parcels must have been under common ownership just before a conveyance; and (3) the necessity must come into existence at the time of, and be ***caused by***, the conveyance that breaks up the common ownership. Here, the first two requirements are satisfied, but the third one is not: Frederika's need to cross West Overlook was not created by the conveyance of East Overlook to her, and indeed did not come into existence until her later stroke. Cf. Rest. 3d (Servitudes), §2.15 and Illustr. 8 thereto (where need arises post-conveyance because government condemns the access road used by the would-be dominant parcel, no easement by necessity exists).

Nor can this be an "easement by estoppel," because such an easement requires substantial and foreseeable ***reliance*** by the would-be easement holder as of the time the easement came into existence. Since the facts tell us that Frederika was, as of the moment she took, happy to enter and exit by boat, she has not relied on the right to cross West Overlook.

66. Yes. Ben has obtained an easement by ***prescription***. When one property owner uses another's property for more than the statute of limitations period applicable to adverse-possession actions, and does so in an adverse manner (see answer to prior question), an easement by prescription results. The requirement of "adverse" use is satisfied here by the fact that Ben never asked Astrid's permission, and Astrid never expressly consented, merely tolerated the use. The use must be reasonably continuous, which was the case here. The use need not be exclusive, since it is only an easement by prescription, not formal title, that is being granted by adverse possession. This easement by prescription, once it came into existence in 2005, became a burden on Astrid's land, so that Charles is bound even though he was not the owner while the easement was ripening.

67. Yes. The original deed from Dunes to George created an easement appurtenant, since the free-golf rights were clearly intended to benefit a purchaser of the house in his capacity as owner of a house adjacent to the course. Both the benefit and burden of an easement appurtenant pass with transfer of the property. (It doesn't matter that the deed to the dominant parcel doesn't mention the easement — when a dominant parcel is conveyed, an easement appurtenant automatically passes unless the

parties manifest a different intention.) Thus the benefit passed when George sold the dominant parcel to Henry, and the burden passed when Dunes Development sold the servient parcel to Ian. (This rule that both benefit and burden pass with the land is always subject to a contrary agreement; thus if the original deed from Dunes to George had said that George's rights were not transferable to a subsequent purchaser of a house, Henry would be out of luck. But here, no such provision was present in the deed.)

68. No. An easement is like any other estate in land, in the sense that any extinguishment of it must normally satisfy the Statute of Frauds. Therefore, Quince's oral statement, taken by itself, did not extinguish the easement, and that easement passed to Raymond when the dominant tenement (the quarry and manufacturing plant) were sold to Raymond.

69. (a) A license. A license is a right to use the licensor's land that is revocable at the will of the licensor. A license is not required to satisfy the Statute of Frauds, and thus may be created orally. This is what happened here: Abbott did not sign any writing, and Bingham's confirmatory letter did not satisfy the Statute of Frauds as is normally required for an easement (since it was not signed by Abbott, the only person who could create the easement); nonetheless, a license was created.

(b) No. The feature that distinguishes a license from an easement is that the license is ***revocable at the will of the licensor***. Therefore, Abbott had the right at any time to revoke the license, regardless of his motive.

70. No. Since Claire never promised to pay for repairs, the only way Bertrand's promise could be binding on Claire is if that promise was a "covenant running with the land." In particular, Claire will only be bound if the burden of the covenant runs with the land. At common law, there are several requirements in order for the burden to run. One is that the burden "touch and concern" the land. Here, this requirement is satisfied, since non-payment would result in a lien which would touch and concern the land. But a second requirement in most states is that there must be ***"horizontal privity"*** between promisor and promisee. In particular, it remains the general rule in states following the common-law approach that the ***burden of the covenant may not run with the land where the***

original parties to the covenant were "strangers to title," i.e., had no property relationship between them at the time of the promise. Here, this rule is not satisfied: Allison and Bertrand were strangers to title, and thus could not create a covenant the burden of which would run with the land (unless Allison gave Bertrand an easement to come onto Allison's land to make repairs if she did not do so herself; the facts say that this did not happen).

71. **No, probably.** The vast majority of jurisdictions apply the same horizontal privity requirement for the running of a benefit as they do for the running of a burden, whatever that rule is in the particular jurisdiction. Since the burden of the promise here would not run (see the answer to the prior question) nearly all states would refuse to allow the benefit to run either, so that Doug would not be permitted to recover.
72. **Yes.** Since Allison's promise not to change fences is a negative promise, and the relief sought by Claire is an injunction, the question is whether we have a valid ***"equitable servitude"*** (not a "covenant at law," as we had in the two prior questions). An equitable servitude is a promise (usually negative in nature) relating to land, that will be enforced by courts against an assignee of the promisor.

The promise here satisfies the requirements for equitable servitudes, which are less stringent than for covenants at law. Most states still say that the promise must "touch and concern" both the promisor's land and the promisee's land; that requirement is satisfied here, since Allison (the promisor) has bound herself with respect to a structure on her property, and the appearance of Bertrand's property is directly affected by the promise. Horizontal privity (privity between Allison and Bertrand, the original promisor and promisee) is ***not*** required for an equitable servitude; therefore, the fact that Allison and Bertrand had no preexisting property relationship and were thus "strangers to title" does not prevent Allison's promise from being an enforceable equitable servitude, even though it prevented Bertrand's counter-promise to pay for repairs from being enforceable at law as to Bertrand's successor (see Question 69). Nor is there any vertical privity requirement for equitable servitudes, so Claire could enforce the servitude against Doug even if she only held, say, a lease on the property owned by Bertrand. Courts will not enforce an equitable servitude against an assignee of the promisor unless the assignee was on

actual or constructive notice of the servitude at the time he took possession. But the fact that the Allison-Bertrand agreement was filed in the land records put Doug on such constructive notice.

73. No. Harry is trying to enforce an equitable servitude against Isadore's property. But equity will not enforce an agreement against a subsequent purchaser unless the purchaser had ***notice*** of the restriction at the time he took. This notice can be either actual or "constructive." But the facts make it clear that James did not have actual notice at the time he purchased, and the absence of any valid recordation of the agreement means that James did not have constructive notice either. Therefore, the restriction is not binding against him, and he can build the pool.

74. Yes, probably. Most courts will apply the doctrine of ***"implied reciprocal servitude"*** in this circumstance. This theory holds that if the earlier of two purchasers (here, Kathy) acquires her land in expectation that she will be entitled to the benefit of subsequently created equitable servitudes, there is immediately created an "implied reciprocal servitude" against the developer's remaining land. For this reciprocality doctrine to apply, a general development plan must be in existence at the time of the first sale, a requirement satisfied here. Courts frequently apply the doctrine even where the restrictions are not inserted in the later deed (here, the one to Lewis).

Exam Tips on EASEMENTS AND PROMISES CONCERNING LAND

Easements and covenants regarding land are tested more frequently than you might think. Probably that's because it's easy to draft complex questions that have an objectively-correct answer. So you have to study the technical rules in detail and master them — you can't safely rely on your ability to "argue the pros and cons" without technical knowledge.

<u>Easements, generally</u>

- **Type of easement:** Identify the ***type*** of easement and how it was

created. Issues that arise:

- **Easement by implication:** When an easement is not expressly created, you may argue that an easement has been created by ***implication***. For an easement by implication, you must find that ***all*** of the following conditions are met:

  [1] the servient estate was ***used*** for the purpose for which the easement is now being claimed ***before the severance*** of the dominant and servient estates;

  [2] the use was ***reasonably apparent and continuous*** at the time of the severance, and

  [3] the easement is ***reasonably necessary*** to the enjoyment of the dominant estate.

  Example: B purchases Lot 1 from O. Lot 1 is a plot with a house on it located adjacent to O's Lot 2, which also contains a house. O then sells Lot 2 to *C*. *B* razes the house on Lot 1 and discovers on her lot a sewer pipe connecting Lot 2's house with the public sewer. The pipe runs beneath the surface of the land outside where the Lot 1 house was, and then runs above the surface in an accessible crawl space located beneath the first floor of the now-razed house. *B* demands that *C* remove the pipe from *B*'s land; *C* does not want to do this because of the expense of getting a substitute sewer hookup.

  C has an easement by implication for the pipe across Lot 1. Requirement [1] is clearly satisfied, because Lot 1 was used for the pipe before ownership of Lot 1 was severed from Lot 2. As to requirement [2], *C* will probably prevail with the argument that the part of the pipe that was in the crawl space was visible through inspection to the owner of Lot 1 at all times, so that the easement was "reasonably apparent and continuous" before the severance. Requirement [3] is easily satisfied, since the owner of Lot 2 has reasonable need for a sewer hookup. Therefore, *C* will be found to have

an easement by implication if he can persuade a court that the use of the pipe was reasonably apparent to O at the time O sold Lot 1.

- **Easement for "light and air" (i.e., view):** A fact pattern will often indicate that construction on a parcel is ***blocking the view*** from an adjoining lot. Remember that an easement for an unobstructed view — sometimes called an easement of ***"light and air"***— generally ***cannot be created by implication.*** So unless such an easement is created by express grant, you should say that no easement exists.

- **Easement by necessity:** The requirements for an ***easement by necessity*** are different from those for an easement by implication. For the easement-by-necessity, three requirements must be met:

  [1] The servient and dominant parcels must have been under ***common ownership*** at one time (this requirement is the same as for easement-by-implication);

  [2] The use must be ***"strictly necessary"*** (rather than just "reasonably necessary," the standard for easement-by-implication); and

  [3] The necessity must ***come into existence at the time of,*** and be ***caused by***, the ***conveyance*** that breaks up the common ownership.

  But there is ***no requirement*** that the easement have been in ***actual use*** prior to severance.

  Here are some examples that would probably qualify as easements by necessity (always assuming that Lot 1 and Lot 2 were under common ownership before the severance that created the need for the easement):

  - Lot 2 is inaccessible to the public road except via a right-of-way over Lot 1. (The easement-by-

necessity will exist even if the road, and the need for the right-of-way, didn't come into existence until the moment the two lots were severed.)

- ❑ Lot 2 has a sewer line that passes through Lot 1 on its way to the public sewer, and relocating the line so it doesn't pass beneath Lot 1 would be prohibitively expensive. (In other words, on the facts of the above sewer example on p. 242, *C* would probably win on easement-by-necessity even if for some reason he lost on easement-by-implication).

- **Need arises later:** Be on the lookout for a fact pattern where the need arises some time ***after the severance.*** Requirement [3] above (that the severance must cause the need for the easement) means that if the would-be dominant parcel has some ***alternative means of access*** at the time of the severance, and that alternative means ***disappears at some later date***, the dominant holder does not get an easement by necessity.
  Example: O owns Lot 1and Lot 2, adjacent to each other. At the moment *O* sells Lot 2 to *A*, anyone on Lot 2 can get to a public road by crossing *X*'s land to the east of Lot 2, which *X* has always allowed. Two years after *A* buys Lot 2, *X* revokes *A*'s permission to cross his land. Now, the only way to exit Lot 2 to get to a road is through Lot 1. *A* does not have an easement by necessity to cross Lot 1, because *O*'s act of severing ownership of Lot 1 and Lot 2 didn't cause the necessity to arise.

- **Easement by prescription:** Remember that there can be an ***easement by prescription —*** that is, an easement can come into existence by operation of the ***adverse-possession*** statute.

  - **Use must be adverse:** Be sure to identify in your answer all the requirements for this kind of easement: that it be (1) ***adverse*** to the owner of the servient estate;

(2) ***"open and notorious"***; and (3) ***"continuous and uninterrupted"*** for the full statutory period.
Pay closest attention to the requirement that the use be ***adverse*** to the rights of the owner of the servient parcel. That is, look at whether the servient owner has ***granted permission*** to the dominant owner to use the piece of the servient's land that is in dispute — if permission has been granted, then the use is not adverse.

- **Express easement:** An ***express*** easement is one created by the express agreement of the parties. Most important: an express easement must ***satisfy the Statute of Frauds*** (i.e., be in writing), and must be ***recorded*** in the same way as any other interest in land. If a right to use land is oral, it therefore cannot be an express easement (and will usually be just a revocable "license" — see below).

- **Easement by estoppel:** If one landowner knows that the other is substantially relying on oral permission to use the first one's land, consider the possibility that there is an easement by estoppel, which doesn't have to satisfy the Statute of Frauds.

  Example: A, a farmer, wants to pipe irrigation water from a nearby river across *B*'s land to *A*'s own land. *B* gives oral permission, knowing that *A* will spend $30,000 on an irrigation pumping system on *A*'s land and on the pipes. *A* does this. The resulting pipes that run across *B*'s land are visible to the naked eye. Two years later, *B* sells to *C*. *C* revokes permission. A court will likely hold that due to *A*'s foreseeable and substantial reliance, *B* created an easement by estoppel. This estoppel is binding on *C*, because he saw or could easily have seen the pipes on *B*'s land before he bought.

<u>Scope and use of easement</u>

- **Scope, generally:** Once you've concluded that an easement exists, look for a change in the ***use*** of the easement from the time it was created. If the new use arises from the normal, ***foreseeable***, development of the dominant estate without imposing an ***unreasonable burden*** on the servient estate, it is permissible. Be especially skeptical of expansions of the scope of express easements (as opposed to easements by implication or prescription).

- **Interference by servient owner:** Also look for ***interference by the owner of the servient estate***— the servient owner does not have the right to ***unreasonably interfere*** with the dominant owner's use of the easement.

    Example: X holds an easement for a four-foot-wide strip of land on *Z*'s property for an underground sewer line. *Z* later connects his own sewer line to *X*'s line. This causes *X*'s sewer line to overload and to occasionally back up waste onto *X*'s property. *Z*'s hookup would be considered an ***unreasonable interference*** with the servient estate.

<u>Transfer of easement</u>

- **Transfer of appurtenant easements:** An appurtenant easement is ordinarily ***automatically transferred*** along with a conveyance of the dominant estate.

- **Transfer of easement in gross:** Commercial easements ***in gross*** are ***freely alienable*** as long as alienation does not increase the burden on the servient estate.

    Example: O, the owner of Blackacre, gives an easement in gross to Telephone Co. for the erection of poles and wires on Blackacre, so Telephone Co. can provide Blackacre and other nearby owners with telephone service. Cable Co., a cable TV company, then contracts with Telephone Co. to be able to transmit cable television signals through the wires.

The wear and tear on the wires is not increased as a result, and the burden on the servient estate is not increased. Therefore, the partial transfer of the easement by Telephone Co. to Cable Co. is valid.

- **Recording:** If alienable easements are ***recorded***, subsequent grantees of the servient estate take the servient estate subject to the easement.

  Example: Same facts as prior example. If Telephone Co. records the easement over Blackacre, and *A* then buys Blackacre from O, *A* will be bound by the easement.

Termination of easement

- **Abandonment and non-use of express easement:** Fact patterns will often indicate that the easement is ***no longer being used.*** This is usually a trick: it's true that an easement can be extinguished by abandonment, but abandonment will be found only if the easement-holder has a ***clear intent to abandon***, as shown by her ***actions*** (not just her words). Most importantly, the fact that the easement is ***no longer needed won't*** by itself show abandonment, at least where the easement is express (rather than by necessity or implication, both of which require that the easement continue to be necessary).

  Example: X owns six acres of land, which he divides into three lots. He sells two of them and retains ownership of the middle lot, Lot 2. In his deed to *A*, the new owner of Lot 1, *X* reserves for himself an easement over a dirt roadway located on that lot which is necessary for ingress and egress to the main road. After five years, a new road is constructed, making *X*'s use of the dirt roadway unnecessary, although *X* continues to maintain it. If *A* brings an action to enjoin *X* from using the dirt roadway, *A* will fail because *X* did not show an intent to abandon the easement, and the fact that the easement is no longer necessary will

not extinguish it (given that the easement is an express one).

- **Merger:** Remember that an easement can be destroyed by ***"merger."*** Read carefully to determine whether at any time after creation of the easement the dominant and servient estates come to be ***owned by the same person —*** if so, the easement is ***destroyed and must be re-created*** in order to be enforceable.

  Example: X owns six acres of land, which he divides into three lots. He sells two of them and retains ownership of the middle lot, Lot 2. In his deed to *Y*, the new owner of Lot 3, *X* reserves for himself an easement for access to a lake. Two years later, *Y* sells Lot 3 back to *X*. One month later, *X* sells Lot 3 to *A* by a deed which does not mention the easement. *X* then sells his Lot 2 to *B* by a deed granting a right-of-way over Lot 3 for access to the lake. However, *A* refuses to allow *B* access over the right-of-way when *B* attempts to go to the lake.

  If *B* tries to enforce the easement against *A*, *B* will lose. The easement was destroyed when the dominant and servient estates came under common ownership, i.e., when Lot 3 was sold back to *X*. It was not automatically revived later by *X*'s sale of Lot 3 to *A*, because the *X*-to-*A* deed did not mention an easement. And *X*'s sale of Lot 2 to *B* with a purported reservation of the easement did not re-create the easement, because at that point *X* had no interest in Lot 3, and thus no power to create an easement over it.

Profits

- **Profits generally:** Occasionally, a landowner will give another person a right to go onto the owner's land and remove the soil or a product of it, such as sand, gravel and stone or minerals. When this happens, call the right a ***"profit,"*** but treat it ***as if it were an easement*** (since in the U.S. the rules for profits are the same as for easements).

- **Right to do what's necessary to exploit:** The holder of the easement has the right to ***use and modify*** the property in any way reasonably required to exploit the right.

  Example: O gives *A* the right to mine ore from Blackacre, an undeveloped parcel. The property has no roads over it. The only commercially-feasible way for *A* to mine the ore is for *A* to build a dirt road to the mine head. *A*'s profit will be interpreted to permit *A* to build this road at *A*'s expense.

Licenses

- **License generally:** A ***"license"*** is merely a personal privilege to enter upon another's land which is ***revocable*** and is not an interest in land. If you see a permission that's given ***orally***, assume that it's a license, and that it's therefore revocable at the licensor's will.

  Example: O owns a lakefront property with a dock. O orally says to *A* (owner of a land-locked parcel 2 miles away), "Whenever you want, you may launch your boat from my dock." 6 months later, O changes his mind, and refuses to allow *A* access.

  O's grant cannot be an easement, because it's not in writing. Therefore, it's a license. Since it's a license, it's revocable at O's discretion at any time.

Covenants and Equitable Servitudes

The most tested area in this section is the ***equitable servitude.*** But first, some tips on ***covenants***.

- **Covenants generally:** If one party is trying to get money damages for breach of a promise about land use, and the defendant is a successor to the one who made the promise, discuss whether the promise is a "covenant at law" that runs with the land.

- **Intent to run:** Check to make sure that the parties intended that the benefit or burden (whichever is in issue on your facts) run with the land.

  - **"Assigns" as clue:** Look for the word ***"assigns"***— if present, that will virtually guarantee an intent to have the benefit (or burden) run. (*Example:* "The parties hereto covenant for themselves, their heirs, successors, and assigns …" The reference to "assigns" of both parties means that the benefit and burden will both run.)

- **Privity:** In your answer, note whether there is both horizontal and vertical privity. In general, at common law ***both must exist*** if the burden and benefit are to run.

  - **Horizontal privity:** The most important and frequently-tested type of privity is ***horizontal***. Assume as a general rule that there ***must be horizontal privity for either the benefit or burden to run.*** In other words, make sure that at the time of the covenant, between the promisor and promisee there's either a ***landlord/tenant*** relationship or a ***conveyance*** from one to the other. Two ***"strangers to title"*** don't have horizontal privity at common law, and they therefore can't create a covenant whose burden or whose benefit will run.
    Example: A owns Lot 1 and *B* owns Lot 2. There is a strip of land 10 feet by 100 feet which lies half on Lot 1 and half on Lot 2. *A* and *B* both want to use the strip of land as a driveway. They exchange covenants, under which each agrees to keep the driveway unbuilt-upon, and to pay half the costs of keeping it paved and cleared of snow. *A* then sells Lot 1 to *C*, and *B* sells Lot 2 to *D*. At common law, neither *C* nor *D* can sue the other for damages for breach of the covenant. That's so because at the time of the covenant, *A* and *B* did not have horizontal privity — they were "strangers to title" — so neither the benefit nor burden of the covenant could run

with the land after a sale, under the common-law approach. (But you might note in your answer that under the modern / Third Restatement approach, horizontal privity isn't needed, so *C* and *D could* sue each other.)

- **Touches and concerns land:** Remember that the benefit will run only if that benefit ***"touches and concerns"*** the promisee's land; similarly, the burden will run only if it touches and concerns the promisor's land. (But the benefit can run even if the burden is "in gross," i.e., doesn't touch the promisor's land.)

  - **Homeowner's association fees:** Watch for ***homeowner's association fees*** to ***maintain common areas.*** This is a commonly-tested type of real covenant. Even though the obligation is to pay money, it *is* considered to touch and concern the promisor's land. *Example:* Developer, who has developed condos that abut a golf course, puts in the deed to each unit that the owner will pay annually to an Association of home owners a pro rata share of the fees needed to maintain the course. *A* buys Unit 1, then sells to *B*, whose deed is silent about the association-fee promise. The fee promise will be deemed to touch and concern Unit 1. Therefore, the Association will be permitted to bring suit against *B* to recover the fees (i.e., the burden will be found to run).

- **Equitable servitude:** On exams, most covenants must be analyzed as equitable servitudes. That is, in the typical exam setting the promise is a negative one — "I won't use the land in a particular way" — and the plaintiff seeks an ***injunction***, not damages for monetary loss.

  - **General rules:** Generally, the ***burden must touch and concern the land*** in order to run with the land. Although the

benefit need not always touch and concern the land, the original parties must be fairly specific as to who may enforce the promise. And successors will be bound only if they had ***notice***.

- **Who may enforce promise:** When the words used do not clearly indicate an intent to bind subsequent transferees, look at the surrounding circumstances. If there's no clear evidence of an intent to let, say, the benefit run, it won't run.
  Example: An agreement is entered into by *A* and *B*, two neighbors, permitting *A*, a scientist conducting an experiment, to let his wolves wander freely over *B*'s property. *C*, a scientist working with *A*, buys *A*'s land and tries to enforce the promise. A court will probably hold that there was no intent that the benefit of the promise will run with the land because the promise was given specifically to *A* for the purpose of permitting ***him*** to complete ***his*** experiment.

- **Successor must have notice before taking:** Remember that only a successor in interest who had ***actual or constructive notice*** of the servitude can be ***bound***. This is a very commonly tested point.

  Example: O owns Lot 1 and Lot 2, which are adjacent. *O* sells Lot 2 to *A*, and in the deed agrees that both Lot 1 and Lot 2 will always be limited to single-family housing, and that this limit will be binding on *O*'s and *A*'s heirs and assigns (and will be included in any later deed by either). *A* records the deed to Lot 2. *O* later sells Lot 1 to *C*, but omits the promise from the deed. *C* doesn't know about the promise when he buys. Since the neighborhood is mixed-use (including some stores), there's nothing in the nature of the neighborhood to suggest to *C* that Lot 1 may be burdened by a single-family covenant. *C* starts to build a store on Lot 1, and *A* sues to enjoin him.

  A will lose — the equitable servitude on Lot 1 isn't

binding on *C*, because he took without actual notice and without any form of constructive notice (either record or inquiry). He didn't have record notice because the servitude was included only in the deed to Lot 2, and nothing about Lot 2 was in *C*'s chain of title (which involved only Lot 1). He didn't have inquiry notice because nothing about the neighborhood would have indicated that Lot 1 was likely to be burdened by a single-family-use limitation.

- **Subdivision plan:** Where a ***developer*** records a ***subdivision plan*** with a description of restrictions, this filing will generally accomplish two things: (1) it will indicate that the ***burden and benefit*** of the restrictions is intended to ***run*** with the land; and (2) it gives ***constructive notice*** to subsequent takers (so the requirement of notice is satisfied).

- **Zoning laws:** Don't be fooled when a fact pattern indicates that a deed restriction is ***more restrictive*** than the applicable ***zoning*** laws. That is permissible.

- **Implied reciprocal servitude:** Where a ***large tract*** of land has been ***subdivided*** into lots, watch for a subsequent property owner whose deed does not contain a restriction and a prior grantee who wishes to bind him to restrictions found in his own deed. As long as the court can find that (1) there was a general plan of restrictions for the subdivision; and (2) that the owner whose deed doesn't have the restriction had at least constructive notice of the general plan, the court will probably find that an ***"implied reciprocal servitude"*** came into existence, and will grant the injunction. This type of fact pattern is surprisingly-often tested.

---

1. Easements by *estoppel* (*supra*, p. 207) represent a possible exception to this rule, since these can be oral.

2. There is no horizontal privity here, because *A* and *B* were "strangers to title," i.e., had no privity of estate with each other. See *supra*, p. 222.

3. Thus you will notice that of the four items listed here, only [3] and [4] are requirements; [1] and [2] are items that would traditionally be required for running of a covenant at law, but aren't requirements for an equitable servitude.

4. We are assuming that the single-family nature of the development did not put *B* on "inquiry notice" of the possibility that Devel had agreed to a single-family restriction on Lot 2. If the court finds that the single-family nature of the neighborhood would have caused a reasonable buyer in *B*'s position to have done further research to discover whether Devel had agreed to such a restriction, then this "inquiry notice" will be a form of constructive notice, and *B* will be bound by the restriction. *Sanborn v. McLean*, on p. 232, is an illustration of such inquiry notice.

UNDERSTANDING PROPERTY LAW

FOURTH EDITION

JOHN G. SPRANKLING

Understanding Property Law

Understanding Property Law

FOURTH EDITION

John G. Sprankling
DISTINGUISHED PROFESSOR OF LAW
UNIVERSITY OF THE PACIFIC
MCGEORGE SCHOOL OF LAW

CAROLINA ACADEMIC PRESS
Durham, North Carolina

Names: Sprankling, John G., 1950-
Title: Understanding property law / John Sprankling.
Description: Fourth edition. | Durham, North Carolina : Carolina Academic Press, LLC, [2016] | Series: Understanding series | Includes bibliographical references and index.
Identifiers: LCCN 2016046802 | ISBN 9781522105572 (alk. paper)
Subjects: LCSH: Property--United States.
Classification: LCC KF561 .S67 2017 | DDC 346.7304--dc23
LC record available at https://lccn.loc.gov/2016046802

Carolina Academic Press, LLC
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Chapter 32

Easements

§32.01 The Easement in Context

A owns Whiteacre, a 100-acre tract that is "landlocked," meaning that it does not adjoin a public road.[1] Whiteacre is entirely surrounded by lands owned by B. How can A legally cross B's land to reach Whiteacre? How can A obtain the right to install electric, telephone, and cable television lines through B's land to reach Whiteacre? In each instance, A's best solution is to obtain an *easement*—a nonpossessory right to use land in the possession of another—from B.

The modern easement evolved in response to economic and social changes that began in sixteenth-century England. One major influence was the collapse of the "common field" system of agriculture. During the Middle Ages, most farm land was cultivated on a communal basis, by which individual peasants were assigned to work on rather small, separate fields; peasants could roam freely through the countryside to reach their designated fields. The adoption of more efficient farming methods during the sixteenth century led to the "enclosure" movement, which gradually created large, fenced farms in place of small, unfenced fields. Because farmers could no longer wander freely, the need arose for formalized rights of access through fenced agricultural land. A second influence was the Industrial Revolution, which created new demands for legally-protectable access rights for railroads, canals, and other improvements. These pressures created an extensive body of law governing easements, most of which was later inherited by the new United States.

Today the law recognizes five basic categories of easements, which are classified according to the manner of their creation:

(1) express easements (*see* §32.03),

(2) easements implied from prior existing use (*see* §32.04),

(3) easements by necessity (*see* §32.05),

(4) prescriptive easements (*see* §32.06), and

(5) irrevocable licenses or "easements by estoppel" (*see* §32.07).

The first type of easement—the express easement—arises only when a landowner agrees to burden his or her land. For example, B might voluntarily

decide to grant an easement to A. But under limited circumstances, the law will impose an easement without consent of the burdened landowner. The remaining four types of easements all arise as a matter of law, *without any express agreement to create an easement*. In other words, the law might give A an easement over B's land despite B's objection. Why would the law create an easement against the will of the burdened landowner? The answer to this question provides a window into the basic policies that underpin American property law.

The law of easements is well-settled and provokes little academic controversy. However, the Restatement (Third) of Property: Servitudes proposes significant changes in the rules governing the easement and its cousins, the real covenant (*see* Chapter 33) and the equitable servitude (*see* Chapter 34). Most importantly, the Restatement would simplify the law by combining all three doctrines into one: the servitude (*see* §34.08). To date, however, states have been unwilling to adopt the major changes proposed by the Restatement.

§32.02 What Is an Easement?

[A] Defining the Easement

In general, an *easement* is a nonpossessory right to use land in the possession of another.[2] This pithy definition has several elements. First, an easement does not give its holder any right to possession of land; in this sense, the easement is different from freehold and nonfreehold estates, which are possessory interests. The easement holder merely has the right to use the land for a limited purpose, most commonly for access to another parcel. Second, an easement is viewed as an interest in land, not simply a contract right; among other things, this means that the grant of an easement is subject to the Statute of Frauds. Finally, the easement burdens land that is possessed by another person, typically an owner; a person cannot hold an easement in his own land.

Consider a sample easement. Suppose C, the owner of Redacre, holds an easement that allows her to cross part of Greenacre, owned by D, in order to reach the nearest public highway. C is not entitled to possession of Greenacre; rather, she merely has a right to use a portion of the land for a narrow purpose: access between Redacre and the highway. D remains the fee simple owner of Greenacre, subject only to C's easement.

The law of easements has developed its own terminology over the centuries. The land benefited by an easement (here, Redacre) is known as the *dominant tenement*, *dominant estate*, or sometimes the *dominant land*; the easement holder (here, C) is sometimes called the *dominant owner*. Conversely, the land burdened by an easement (here, Greenacre) is variously called the *servient tenement*, the *servient estate*, or just the *servient land*; the person entitled to possession of the servient land (here, D) is often called the *servient owner*.

The distinctions between the easement and the following related doctrines are discussed elsewhere in this text:

(1) license (*see* §32.13),

(2) profit a prendre (*see* §32.14),

(3) real covenant (*see* §33.02[B]), and

(4) equitable servitude (*see* §34.02[B]).

[B] Classifying Easements

[1] Affirmative or Negative?

Every easement is classified as either affirmative or negative. An *affirmative easement* authorizes the holder to do a particular act on the servient land. The easement that allows C to cross D's land (*see* [A], *supra*) is affirmative in character; it permits the holder (C) to do something on (to travel across) the servient land (D's land Greenacre). Most easements are affirmative. For example, easements that allow the holder to use the servient land for power lines, railroads, drainage, hunting, or boating are all affirmative. In contrast, a *negative easement* entitles the dominant owner to prevent the servient owner from doing a particular act on the servient land (*see* §32.12).

[2] Appurtenant or In Gross?

Every easement is also classified as either appurtenant or in gross. An *easement appurtenant* benefits the easement holder in using the dominant land. In other words, it benefits the holder in a special sense—as the owner of the dominant land. Under the law, it is seen as attached to the dominant land, not to any particular owner of that land. For example, C's right to cross D's land Greenacre is presumably an easement appurtenant, attached to Redacre. By definition, an easement appurtenant exists only when there is both dominant land and servient land.

Conversely, the *easement in gross* is personal to the holder. It benefits the holder in a personal sense, whether or not he owns any other parcels of land. Thus, it is attached to the holder, not the land. The easement in gross involves only servient land; by definition, no dominant land exists. For example, suppose utility company U holds an easement that allows it to maintain power lines that cross O's land. This easement does not benefit U in U's use of any particular parcel of land. Instead, it benefits U regardless of whether U owns land at all.

The intention of the parties determines whether a particular easement is appurtenant or in gross.[3] A well-drafted express easement will specify the parties' intent. Absent such clear evidence, courts determine intent based on

the circumstances surrounding the creation of the easement. For example, access easements are almost always appurtenant because they facilitate the holder's use of a particular parcel of dominant land.[4] In the same manner, if an easement contributes to the use or enjoyment of a particular parcel owned by the holder, it will usually be classified as appurtenant.[5] The law generally favors the easement appurtenant over the easement in gross because this result facilitates the productive use of land. Thus, if a court cannot determine the parties' intent, it will classify the easement as appurtenant.

The distinction between the easement appurtenant and the easement in gross is sometimes critical. For example, an easement appurtenant is automatically transferred when the dominant tenement is transferred, while an easement in gross remains with the holder (*see* §32.10). Suppose O owns Bigmart, a retail store; O holds an easement that allows patrons of Bigmart to park on P's land, Parkacre. O now sells Bigmart to R pursuant to a deed that does not mention the easement; O then purchases another nearby store called Superstore. Who can park on Parkacre? If the easement is appurtenant (which it presumably is), it was automatically transferred to R along with title to Bigmart; thus, only Bigmart patrons may park there. If the easement is in gross, it remained with O, and only Superstore customers may park on the land.

§32.03 Express Easements

[A] Nature of Easement

The *express easement* is voluntarily created in a deed, will or other written instrument. The vast majority of easements are express easements.

The express easement may arise either by *grant* or by *reservation.* The distinction between the two methods turns on who is obtaining the easement: the transferor or a transferee. As its name suggests, the easement by grant is typically created when a grantor conveys or "grants" an easement to another person. Suppose A owns Whiteacre and her neighbor B owns Blackacre. If A conveys an easement to B that allows B to install and maintain a water pipe across Whiteacre, this easement arises by grant.

The easement by reservation arises in a special situation: when a grantor conveys land to another, but retains or "reserves" an easement in that land. Suppose C owns both Greenacre and Blueacre; C conveys Greenacre to D, but reserves an easement for access across Greenacre to reach Blueacre. C's easement arises by reservation.[6]

[B] Creation of Easement

[1] By Grant

Creation of an express easement by grant is simple. The deed conveying the easement must comply with the same Statute of Frauds requirements applicable to all deeds (*see* §23.04[A]).[7]

Briefly, it must:

(1) be in writing,

(2) identify the grantor and grantee,

(3) contain words manifesting an intention to create an easement,

(4) describe the affected land,[8] and

(5) be signed by the grantor.

The usual exceptions to the Statute of Frauds—notably estoppel and part performance—apply here as well.

[2] By Reservation

The formal requirements for creating an express easement by reservation are identical to those governing the express easement by grant. The only controversial issue concerning the express easement by reservation is whether it can be created in a third person.

At common law, an easement could only be reserved in favor of the grantor. Any attempt to reserve an easement in favor of a third person was invalid.[9] Influenced by the California Supreme Court's landmark decision in *Willard v. First Church of Christ, Scientist,*[10] many courts have abandoned the traditional rule. The *Willard* court justified its departure from centuries of precedent mainly by demonstrating that the original reason for the rule no longer existed. It reasoned that the rule arose in England during a transitional era when freehold estates could be transferred either by the historic ceremony of livery of seisin or by the newly-authorized deed. Common law courts refused to allow a reservation in favor of a third person in order to discourage use of the deed, and thus protect livery of seisin. Yet livery of seisin became obsolete centuries ago; and with its demise, the rationale for the rule ended. Today the deed is the standard method to transfer interests in real property, and there is no justification for ignoring the grantor's clear intent to create an easement.

[C] Policy Rationale

Why should the law recognize an express easement? Two major jurisprudential strands underpin this easement. At one level, enforcement of an express easement respects the personal liberty of landowners to act as they wish. More fundamentally, the law presumes that honoring such easements will facilitate the efficient use of land. If adjacent owners A and B agree to burden A's land in order to benefit B's land, their agreement presumably reflects a rational economic decision about how to maximize the value of their respective parcels. Further, B's knowledge that courts will enforce the easement in the future encourages her to invest in developing the long-term productivity of her land.

§32.04 Easements Implied from Prior Existing Use

[A] Nature of Easement

A purchases from B a parcel of industrial land that receives its electric power through lines that cross B's retained adjacent land. The B-A deed, which is duly delivered, makes no reference to an easement. Can B now remove the power lines from his property?

The common law answer to this dilemma is the *easement implied from a prior existing use*, sometimes loosely called an *implied easement* or *easement by implication*. Even though A and B never expressly agreed to create an easement, the court may infer such intent from the presence of an existing use (the power lines crossing B's retained land) and impose an easement by operation of law. The Statute of Frauds is inapplicable to this type of easement. Of course, if the parties affirmatively express their intent not to create an easement, this easement cannot arise.

The easement may be created either by grant or by reservation. Some states impose more rigorous requirements for the implied easement created by reservation. They reason that a reservation of an easement is inconsistent with the words of grant in the deed executed by the grantor. Most commonly, such states demand a heightened showing of necessity for an easement by reservation.

[B] Creation of Easement

[1] Required Elements

Three elements are required for an easement implied from a prior existing use:

(1) *severance of title* to land held in common ownership,

(2) *an existing, apparent, and continuous use* when severance occurs, and

(3) *reasonable necessity* for the use at time of severance.[11]

In the B-A hypothetical (*see* [A], *supra*), all three elements are satisfied. B

conveyed part of his land to A, thus severing title. At the time of conveyance, B's retained land was already burdened with visible power lines that were used to benefit the portion he transferred to A. Finally, the easement for power lines is reasonably necessary for the use of A's industrial land.

[2] Severance of Title

The first element is severance of title. A tract of land held in common ownership must be divided into two or more parcels;[12] at least one parcel must be transferred to a new owner and at least one must be retained by the original owner.[13] Consider a sample hypothetical. Suppose S owns Greenacre, a 100-acre tract of unimproved land that adjoins a public highway on its southern border. For years before the sale, S regularly reached the north half of Greenacre by using a gravel road that runs from the highway across the south half of the land. On January 1, S conveys the northern half of Greenacre to B. The severance of title requirement is met on these facts because S divided Greenacre into two parcels, selling one to B and retaining the other.

[3] Existing, Apparent, and Continuous Use

The second element is an apparent and continuous use of part of the tract for the benefit of another part, which already exists when title is severed. In other words, while the common owner still owns both parcels, he or she must use one parcel in a manner that benefits the other parcel. This pre-existing use must be so “apparent” and “continuous” that the parties presumably intended it to continue.

This second requirement is also satisfied in the S-B hypothetical (*see* [2], *supra*). For years before the sale, S used the gravel road across part of his land (south Greenacre) to benefit another part (north Greenacre); the road is readily visible to any observer; and S's use has been continuous over the years. Therefore, on January 1, when title is severed, an existing, apparent, continuous use exists.[14]

S's use before severance of title does not create an easement as such; one cannot obtain an easement in one's own land. For the sake of having a convenient label, however, this type of use existing before severance of title is often described as a *quasi-easement*. Under this terminology, before

severance of title, north Greenacre is termed the *quasi-dominant tenement* and south Greenacre is called the *quasi-servient tenement*.

Case law has substantially diluted the traditional requirement that the use be "apparent." The term was once limited to readily visible uses, such as roads, surface pipelines, and the like. But most courts have redefined the term to include uses that are discoverable through reasonable inspection, even if not readily visible. Predictably, this standard often creates difficult factual issues.

The main impetus leading to this transformation was the problem of the underground sewer pipe.[15] Suppose G's home is serviced by a sewer pipe that crosses underneath an adjacent unimproved lot also owned by G. G sells the lot to H who has no actual or record notice of the pipe; the G-H deed does not expressly reserve an easement. Is the underground pipe "apparent" such that G can claim an implied easement from prior existing use? Many courts reason that although the pipe is not visible, it is connected to visible utilities at G's house, and therefore is discoverable by H.[16] Yet this argument has little connection with the main rationale for this implied easement—that it reflects the parties' mutual intent. Why should H assume that G's sewer line crosses under the lot, instead of taking some other route to the sewer main? Is it reasonable to expect a buyer like H to inquire about the location of underground sewer pipes? Rather than continuing to distort the meaning of "apparent," the Restatement (Third) of Property: Servitudes simply treats underground utilities as a special case.[17] It recognizes implied easements for such utilities regardless of whether they are discoverable, largely based on an efficiency rationale, not party intent.

In addition, most courts require that the use be continuous or permanent, as opposed to temporary, sporadic, or occasional.[18] This requirement is typically explained in terms of notice to the parties. The use must be sufficiently continuous so that the parties would reasonably expect that it will continue after severance of title.

[4] Reasonable Necessity

Most states only require a showing of *reasonable* necessity.[19] In other words, the easement must be convenient or beneficial to the use and enjoyment of the dominant tenement, but need not be absolutely necessary. This standard is usually met if the owner of the dominant tenement would be

forced to expend substantial money[20] or labor in order to provide a substitute for the easement.[21]

Suppose, under the S-B road hypothetical (*see* [B][2], *supra*), that B already has an express easement to reach north Greenacre via a narrow and steep road over land owned by X. It is not absolutely or "strictly" necessary that B secure an easement over S's retained land because B has legal access to north Greenacre. On the other hand, because this route is narrow and steep, it would be more convenient for B to use the wide gravel road over S's property, and accordingly reasonable necessity exists.[22]

[C] Policy Rationale

This easement is most commonly justified in terms of party intent. If an existing use is sufficiently apparent and continuous when a parcel is divided, the parties were on notice of the use and presumably expected—or should have expected—that it would continue. Under this view, the failure to grant or reserve an express easement is merely an oversight that the law rectifies by recognizing an implied easement. Using the B-A hypothetical (*see* [A], *supra*), presumably both A and B intended that the power lines would continue to benefit A's parcel and burden B's parcel. Or at least they would have so intended if they had considered the issue.

In addition, under utilitarian theory, this easement serves the policy goal of promoting the productive use of land. It reflects a bias in favor of continuing land uses that already exist, absent an affirmative objection by a party. Thus, we could also explain the doctrine as ensuring that A's parcel receives the electrical power that is critical to continuing the industrial use. Absent such an easement, A would be required to pay the significant cost of obtaining replacement power lines, at a minimum; at worst, A might be forced to cease operations altogether.

§32.05 Easements by Necessity

[A] Nature of Easement

Suppose A owns Brownacre, a 200-acre parcel of wild and unimproved land, bordered by a public road only on its east side. A conveys the west half of Brownacre to B on January 1. Assume west Brownacre is now landlocked, without any legal access to a public road. The easement implied from a prior existing use is unavailable, because no prior use existed. How can B reach his land?

The common law solution is the *easement by necessity*, which will allow B access over A's land. Like its cousin, the easement implied from a prior existing use, this easement arises by operation of law based on the circumstances of the case, without any express agreement. Similarly, the doctrine is an exception to the Statute of Frauds. But the difference between the two easements is fundamental. The easement implied from a prior existing use requires—as the name suggests—an existing use before severance of title; the easement by necessity requires a high degree of necessity when title is severed—hence the name—but no prior use.

Virtually all decisions finding an easement by necessity involve road easements to reach landlocked parcels.[23] How could such a problem arise? Perhaps the most common scenario involves an amateur attempt to divide family-owned lands that inadvertently fails to provide legal access for one or more parcels. The law has long viewed road access as absolutely necessary. But, perhaps afflicted by a nineteenth-century mindset, courts have not extended the doctrine to easements for sewer pipes, water lines, electric power lines, or other modern utilities.

Two special rules minimize the burden that an easement by necessity imposes on the servient land. The servient owner is usually permitted to select the location for the road easement, as long as the route is reasonable. Further, the easement endures only for so long as the necessity itself. Once the necessity ends (e.g., the state builds a highway through the dominant land), an easement by necessity terminates.[24]

[B] Creation of Easement

[1] Required Elements

Two elements are generally required for an easement by necessity: (1) *severance of title* to land held in common ownership; and (2) *strict necessity* for the easement at the time of severance.[25] These elements are closely related to the criteria for an easement implied from a prior existing use. However, the traditional standard for necessity is strict, not reasonable, and no pre-existing use is required.

Both elements are met in the A-B hypothetical (*see* [A], *supra*). A conveyed the west half of Brownacre to B, thus severing title. At the time of the conveyance, access across A's retained land (east Brownacre) was absolutely necessary for travel to B's land (west Brownacre). B is entitled to an easement by necessity over A's land.

[2] Severance of Title

The first element—severance of title—merely requires ownership of a tract of land, followed by the conveyance of part of the tract to a new owner, as in the A-B hypothetical above. The discussion of severance of title in connection with easements implied by prior existing use (*see* §32.04[B][2]) is equally applicable here.

[3] Necessity at Time of Severance

[a] Traditional View: Strict Necessity

Many courts still recite the traditional rule that strict necessity is required.[26] In order to establish an access easement under this approach, an owner must prove that the severance of title caused the property to be absolutely "landlocked." In other words: (a) the parcel must be entirely surrounded by privately-owned land, without touching any public road; and (b) the owner must not hold an easement or other legal right of access to cross the adjoining land to reach a public road.[27]

Under this view, if the owner has any legal means of reaching the land—regardless of how inconvenient, expensive, or impractical it may be—no strict necessity exists.[28] For example, suppose O has an easement that allows him to reach his land by hiking across P's land on a narrow and dangerous trail. O cannot prove strict necessity; he has a right of access, even if it is impractical to use. Or suppose that part of R's land adjoins a public road, but

an impassible cliff in the middle of the land prevents R from reaching the rest of his land without building an expensive road; because R has legal access to his land, strict necessity does not exist.[29] Another classic dilemma is the landlocked parcel that adjoins a lake, river, or other navigable body of water. Many early decisions held that water access precludes strict necessity, but it seems unlikely that a modern court would follow this antique approach.[30]

The strict necessity must exist when title is severed. In the A-B hypothetical (*see* [A], *supra*), A's conveyance to B both (a) severed title to Brownacre, and (b) created the necessity for an easement by landlocking B's new property, west Brownacre. Necessity is measured at the instant in time when the common ownership is severed, not later. For example, the 1950 decision of *Othen v. Rosier*[31] involved a severance of title that occurred in 1896. It was clear that plaintiff's parcel had been landlocked since at least 1900. But because plaintiff could not meet his burden of producing evidence about the access situation in 1896—presumably because the potential witnesses had died—the court refused to find an easement by necessity.

The easement by necessity doctrine does not apply to a parcel that becomes landlocked only after the severance of title.[32] Suppose that O's land Blueacre adjoins public roads on its north and south borders. O conveys north Blueacre to B. Strict necessity does not exist at this point, because B can access his land by the public road along his north boundary. One year later, after a bridge washes out, the county closes and abandons the public road along north Blueacre. Strict necessity now arises, but too late. B cannot obtain an easement by necessity.

[b] Modern View: Reasonable Necessity

The modern approach—endorsed by the Restatement (Third) of Property: Servitudes[33]—only requires *reasonable* necessity for the easement.[34] The easement must be convenient or beneficial to the normal use and enjoyment of the dominant land. For example, in the O-P hypothetical (*see* [a], *supra*), O's existing easement does not allow him to make normal use of his land because it only allows access by foot, not by automobile; under the reasonable necessity standard, O is entitled to an easement by necessity for automobile access. Similarly, because R (*see* [a], *supra*) cannot utilize all of his land unless he builds an extremely expensive road, R has reasonable

necessity for an easement to reach the rest of his property.[35]

The Restatement suggests that this standard might support recognition of easements by necessity for non-road purposes, such as easements for utility lines.[36] Electricity and telephone services are usually provided through power lines or cables. Depending on the circumstances, an owner whose land lacks access to such utilities might well be deprived of the beneficial enjoyment of the property. Once seen as luxuries, electricity and telephone service are now viewed as reasonably necessary to the modern home. On the other hand, with the development of wireless forms of communication (e.g., the cell phone) and alternative energy sources (e.g., solar panels), the need for utility line easements may decrease in future years. Nonetheless, as technological change converts the luxury of today into the necessity of tomorrow, the scope of easements by necessity will correspondingly enlarge.

[C] Policy Rationale

The policy rationale underpinning the easement by necessity has two strands: society's utilitarian interest in encouraging productive use of land and the parties' presumed intent. The relative importance of each strand has fluctuated over time.

The first strand originated in seventeenth-century England, where courts feared that landlocked parcels might remain idle and wasted. Judicial recognition of easements by necessity allowed the cultivation, improvement, and occupancy of these lands. This focus on society's interest in the efficient utilization of land gained renewed importance in the twentieth century.

The second strand—the presumed intent of the parties—has roots in thirteenth-century English law. But its modern prominence arose in the nineteenth century, as American courts gradually turned away from broad concerns of social policy toward implementing the intent of private owners. Under this view, a grantor presumably intends to convey everything that is necessary for the grantee to make beneficial use of the land. Thus, if grantor R conveys an apparently landlocked parcel of land to grantee E, the law presumes that R also intended to convey an access easement to E over R's retained land.

Although both approaches have shaped the doctrine, the party-intent approach is still the dominant influence.[37] It explains the traditional rules that the necessity (a) must be strict, and (b) must be caused by the severance;

otherwise, there is no basis to infer intent. Moreover, if the parties clearly manifest an intent not to create an easement upon severance of title (e.g., by expressly disclaiming intent), an easement by necessity cannot arise. If the doctrine were based solely on the public policy in favor of productive land use, any landlocked parcel would be entitled to an easement by necessity, regardless of the surrounding circumstances.

§32.06 Prescriptive Easements

[A] Nature of Easement

A owns Pineacre, a ten-acre mountain tract that adjoins Oakacre, a similar tract owned by B. The dirt driveway leading from A's house across Pineacre to the nearest public road is rough and narrow. But the driveway on Oakacre that connects B's garage to the public road is paved and wide. For 20 years, A regularly drives her car over to Oakacre and then down B's driveway in order to reach the road; she reverses the process when going home. Can B now install a gate on the driveway that blocks A's access? On these facts, A has probably acquired a prescriptive easement to use B's driveway.

The *prescriptive easement* is closely related to the doctrine of adverse possession (*see* Chapter 27). Both share the central concept that property rights in the land of another can be acquired by conspicuous, long-term use.[38] Under the majority American view, both involve specialized applications of the statute of limitations.[39] And most of the modern law governing the prescriptive easement is borrowed from adverse possession, including the list of required elements and the principles of "tacking" and "tolling." As a practical matter, the main difference between the two doctrines today is the result. The adverse possessor receives title to the land, while the prescriptive easement holder merely receives an easement in land still owned by another.

Almost any type of affirmative easement can be acquired by prescription. The vast majority of cases involve easements for access over a road or driveway. Prescriptive easements can also be acquired for uses including power lines, drainage, encroaching buildings, bathing,[40] and airplane overflights. However, negative easements cannot be established through prescription.

[B] Creation of Easement

[1] Required Elements

The elements required for a prescriptive easement vary somewhat from state to state. The most common formula requires that the claimant's use be:

(1) open and notorious,

(2) adverse and under a claim of right, and

(3) continuous and uninterrupted for the statutory period.[41]

What about the other two standard elements for adverse possession—exclusive possession and actual entry or possession?[42] Some courts list *exclusive use* as a required element. However, as discussed below, this element has a special, narrow meaning when applied to prescriptive easements, and rarely becomes important. Only a few courts expressly require *actual use.* Certainly, the claimant must make some actual, physical use of a defined area of land;[43] but most courts seem to subsume this requirement within open and notorious use.[44]

[2] Open and Notorious Use

The first element is open and notorious use. The claimant's use must be sufficiently visible and apparent that a diligent owner who was present on the land at the time would be able to discover it. The use must not be concealed or hidden from view. But it is not necessary that the owner have actual knowledge of the use.[45]

This element is almost always satisfied in the typical prescriptive easement case, involving a claimed easement for access over a path, road, or driveway.[46] For example, in the A-B hypothetical (*see* [A], *supra*), B could easily have seen A's car going up and down the driveway. In the same manner, improvements that permanently occupy the land surface (e.g., an encroaching garage) or airspace (e.g., an overhanging power line) usually constitute open and notorious uses. On the other hand, suppose that C owns two adjacent lots, Lot 1 and Lot 2. The sewage pipe from C's house on Lot 1 crosses underneath the surface of Lot 2 before connecting to the main sewer line. There is nothing on the ground surface such as signs, manhole covers, or gratings that would give anyone notice of the subsurface pipe. D purchases Lot 2, and 10 years later—after the limitations period has run—C claims a prescriptive easement. On these facts, the pipe is not considered an open and notorious use.[47]

[3] Use That Is Adverse and under Claim of Right

The most commonly litigated issue in prescriptive easement cases is

whether the use was adverse and under a claim of right. The law on this element mirrors the familiar split in adverse possession doctrine between the majority *objective test* and the minority *subjective test* (*see* §27.03[E]). Under the objective test, the claimant need only use the land as a reasonable owner would use it, without permission from the servient owner; the claimant's subjective intent is irrelevant.[48] A handful of states follow the subjective test, which requires that the claimant have a good faith belief that he or she is entitled to use the land.

This element is particularly interesting in the typical case where there is no evidence at all about whether the owner consented to the use—where the facts simply show long-term use by the claimant without objection by the owner. Should the law's default standard assume that the use was permissive or adverse? As a general rule, proof of the other elements—open, notorious, continuous, and uninterrupted use—creates a presumption that the use was adverse and under a claim of right.[49] This shifts the burden to the owner to prove consent, which is impossible in the common scenario outlined above. For example, in the A-B hypothetical (*see* [A], *supra*), A's use is presumed to be adverse because she can easily prove the other elements for a prescriptive easement; B has no evidence to rebut this presumption. However, many states refuse to apply this presumption when the land is wild and unenclosed, assuming instead that the owner allowed the use as a neighborly accommodation.[50] And a minority of states reject the doctrine entirely, presuming that all use is permissive.[51]

[4] Exclusive Use

Some courts require that the use be *exclusive*, mechanically borrowing the element from adverse possession doctrine. Yet courts that follow this view do not demand exclusivity in the adverse possession sense of the term.[52] Confusingly, a claimant's use may still be considered “exclusive” even though he is not the exclusive user (e.g., if he shares the use with the owner and with others). In this context, exclusivity means that the claimant's use is independent of uses by others. As a practical matter, in most cases this element merely requires that the use must be separate and distinguishable from uses by the general public.

[5] Continuous and Uninterrupted Use for the Statutory Period

Finally, the use must be continuous and uninterrupted for the statutory period. The first portion of this element—continuous use—focuses on the conduct of the claimant.[53] Just as with adverse possession, continuous use does not mean constant use. The use need only be as frequent as is appropriate given the nature of the easement and the character of the land. Particularly in rural areas, occasional or seasonal use of an easement may be sufficient.[54]

In the A-B hypothetical (*see* [A], *supra*), it is not necessary for A to drive up and down B's driveway every minute of every day. A seeks an access easement in order to travel between her home and the public road a few times each day. Thus, if A crosses B's driveway two or three times daily, this periodic use is sufficiently continuous. Conversely, if A normally travels on her own driveway, and only utilizes B's driveway one or two times each year, this sporadic use is not continuous.

The second part of this element—uninterrupted use—focuses on the conduct of the owner. As a general rule, if the owner succeeds in stopping the use—even for a short period of time—continuity ends. Suppose that after A uses B's driveway daily for three years, B chops down a tree that blocks the driveway for a month; this interrupts A's continuity. If B removes the tree, and A starts using the driveway again, a new prescriptive period begins to run.

In almost all jurisdictions, the statutory period for adverse possession also applies to the prescriptive easement (*see* §27.03[G]). Thus, between 10 and 20 years of continuous use are typically required to obtain such an easement.

[C] Policy Rationale

The prescriptive easement doctrine is supported by the same blend of utilitarian policies that underpin adverse possession (*see* §27.06). It facilitates the productive use of land by protecting the industrious claimant's use. As one court observed, “land use has historically been favored over disuse, and ... therefore he who uses land is preferred in the law to he who does not, even though the latter is the rightful owner.”[55] It also serves the goals of the statute of limitations—minimizing the risk of judicial error and allowing repose.

§32.07 Irrevocable Licenses or “Easements by Estoppel”

[A] Nature of “Easement”

A owns Blackacre, a landlocked parcel that adjoins Redacre, a parcel owned by B; Redacre adjoins a public highway. An old private road travels from the highway, across Redacre, and reaches Blackacre, but A has no right to use this road. Planning to build a vacation cabin on Blackacre, A asks permission to use the road for this purpose and B replies: “Sure!” With B's consent, A widens and improves the road. B observes A use the road to haul materials, machinery, and workers to the building site. A eventually spends $25,000 to build the cabin. Can B now block A from using the road?[56]

In some jurisdictions, A now holds an *irrevocable license* to use the road. B's oral consent gave A a *license* (*see* §32.13) to use the road for access to Blackacre. Ordinarily, an owner who gives a license can revoke it at any time. However, under limited circumstances, a license may become irrevocable through estoppel. Under this approach, if the licensee expends substantial money or labor in reasonable reliance on the license and the licensor should reasonably expect such reliance, the licensor is estopped to revoke it.[57]

The irrevocable license is the functional equivalent of an easement for most purposes. Indeed, some courts refer to the irrevocable license as an “easement by estoppel.”[58]

[B] Creation of Irrevocable License

[1] Required Elements

Three elements are commonly required to create an irrevocable license:

(1) a license, typically for access purposes;

(2) the licensee's expenditure of substantial money or labor in good faith reliance; and

(3) the licensor's knowledge or reasonable expectation that reliance will occur.

[2] License

The license may be either express or implied. The A-B example (*see* [A], *supra*) involves an express license. In some states, an implied license can arise based solely on the conduct of the parties (e.g., if A never sought permission and B failed to object to A's continuing use of the road).

[3] Reliance by Licensee

The licensee's reliance often consists of improvements to the servient land that directly benefit the licensor, such as paving or repairing an access road.[59] Alternatively, the construction of a home, barn, or other improvement on the licensee's property may be sufficient, as in the A-B hypothetical above.[60] But can extensive reliance on an informal oral statement ever be truly reasonable? One might argue that A's expenditure of $25,000 in reliance on B's offhand comment is inherently unreasonable, absent unusual circumstances (e.g., a long-term friendship or family relationship). Reliance is more likely to be found reasonable if the parties clearly intended to create a permanent right of access (e.g., where an oral easement is unenforceable due to the Statute of Frauds).

[4] Knowledge of Licensor

Finally, the licensor must know, or have reason to believe, that reliance will occur. In the A-B hypothetical above, B knew about A's plan to build the cabin when he orally consented to A's use of the road; and B also observed A using the road for this purpose.

[C] Policy Rationale

The policy rationale for the irrevocable license is usually explained in terms of equity: it would be unfair to allow the licensor to revoke the license after the licensee has substantially relied to his detriment. A secondary theme is that the doctrine facilitates the productive use of land. In the A-B hypothetical above, A's investment in Blackacre will be wasted unless A can use B's road for access. A law and economics scholar would put it somewhat differently: efficiency is served by allocating the right to A, who values it more highly than B does.

But two countervailing concerns lead most courts to construe the doctrine narrowly. First, it discourages neighborly conduct. B's land is now subject to

an easement-like right in A because B was initially a “nice guy.” Knowledgeable owners might well avoid the risk of licenses becoming irrevocable by refusing to grant them at all. Second, the irrevocable license undermines the policies served by the Statute of Frauds.

§32.08 Other Types of Easements

Several other types of easements are also recognized. For example, an easement may be implied from a subdivision map or plat. If a subdivider conveys lots by reference to a subdivision map that depicts privately-owned streets, parks, or other common areas, each lot owner acquires an implied easement to use these areas.[61]

Easements may also be created through eminent domain. A governmental entity might condemn an easement for a highway or other public purpose. Similarly, statutes in many jurisdictions allow private owners of landlocked parcels to condemn private easements for access; but the constitutionality of such statutes is unclear in some states (*see* §39.05).

Finally, an easement in favor of the public may arise by implied dedication. The contours of this doctrine are remarkably vague. In general, the landowner's conduct must show a clear intent to dedicate the property to public use. For instance, if the public regularly uses a path across A's land to reach the beach for 20 years, without any objection by A, an easement by implied dedication arises in some jurisdictions.[62]

§32.09 Scope of Easements

[A] Manner, Frequency, and Intensity of Use of Easement

The scope of an easement may evolve over time as the manner, frequency, and intensity of use change. Broadly speaking, the scope of an easement turns on the intent of the original parties.[63] Courts consider a number of factors in determining this intent, including:

(1) the circumstances surrounding the creation of the easement;

(2) whether the easement is express, implied, or prescriptive; and

(3) the purpose of the easement.

Because it is usually difficult to ascertain the parties' actual intent, the law relies heavily on what might be called presumed intent. In general, the law presumes that the parties to an express or implied easement intended that the easement holder would be entitled to do anything that is reasonably necessary for the full enjoyment of the easement, absent evidence to the contrary. Accordingly, reasonable changes in the manner, frequency, or intensity of use to accommodate normal development of the dominant land are permitted, even if this somewhat increases the burden on the servient land.[64] On the other hand, the easement holder cannot change the scope of the easement so as to impose an unreasonable burden on the servient land.[65] These principles stem more from the traditional policy favoring productive land use than from true concern about the parties' intent.[66]

For example, it is well-settled that the scope of an easement usually expands to accommodate technological change, on the theory that this is necessary for its full enjoyment. The access easement originally created for horse-drawn wagons before the invention of automobiles later extends to include trucks;[67] and the easement intended to provide electric, telephone, and telegraph service before the development of television eventually enlarges to accommodate cable television lines.[68]

Disputes about the scope of an easement frequently surface when the dominant parcel is subdivided. Suppose D owns Whiteacre, an unimproved

five-acre tract that he visits on weekends. D holds an appurtenant easement by grant that allows him to use a road across E's farm Greenacre in order to reach Whiteacre. D now subdivides Whiteacre into five residential lots, planning that the lot buyers will also use the easement. This would increase the frequency of trips across Greenacre from two per week to perhaps 50 per week. Can E prevent this expanded use?

As a general rule, when the dominant land is subdivided, every lot owner in the subdivision is entitled to use any easement appurtenant to the dominant land. But this rule is tempered by the principle that the easement cannot be expanded so far that it unreasonably burdens the servient land. How far is too far? Most courts view the subdivision or other intensified use of the dominant land as acceptable development, absent evidence that it substantially interferes with the rights of the servient owner.[69] For example, if the road across Greenacre is a steep, narrow lane that E normally uses to move equipment from place to place on his farm, the increased traffic produced by the subdivision might seriously interfere with E's rights. Unless such unusual circumstances exist, the law will probably permit the expanded use.

The prescriptive easement presents a special problem. Courts are often reluctant to permit expansion of a prescriptive easement because it has little connection to party intent.[70] The presumption that the parties intended the easement to expand to meet future needs is unavailable.

[B] Use of Easement to Benefit Land Other than Dominant Land

In general, an easement holder cannot use the easement to benefit any parcel other than the dominant land; the normal remedy for violation of this rule is an injunction.[71] Yet modern decisions have begun to erode this traditional standard.

For example, in *Brown v. Voss,*[72] plaintiffs held an easement that entitled them to cross defendants' land (“Parcel A”) in order to reach their own land (“Parcel B”), which was improved with a single-family house. Plaintiffs then purchased an adjacent parcel (“Parcel C”), planning first to demolish the house on Parcel B and then to build a new house that would straddle the boundary line between Parcels B and C. These changes would not increase the burden on Parcel A. Plaintiffs sued for the removal of obstructions

defendants had placed within the easement area, and defendants counterclaimed for an injunction to limit plaintiffs' use of the easement to Parcel B. The Washington Supreme Court applied the standard rule and held that plaintiffs had no right to extend the easement to serve Parcel C. But the decision adopted an innovative remedy. On the facts of the case, the court exercised its equitable power to refuse defendants' request for an injunction; this limited the defendants' remedy to damages, here only $1.00. As a practical matter, plaintiffs won the case: they acquired the right to extend the easement to Parcel C.

In effect, the *Brown* court converted the traditional “bright line” rule into a rather mushy standard that requires case-by-case analysis. On balance, however, it may be a more efficient standard. This approach parallels developments in the law of private nuisance, where many courts have softened traditional liability rules in the interest of efficiency by restricting some successful plaintiffs to damages instead of injunctive relief (*see* §29.06[A]).

[C] Change in Location or Dimensions of Easement

It is well-settled that the location or dimensions of an easement may be changed only if the owners of the servient and dominant lands all agree.[73] However, the Restatement (Third) of Property: Servitudes would allow the servient owner to make reasonable changes in the location or dimensions of an easement if necessary for the normal use or development of the property, so long as the easement holder is not prejudiced.[74]

§32.10 Transfer of Easements

[A] Easements Appurtenant

The rules governing the transfer of an easement appurtenant are simple. By definition, an easement appurtenant is deemed attached to a particular dominant parcel. Any transfer of title to the dominant land also automatically transfers the benefit of the easement, unless there is a contrary agreement.[75] For example, suppose A owns Blueacre, which is benefited by an appurtenant access easement burdening B's property Redacre. A now conveys Blueacre to C, using a deed that fails to mention the easement. C now holds the easement because it was appurtenant to Blueacre.

In the same fashion, any transfer of title to the servient land usually transfers the burden of the easement. This rule does not apply if (a) the transferee qualifies for protection against an express easement as a bona fide purchaser (*see* §24.03), or (b) the owner of the dominant land agrees to release the easement.

[B] Easements in Gross

The law regulating the transfer of easements in gross has progressed through three distinct stages. Early American courts were concerned that permitting the assignment of such easements might unfairly increase the burden on the servient land. For example, suppose that A holds an easement in gross to hunt ducks on B's land; if A can freely assign his easement to a duck club that has 500 members, this may greatly expand the burden of the easement. For this reason and others, the rule developed that easements in gross were not transferable.

In the second stage, courts created a distinction between commercial easements (e.g., easements for utilities, railroads or other economic purposes) and noncommercial easements (e.g., easements for hunting, fishing, boating or other personal purposes).[76] Influenced by the Pennsylvania Supreme Court's landmark decision in *Miller v. Lutheran Conference & Camp Association*[77] and similar cases, the first Restatement of Property provided that commercial easements in gross were freely

transferable.[78] On the other hand, noncommercial easements in gross were usually not transferable.

Today the law is gradually moving into a third stage that discards the commercial/noncommercial distinction. An increasing number of decisions —and the Restatement (Third) of Property: Servitudes—broadly recognize that any easement in gross is freely transferable, unless circumstances show that the parties "should not reasonably have expected" this result.[79]

§32.11 Termination of Easements

[A] In General

Easements can be terminated for a number of reasons, most of which also apply to real covenants and equitable servitudes. The Restatement (Third) of Property: Servitudes would complete this process by providing a single set of methods to terminate the new unified "servitude" (*see* §34.08[C]).

Under current law, for example, the creating parties might impose an express limitation on the easement (e.g., a provision limiting its duration to 50 years);[80] or the easement holder might voluntarily agree to release his or her rights to the servient owner. Alternatively, if one owner acquires both the dominant and servient lands, the easement is extinguished under the doctrine of merger.[81] And an easement may also be terminated by eminent domain or estoppel (*see* §34.06[D][2]).[82] Finally, an express easement ends if the servient land is conveyed to a bona fide purchaser without notice of the easement; the weight of authority holds that such a conveyance does not end an implied easement by prior use or an easement by necessity, although the issue rarely arises because the buyer is usually charged with inquiry notice; and the law is quite clear that even a bona fide purchaser takes title subject to a prescriptive easement.

Three bases for termination merit special discussion: (1) abandonment; (2) misuse; and (3) prescription.

[B] Abandonment

An easement may be terminated through abandonment. What constitutes abandonment? Courts uniformly hold that mere nonuse of an easement does not meet this standard.[83] For example, suppose that E holds an access easement over S's servient land, but fails to use the easement for 25 years. Despite this extended period of nonuse, E has not abandoned the easement.

Abandonment hinges on the easement holder's intent: he must affirmatively intend to relinquish his rights. Courts generally use an objective standard to determine this intent, based on the circumstances of each case. Abandonment will be found if the holder both (a) stops using the

easement for a long period and (b) takes other actions that clearly manifest intent to relinquish the easement.[84] For example, in *Preseault v. United States*,[85] the court found abandonment of a railroad easement where the holder: (a) failed to use the easement for 26 years; and (b) removed the rails, switches, and all the other railroad equipment from the servient land, thus making future railroad use impossible.[86] Courts tend to be hostile toward the abandonment doctrine—because it may have a disastrous impact on the dominant owner—and hence it is usually difficult to terminate an easement on this basis.

[C] Misuse

Suppose easement holder E misuses his access easement over S's servient land: E regularly allows guests to park along the easement, which impedes S's own access. On these facts, S can probably secure an injunction to prevent such future misuse.[87] But what if an injunction is ineffective to prevent misuse? Some courts hold that misuse by the easement holder will extinguish the easement in cases where injunctive relief is wholly ineffective.[88] However, even in jurisdictions that accept this doctrine in theory, it is rarely used.

[D] Prescription

Just as the dominant owner may acquire an easement by prescription, the servient owner may terminate an easement by prescription. The same prescriptive easement elements (*see* §32.06[B]) generally apply to both situations, with one important difference. In order to obtain a prescriptive easement, the claimant's use need not be truly exclusive, nor need it interfere with the servient owner's use of the land; most easements—by their very nature—are nonexclusive. However, to extinguish an easement by prescription, the servient owner's conduct must substantially interfere with the holder's use of the easement, such as by blocking the holder from using the easement at all.[89] For example, suppose servient owner S builds a brick wall across E's access easement, completely preventing any use of the easement by E. If this blockage continues for the prescriptive period, it will terminate the easement.[90]

§32.12 Negative Easements

[A] In General

A *negative easement* entitles the holder to prevent the owner of the servient land from doing a particular act on that land, much like a veto power. Suppose that A's farm Greenacre adjoins B's farm Redacre; an irrigation canal crosses Redacre, bringing water to Greenacre. If A holds the right to prevent B from blocking the canal on Redacre, the law would classify this right as a negative easement. A is not personally entitled to do anything on Redacre; but he can stop B from doing something on Redacre.

[B] Traditional Approach

English courts were traditionally hostile to the negative easement for three reasons. First, they feared that it would restrict marketability and accordingly impair the productive use of land. For example, if C's farm Blueacre could be restricted by a negative easement that prohibited C and her successors from building any structures on the land, Blueacre could never be devoted to desirable commercial or industrial uses. Second, in England, negative easements could be created by prescription, without the landowner's consent; this exacerbated concern that the negative easement might stifle development. Finally, under English law, the purchaser of land took title subject to all existing easements whether or not he had notice of them. The risk of negative easements—which were often difficult to detect by inspection—tended to discourage land purchases.

Accordingly, English law recognized only four categories of negative easements. Suppose E owned Blackacre and his neighbor F owned Whiteacre. At common law, E could hold negative easements that entitled him to prevent F from taking the following actions on Whiteacre:

(1) blocking windows of Blackacre buildings,

(2) blocking air that flowed to Blackacre in a defined channel,

(3) blocking water that flowed to Blackacre in a defined channel, and

(4) removing support from Blackacre buildings.

Early American courts adopted the English limitations on the negative

easement, even though the reasons for these limitations were largely inapplicable to American conditions. The United States was blessed with an abundance of undeveloped land; negative easements could not arise by prescription; and the bona fide purchaser doctrine protected innocent buyers against unknown easements.

[C] Modern Approach

In recent decades, the negative easement has expanded beyond its historic boundaries. This expansion stems partly from judicial action. Modern courts recognize that the negative easement and other private land use restrictions may enhance the productive use of land (*see* §33.03). As a result, some courts now accept a new negative easement that arises by grant—the easement of view.[91] If G, owner of Brownacre, grants an easement of view to H, owner of Blueacre, then H may stop G from doing anything on Brownacre that obstructs the view from Blueacre.

The bulk of this expansion, however, comes from legislative action. Statutes in many jurisdictions expressly authorize the creation of new types of negative easements by grant, including conservation and solar easements. The *conservation easement* is used to restrict development of the servient land, usually to protect its natural, scenic, historic or open space values.[92] Typically, the servient owner grants a conservation easement to a government entity or private charitable organization, and then continues to utilize the land to the extent permitted by the easement. Suppose A owns Greenacre, a 400-acre tract of farm land; A conveys a conservation easement to B (a non-profit entity dedicated to the preservation of agricultural land) that forever restricts the use of Greenacre to farming. With the easement in place, A and his successors can never utilize Greenacre for residential, commercial, or industrial purposes, but may continue to farm the land.

The *solar easement* is designed to protect a solar energy system on the dominant land. It stops the servient owner from constructing improvements or growing vegetation that obstructs the natural flow of sunlight across his land.

§32.13 Licenses

A *license* is informal permission that allows the licensee to use the land of another for a narrow purpose. The license is routinely encountered in everyday life. The spectator at a football game,[93] the guest at a New Year's Eve party, and the customer at a grocery store all hold licenses.[94]

Two features distinguish the license from the easement.[95] First, the license is generally not considered to be an interest in land. It is viewed as a personal privilege, usually temporary in nature. For example, the party guest who enters a home does not acquire any right in the land; rather, the guest has only temporary permission to enter the home for the limited purpose of attending the party. Accordingly, the Statute of Frauds does not apply to the license; a license can be created orally. Second, as a general rule, the licensor may revoke a license at any time; and it is automatically revoked if the licensor dies or conveys title to another.[96] However, a license may become irrevocable due to estoppel (*see* §32.07). And a license coupled with an interest is similarly irrevocable. For example, if A purchases a truck from B, A has an irrevocable license to enter B's land and retrieve the truck.

§32.14 Profits a Prendre

The *profit a prendre* or *profit* is the right to enter the land of another and remove timber, minerals, oil, gas, gravel, game,[97] fish,[98] or other physical substances. Like the easement, it involves a right to use land in the possession of another person; but unlike the easement, it includes the right to sever and remove some substance from the land.

Profits are generally governed by the same rules that apply to easements.[99] Indeed, the first Restatement of Property proposed that profits be treated as a type of easement and that the term "profit" be abandoned.[100] Yet the term lingered in common usage. The Restatement (Third) of Property: Servitudes continues to treat the profit as a specialized form of easement, but retains the term for convenience.[101]

---

1. *See generally* Susan F. French, *Highlights of the New Restatement (Third) of Property: Servitudes*, 35 Real Prop., Prob. & Tr. J. 225 (2000); Michael V. Hernandez, *Restating Implied, Prescriptive, and Statutory Easements*, 40 Real Prop. Prob. & Tr. J. 75 (2005); Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 Va. L. Rev. 739 (2002).

2. *See, e.g.*, Millbrook Hunt, Inc. v. Smith, 670 N.Y.S.2d 907 (App. Div. 1998) (right to hunt foxes was easement, not license).

3. *See* Leabo v. Leninski, 438 A.2d 1153 (Conn. 1981).

4. *See, e.g.*, Alft v. Clayton, 1995 Tenn. App. LEXIS 458 (Tenn. Ct. App. 1995); Cushman Virginia Corp. v. Barnes, 129 S.E.2d 633 (Va. 1963); Green v. Lupo, 647 P.2d 51 (Wash. Ct. App. 1982).

5. *See, e.g.*, Martin v. Music, 254 S.W.2d 701 (Ky. Ct. App. 1953); Corbett v. Ruben, 290 S.E.2d 847 (Va. 1982).

6. The easement by *reservation* arises when a deed creates a wholly new easement that is retained by the transferor upon conveyance of land to another. But suppose that the land is already burdened by an easement before the conveyance; if the transferor retains this pre-existing easement, it is called an *exception*. However, in practice many courts use these terms interchangeably without acknowledging the distinction.

7. *See, e.g.*, Berg v. Ting, 886 P.2d 564 (Wash. 1995).

8. But some courts do not require a description of the easement's exact location as long as it can be located with extrinsic evidence. *See, e.g.*, Maier v. Giske, 223 P.3d 1265 (Wash. Ct. App. 2010).

9. *See, e.g.*, Tripp v. Huff, 606 A.2d 792 (Me. 1992).

10. 498 P.2d 987 (Cal. 1972). *But see* Estate of Thomson v. Wade, 509 N.E.2d 309 (N.Y. 1987) (applying common law rule).

11. The first Restatement of Property attempted to merge the two implied easements recognized at common law (by prior use and by necessity) into a single category, whose creation was regulated by eight criteria. Restatement of Property §476 (1944). Most courts ignored this novel approach. The Restatement (Third) of Property: Servitudes abandons this experiment and essentially returns to the common law distinctions. *See* Restatement (Third) of Property: Servitudes §§2.12, 2.15.

12. Some courts have taken a functional approach to the common ownership requirement, finding that it is satisfied when title to two adjacent parcels is held by different entities if both entities are owned by the same people. *See, e.g.*, Houston Bellaire, Ltd. v. TCP LB Portfolio I, L.P., 981 S.W.2d 916 (Tex. App. 1998).

13. *See, e.g.*, Cordwell v. Smith, 665 P.2d 1081 (Idaho Ct. App. 1983); *see also* Schmidt v. Eger, 289 N.W.2d 851 (Mich. Ct. App. 1980) (holding that conveyance of leasehold estate was severance of title); Hellberg v. Coffin Sheep Co., 404 P.2d 770 (Wash. 1965) (same).

14. *Cf.* Williams Island Country Club, Inc. v. San Simeon at the California Club, Ltd., 454 So. 2d 23 (Fla. Dist. Ct. App. 1984) (golf cart path); Granite Prop. Ltd. Partnership v. Manns, 512 N.E.2d 1230 (Ill. 1987) (driveway).

15. For a helpful examination of the issue, see Joel Eichengrun, *The Problem of Hidden Easements and the Subsequent Purchaser Without Notice*, 40 Okla. L. Rev. 3 (1987).

16. *See, e.g.*, Van Sandt v. Royster, 83 P.2d 698 (Kan. 1938); Romanchuk v. Plotkin, 9 N.W.2d 421 (Minn. 1943); Otero v. Pacheco, 612 P.2d 1335 (N.M. Ct. App. 1980).

17. Restatement (Third) of Property: Servitudes §2.12 cmt. g ("Implying the servitude will normally impose a relatively slight economic burden, while the costs of relocating the utility lines will often be high.").

18. *See, e.g.*, Cordwell v. Smith, 665 P.2d 1081 (Idaho Ct. App. 1983) (where roads were built and temporarily used to remove logs, and then left unused for years, there was no continuous use).

19. A few states still require strict necessity, particularly for an easement by reservation.

20. *See, e.g.*, Schmidt v. Eger, 289 N.W.2d 851 (Mich. Ct. App. 1980) (finding necessity for use of drainage ditch where replacement drain system would cost $30,000 or more).

21. Restatement (Third) of Property: Servitudes §2.12 cmt. e.

22. *But see, e.g.*, Whitt v. Ferris, 596 N.E.2d 230 (Ind. Ct. App. 1992) (no reasonable necessity); Thompson v. E.I.G. Palace Mall, LLC, 657 N.W.2d 300 (S.D. 2003) (whether reasonable necessity existed was question of fact, so summary judgment improper).

23. *See, e.g.*, Roy v. Euro-Holland Vastgoed, B.V., 404 So. 2d 410 (Fla. Dist. Ct. App. 1981).

24. *See, e.g.*, Fox Invs. v. Thomas, 431 So. 2d 1021 (Fla. Dist. Ct. App. 1983).

25. *See* Reese v. Borghi, 30 Cal. Rptr. 868 (Ct. App. 1963).

26. See, e.g., Finn v. Williams, 33 N.E.2d 226 (Ill. 1941); Ward v. Slavecek, 466 S.W.2d 91 (Tex. Civ. App. 1971).

27. A public entity that is authorized to acquire property by eminent domain can never establish necessity. It can always acquire an easement through condemnation.

28. This doctrine evolved before the invention of the airplane. "Indeed in an age of helicopters and parachutes, virtually all property is accessible in some manner." Chandler Flyers, Inc. v. Stellar Dev. Corp., 592 P.2d 387, 388 (Ariz. Ct. App. 1979). Accordingly, even if an owner can reach his or her landlocked parcel via helicopter, jet belt, or other air transportation, strict necessity still exists. *But see* Fike v. Shelton, 860 So. 2d 1227 (Miss. Ct. App. 2003) (finding strict necessity even though plaintiff had two legal access rights, on basis that rights were insufficient; one only allowed foot travel, and other was revocable).

29. *See, e.g.*, Schwab v. Timmons, 589 N.W.2d 1 (Wis. 1999) (cliff and rocky terrain).

30. *See, e.g.*, Morrell v. Rice, 622 A.2d 1156 (Me. 1993) (necessity found even though property adjoined ocean); Berge v. Vermont, 915 A.2d 189 (Vt. 2006) (necessity found even though land adjoined navigable pond).

31. 226 S.W.2d 622 (Tex. 1950).

32. However, statutes in a number of states authorize a private landowner to condemn an easement by necessity across surrounding lands, regardless of when the necessity arose.

33. Restatement (Third) of Property: Servitudes §2.15.

34. *See, e.g.*, Dupont v. Whiteside, 721 So. 2d 1259 (Fla. Dist. Ct. App. 1998); Cordwell v. Smith, 665 P.2d 1081 (Idaho Ct. App. 1983). The modern approach has been so widely adopted that it may now be the majority view.

35. *But see* Chandler Flyers, Inc. v. Stellar Dev. Corp., 592 P.2d 387 (Ariz. Ct. App. 1979) (where property adjoined public road, there was no reasonable necessity for aircraft access); *see also* Dupont v. Whiteside, 721 So. 2d 1259 (Fla. Ct. App. 1998) (reasonable necessity not shown).

36. Restatement (Third) of Property: Servitudes §2.15 cmt. d.

37. *See* Hurlocker v. Medina, 878 P.2d 348 (N.M. Ct. App. 1994).

38. Similarly, a future interest is immune from a prescriptive easement claim until the holder is entitled to possession of the land, which parallels the rule for adverse possession. Dieterich Int'l Truck Sales, Inc. v. J.S. & J. Serv., Inc., 5 Cal. Rptr. 2d 388 (Ct. App. 1992).

39. Early American courts justified the prescriptive easement using the legal fiction of a supposed *lost grant*. Open, notorious, and continuous use throughout the prescriptive period created a presumption that the claimant had received an express easement by grant from the servient owner, but that the deed had somehow been misplaced or lost. Although traces of this approach still linger in a few states, almost all courts explain the prescriptive easement by analogy to adverse possession.

40. *See, e.g.*, Miller v. Lutheran Conference & Camp Ass'n, 200 A. 646 (Pa. 1938).

41. *See, e.g.*, Warsaw v. Chicago Metallic Ceilings, 676 P.2d 584 (Cal. 1984); *see also* Restatement (Third) of Property: Servitudes §§2.16, 2.17. The Restatement also provides that a prescriptive easement may arise based on a "use that is made pursuant to the terms of an intended but imperfectly created servitude." Restatement (Third) of Property: Servitudes §2.16(2). *See, e.g.*, Paxson v. Glovitz, 50 P.3d 420 (Ariz. Ct. App. 2003).

42. A handful of courts also state that the use must be with the knowledge and acquiescence of the servient owner; this is a remnant from the outdated "lost grant" theory of prescriptive easements. *See, e.g.*, Berkeley Dev. Corp. v. Hutzler, 229 S.E.2d 732 (W. Va. 1976).

43. *See* Othen v. Rosier, 226 S.W.2d 622 (Tex. 1950) (finding testimony about location of easement was too vague and uncertain to allow tacking on prior use); Community Feed Store v. Northeastern Culvert Corp., 559 A.2d 1068, 1071 (Vt. 1989) (location of easement need not be proven "with absolute precision, but only as to the general outlines consistent with the pattern of use").

44. There is no requirement that the claimant pay property taxes, even in states that mandate that the adverse possessor pay taxes.

45. *See* White v. Ruth R. Millington Living Trust, 785 S.W.2d 782 (Mo. Ct. App. 1990).

46. *See, e.g.*, Melendez v. Hintz, 724 P.2d 137 (Idaho Ct. App. 1986) (use of driveway as only vehicular access to home); White v. Ruth R. Millington Living Trust, 785 S.W.2d 782 (Mo. Ct. App. 1990) (use of road on most weekends). *But see* Beers v. Brown, 129 P.3d 756 (Or. Ct. App. 2006) (denying prescriptive easement for golf balls to enter property from adjoining golf course because the use was not open and notorious).

47. *But cf.* Van Sandt v. Royster, 83 P.2d 698 (Kan. 1938) (suggesting that lot buyer was charged with inquiry notice of sewer pipe easement).

48. *See, e.g.*, Othen v. Rosier, 226 S.W.2d 622 (Tex. 1950) (finding permissive use where owners controlled access to road by installing gate and repaired road).

49. *See, e.g.*, MacDonald Props., Inc. v. Bel-Air Country Club, 140 Cal. Rptr. 367 (App. 1977); Plettner v. Sullivan, 335 N.W.2d 534 (Neb. 1983); Brocco v. Mileo, 565 N.Y.S.2d 602 (App. Div. 1991); Community Feed Store v. Northeastern Culvert Corp., 559 A.2d 1068 (Vt. 1989); Drake v. Smersh, 89 P.3d 726 (Wash. Ct. App. 2004). *But see* Feloney v. Baye, 815 N.W.2d 160 (Neb. 2012) (when claimant uses neighbor's driveway without interfering with neighbor's use or driveway itself, use is presumed to be permissive); Thompson v. E.I.G. Palace Mall, LLC, 657 N.W.2d 300 (S.D. 2003) (use deemed permissive).

50. *See, e.g.*, Hester v. Sawyers, 71 P.2d 646 (N.M. 1937); Rancour v. Golden Reward Mining Co.,

694 N.W.2d 51 (S.D. 2005); *cf.* Lyons v. Baptist School of Christian Training, 804 A.2d 364 (Me. 2002) (public recreational use of open, unenclosed land presumed to be permissive).

51. *Cf.* McDonald v. Harris, 978 P.2d 81 (Alaska 1999) (use is presumed to be permissive unless roadway was not established by servient owner for its own use and was for many years the only access to the dominant parcel).

52. *See, e.g.*, Plettner v. Sullivan, 335 N.W.2d 534 (Neb. 1983) (holding use was sufficiently exclusive for prescriptive easement, but not for adverse possession).

53. *See, e.g.*, Beebe v. DeMarco, 968 P.2d 396 (Or. Ct. App. 1998).

54. *See, e.g.*, Block v. Sexton, 577 N.W.2d 521 (Minn. Ct. App. 1998) (holding use of farm road "several times each month between May and October" was continuous).

55. Finley v. Yuba County Water Dist., 160 Cal. Rptr. 423, 427 (Ct. App. 1979).

56. The facts of this hypothetical are based on Holbrook v. Taylor, 532 S.W.2d 763 (Ky. 1976).

57. *See, e.g.*, Camp v. Milam, 277 So. 2d 95 (Ala. 1973); Stoner v. Zucker, 83 P. 808 (Cal. 1906); Holbrook v. Taylor, 532 S.W.2d 763 (Ky. 1976).

58. *See, e.g.*, Stoner v. Zucker, 83 P. 808 (Cal. 1906); Kienzle v. Myers, 853 N.E.2d 1203 (Ohio Ct. App. 2006).

59. *See, e.g.*, Shearer v. Hodnette, 674 So. 2d 548 (Ala. Civ. App. 1995) (maintaining access road and granting easement that allowed road improvement).

60. *See, e.g.*, Mund v. English, 684 P.2d 1248 (Or. Ct. App. 1984) (construction of house).

61. *See, e.g.*, Emerald Hills Homeowners' Ass'n, Inc., v. Peters, 130 A.3d 469 (Md. 2016).

62. Easements for beach access may arise under other theories as well, as discussed in §30.05.

63. *See, e.g.*, Sides v. Cleland, 648 A.2d 793 (Pa. Super. Ct. 1994) (limiting time and manner of use of trail based on parties' apparent intent to allow users to enjoy wilderness setting).

64. *See generally* Restatement (Third) of Property: Servitudes §4.10 (noting that the "manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate" unless this imposes an unreasonable burden).

65. *See, e.g.*, Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) (use of railroad easement for public hiking and biking trail imposed unreasonable burden on servient tenement); Chevy Chase Land Co. v. United States, 733 A.2d 1055 (Md. Ct. App. 1999) (contra).

66. Similarly, the servient owner may not unreasonably interfere with the dominant owner's use of the easement. *See, e.g.*, Figliuzzi v. Carcajou Shooting Club, 516 N.W.2d 410 (Wis. 1994) (servient owner cannot interfere with hunting easement by building condominiums on servient land).

67. *See* Glenn v. Poole, 423 N.E.2d 1030, 1033 (Mass. App. Ct. 1981) ("The progression from horse or ox teams to tractors and trucks is a normal development....").

68. *See, e.g.*, Heydon v. MediaOne, 739 N.W.2d 373 (Mich. 2007). *But see* Marcus Cable Assocs. v. Krohn, 90 S.W.3d 697 (Tex. 2002) (easement for "electric transmission or distribution line or system" did not include cable television lines).

69. *See, e.g.*, Martin v. Music, 254 S.W.2d 701 (Ky. Ct. App. 1953) (expansion of sewer easement due to residential development of dominant land did not impose unreasonable burden); Hayes v. Aquia Marina, Inc., 414 S.E.2d 820 (Va. 1992) (increase in road use caused by expansion of marina from 84 slips to 280 slips was not unreasonable burden); *cf.* Green v. Lupo, 647 P.2d 51 (Wash. Ct. App. 1982) (overturning injunction that banned motorcycle travel along easement to land developed as new mobile home park). *But see* Stew-Mc Development, Inc. v. Fischer, 770 N.W.2d 839 (Iowa 2009) (refusing to grant declaratory judgment that owner of dominant tenement had "unlimited" right to use easement over farm for access to planned 200-acre residential development).

70. *See, e.g.*, Aztec Ltd. v. Creekside Dev. Co., 602 P.2d 64 (Idaho 1979); S.S. Kresge Co. v. Winkelman Realty, 50 N.W.2d 920 (Wis. 1952). *But see* Glenn v. Poole, 423 N.E.2d 1030 (Mass. App. Ct. 1981).

71. *See, e.g.*, Penn Bowling Recreation Ctr. v. Hot Shoppes, 179 F.2d 64 (D.C. Cir. 1949); Christensen v. Pocatello, 124 P.3d 1008 (Idaho 2005).

72. 715 P.2d 514 (Wash. 1986).

73. *See, e.g.*, Davis v. Bruk, 411 A.2d 660 (Me. 1980) (holder could not change location of easement); Clemson Univ. v. First Provident Corp., 197 S.E.2d 914 (S.C. 1973) (holder could not enlarge easement). *See also* Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012) (rejecting "rolling" public beachfront access easement).

74. Restatement (Third) of Property: Servitudes §4.8. *See, e.g.*, M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053 (Mass. 2004) (following Restatement standard); St. James Village, Inc. v. Cunningham, 210 P.3d 190 (Nev. 2009) (same); Lewis v. Young, 705 N.E.2d 649 (N.Y. 1998) (same). *But see* AKG Real Estate, LLC v. Kosterman, 717 N.W.2d 835 (Wis. 2006) (rejecting Restatement approach).

75. *See, e.g.*, Nelson v. Johnson, 679 P.2d 662 (Idaho 1984).

76. *See, e.g.*, Crane v. Crane, 683 P.2d 1062 (Utah 1984).

77. 200 A. 646 (Pa. 1938).

78. Restatement of Property §489.

79. Restatement (Third) of Property: Servitudes §4.6.

80. *See, e.g.*, Pavlik v. Consolidation Coal Co., 456 F.2d 378 (6th Cir. 1972).

81. *See, e.g.*, Williams Bros. Inc. of Marshfield v. Peck, 966 N.E.2d 860 (Mass. App. Ct. 2012) (finding merger); Pergament v. Loring Props., Ltd., 599 N.W.2d 146 (Minn. 1999) (finding merger); Simone v. Heidelberg, 877 N.E.2d 1288 (N.Y. 2007) (finding merger).

82. *See, e.g.*, Lindsey v. Clark, 69 S.E.2d 342 (Va. 1952).

83. *See, e.g.*, Graves v. Dennis, 691 N.W.2d 315 (S.D. 2004); Lindsey v. Clark, 69 S.E.2d 342 (Va. 1952).

84. *See, e.g.*, Hickerson v. Bender, 500 N.W.2d 169 (Minn. Ct. App. 1993) (abandonment of access easement found based on lengthy nonuse and holder's failure to object to servient owners' obstruction of easement); Frenning v. Dow, 544 A.2d 145 (R.I. 1988) (abandonment of easement for water pipe established by (a) nonuse for 16 years and (b) other actions that included failing to maintain pipeline, allowing line to be blocked, and obtaining new water sources).

85. 100 F.3d 1525 (Fed. Cir. 1996).

86. *See also* Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014); Anna F. Nordhus Family Trust v. United States, 98 Fed. Cl. 331 (2011).

87. *Cf.* Reichardt v. Hoffman, 60 Cal. Rptr. 2d 770 (Ct. App. 1997).

88. *See, e.g.*, Crimmins v. Gould, 308 P.2d 786 (Cal. Ct. App. 1957). *But see* Frenning v. Dow, 544 A.2d 145 (R.I. 1988).

89. *See, e.g.*, Tract Dev. Service v. Kepler, 246 Cal. Rptr. 469 (Ct. App. 1988) (fence across easement did not terminate it because users could pass through unlocked gate); Hickerson v. Bender, 500 N.W.2d 169 (Minn. Ct. App. 1993) (easement terminated by prescription where garage, stone barbecue, trees and other obstacles materially blocked easement).

90. *But see* Castle Assoc. v. Schwartz, 407 N.Y.S.2d 717 (App. Div. 1978) (recognizing exception where easement has been created but no occasion has arisen for its use).

91. *See, e.g.*, Petersen v. Friedman, 328 P.2d 264 (Cal. Ct. App. 1958). *But see* Patterson v. Paul, 863 N.E.2d 527 (Mass. 2007) (view easement was affirmative easement because it included right to enter servient land to trim vegetation to preserve view).

92. *See generally* Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L. Prop. & Soc'y 107 (2015); Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 Stan. Envtl. L.J. 121 (2011).

93. *Cf.* Marrone v. Washington Jockey Club, 227 U.S. 633 (1913) (ticket to enter race track was a license).

94. *See, e.g.*, Cooper v. Boise Church of Christ, 524 P.2d 173 (Idaho 1974) (agreement allowing church to place electric sign on lot created a license); Linro Equip. Corp. v. Westage Tower Assocs., 650 N.Y.S.2d 399 (App. Div. 1996) (agreement allowing plaintiff to install and maintain coin-operated laundry machines in residential complex created a license); Todd v. Krolick, 466 N.Y.S.2d 788 (1983) (same).

95. *See generally* McCastle v. Scanlon, 59 N.W.2d 114 (Mich. 1953).

96. *See, e.g.*, Mosher v. Cook United, Inc., 405 N.E.2d 720 (Ohio 1980).

97. *See, e.g.*, St. Helen Shooting Club v. Mogle, 207 N.W. 915 (Mich. 1926).

98. *See, e.g.*, Hagan v. Delaware Anglers' & Gunners' Club, 655 A.2d 292 (Del. Ch. 1995).

99. *See, e.g.*, Lobato v. Taylor, 71 P.3d 938 (Colo. 2002); Central Oregon Fabricators, Inc. v. Hudspeth, 977 P.2d 416 (Or. Ct. App. 1999).

100. Restatement of Property §450 cmt. f.

101. Restatement (Third) of Property: Servitudes §1.2.

Chapter 33

Real Covenants

§33.01 The Birth of Private Land Use Planning

Suppose A owns fee simple absolute in two adjacent parcels, Greenacre (her home) and Blueacre (a vacant lot).[1] A plans to sell Blueacre to B, but wishes to restrict it to residential use in order to preserve the character of the neighborhood; B agrees to this restriction. Accordingly, A conveys Blueacre to B using a deed that provides: "B, his successors, heirs, and assigns shall use Blueacre only for residential purposes." B then conveys Blueacre to C, who opens a pig farm there. What rights does A have against C?

Under traditional English law, the answer was "none." If B had opened the pig farm, A could enforce B's promise as a *personal covenant*, like any other contract. But the personal covenant suffered from a fatal flaw: it did not burden or benefit the successors to the original contracting parties. In that era, contract rights and duties could not be assigned or delegated to successors. Thus, the personal covenant was hopelessly weak as a land planning device.[2]

Over time, the law developed two methods to address this problem: the *real covenant* or *covenant running at law* (discussed in this chapter) and the *equitable servitude* (discussed in Chapter 34). Both methods serve the same purpose: they extend the burdens and benefits of land use covenants to the successors of the original parties. Damages are recoverable for breach of a real covenant, while the equitable servitude is primarily enforced by injunction. These new doctrines facilitated long-term private land use planning.

Yet—much like twins separated at birth—the two doctrines evolved quite differently. The modern evolution of the real covenant occurred in the eighteenth-century English law courts, which were quite hostile to restrictions on the free use of land (*see* §9.08[A]).[3] Reflecting this heritage, the real covenant is a rigid, narrow, and intricate device. The American law governing real covenants is so confusing that one text describes it as an "unspeakable quagmire."[4] In contrast, the equitable servitude developed during the nineteenth century in the English equity courts; these courts were more willing to tolerate private land use restrictions in order to avoid unfairness and inequity.[5] The law governing equitable servitudes is relatively

simple and straightforward. Thus, the distinction between the two doctrines stems more from historical accident than from logic.

American courts have often blurred the boundary between the real covenant and the equitable servitude, and today there is a clear trend toward eliminating the distinction. As a practical matter, the real covenant is now used infrequently; instead, the equitable servitude dominates the field. Moreover, the Restatement (Third) of Property: Servitudes proposes to combine the real covenant, the equitable servitude, and the easement into a single category—the *servitude* (*see* §34.08).[6] This unified servitude would be enforceable either in damages or by injunction. Accordingly, the real covenant may be nearing extinction.

§33.02 What Is a Real Covenant?

[A] Defining the Real Covenant

A real covenant is a promise concerning the use of land that (1) benefits and burdens the original parties to the promise *and also their successors* and (2) is enforceable in an action for damages. Legal authorities usually recite that such a covenant "runs with the land," but this phrasing is merely a shorthand reference, not literal truth. A real covenant does not "run with the land"; rather, it "runs" with an estate in land. The promisor's successors in title are bound to perform the promise; and the promisee's successors in title are able to enforce the promise in an action to recover compensatory damages.

In a practical sense, both the real covenant and the equitable servitude are tools that allow a promise to be enforced by or against a successor owner under limited circumstances. Suppose adjacent landowners A and B jointly agree that B's property Blueacre will be restricted to residential use; A sells her land to C, and B sells Blueacre to D. If D now begins building an oil refinery on Blueacre, C has a choice of theories. C can enforce the promise against D *either* as a real covenant *or* as an equitable servitude, assuming all requirements are met. Note that A and B probably did not describe their original agreement as a "real covenant" or an "equitable servitude," nor is this necessary. If all requirements are satisfied, *a promise can be enforced either as a real covenant or as an equitable servitude*.

A real covenant may be an *affirmative covenant* (a promise to perform a particular act) or a *negative covenant* (a promise not to perform a particular act).

[B] Distinguished from Other Doctrines

How does the real covenant differ from its close relatives—the equitable servitude and the negative easement? The equitable servitude is quite similar to the real covenant; it is a promise concerning the use of land that benefits and burdens the original parties and their successors. But the traditional remedy for breach of the equitable servitude is an injunction, not damages; the requirements for creating a valid equitable servitude are far easier to

satisfy; and a broader range of defenses are available against enforcement of an equitable servitude (*see* Chapter 34).

The distinction between the real covenant and the negative easement is harder to discern. Both may involve the owner's promise to refrain from performing an action on the land that the law otherwise permits; and the remedy of damages is available under both. Of course, the requirements for each differ. At a more practical level, American courts—like their English counterparts—recognize only a few types of negative easements, which limits the scope of the doctrine (*see* §32.12).

§33.03 Policy Implications of Private Land Use Restrictions

The English law courts restricted the real covenant due to utilitarian fear that it would limit marketability and thereby impair the productive use of land. "[R]estrictive covenants [are disfavored] based upon the view that the best interests of society are advanced by the free and unrestricted use of land."[7] But modern American courts increasingly acknowledge that the real covenant and the equitable servitude can help to ensure that land is used efficiently. In other words, private land use restrictions may enhance productive use.

For example, consider the A-B covenant that limits Blueacre to residential use (*see* §33.01). By enforcing this covenant between adjacent landowners, the law ensures that A's home—and presumably other neighborhood homes as well—are protected against noise, odors, and other nuisance-like impacts from industrial or other non-residential uses. Today private land use restrictions are most commonly created in connection with new residential "common interest communities"—tract home subdivisions, townhouse developments, or condominium projects (*see* Chapter 35). In this setting, restrictions both permit the operation of the community (e.g., by providing a method for collection of homeowner assessments) and protect the legitimate expectations of home buyers that the residential character of the development will be preserved (e.g., by limiting uses, reducing noise levels, and policing architectural design).

A second policy theme may be broadly described as individual liberty, incorporating both libertarian precepts and law and economics theory. By enforcing the A-B agreement, the law respects the autonomy of each owner to deal with land as he or she sees fit, with minimal state intervention. For libertarian theorists, this result comports with the goal of protecting the personal freedom of A and B; and law and economics scholars presume that market-driven decisions by rational economic maximizers like A and B will best ensure that land is used efficiently.

On the other hand, private land use restrictions can sometimes impair the productive use of land, particularly over the long term.[8] Suppose that E and F

agree in 1920 that E's farm Redacre will “forever be restricted to agricultural use.” But by 2018, a growing city has literally surrounded Redacre; the farm is now an agricultural island in an urban sea. Redacre is now most valuable if it can be developed into a large apartment complex to meet the urgent housing needs of low-income residents. Should the law enforce the restriction?

§33.04 Creation of a Real Covenant

[A] Perspectives on the Real Covenant

The law governing real covenants is—to put it charitably—confused. Courts tend to be imprecise in analyzing and describing the law; and even within a single jurisdiction, the case law is sometimes inconsistent. Moreover, modern cases involving real covenants are relatively scarce, because most plaintiffs prefer to enforce restrictions as equitable servitudes.

In approaching the real covenant, two points are crucial. First, the law distinguishes between the *original parties* to the covenant and their *successors*. Suppose A and B agree that B's property Blueacre will be restricted to residential use; B conveys Blueacre to C, and A conveys her retained property, Greenacre, to D. A (the promisee or "covenantee") and B (the promisor or "covenantor") are the original parties to the covenant; D and C, respectively, are their successors in title. As between A and B, the original parties, the covenant is simply a contract that A can enforce against B —*regardless* of whether it runs with the land. But C and D, as successors, are burdened and benefited, respectively, *only* if the covenant runs with the land.

Second, each real covenant has two "sides." The promisor's duty to perform the promise is commonly called the *burden*; the promisee's right to enforce the promise is commonly called the *benefit*. In analyzing whether a real covenant is enforceable, it is helpful to approach the two sides separately. Why? Disputes involving real covenants fall into one of three basic scenarios, based on the identities of the plaintiff and the defendant; and the requirements for enforcement differ in each scenario. First, the original promisee might seek to enforce the covenant against the promisor's successor; here the issue is whether the *burden* runs. Second, the promisee's successor could try to enforce the covenant against the original promisor; here the issue is whether the *benefit* runs. Finally, the promisee's successor might seek to sue the promisor's successor; here both the *burden* and the *benefit* must run.

[B] Original Promisee vs. Promisor's Successor:

Does the Burden Run?

[1] Requirements for Burden to Run

Suppose A owns fee simple absolute in two adjacent parcels, Blackacre (A's home) and Greyacre (a vacant lot). From the second story, A's home enjoys a view across Greyacre to a distant lake. A wants to sell Greyacre, but also wishes to protect this view. A agrees to sell Greyacre to B, and eventually conveys title to B pursuant to a deed that expressly states: "B, his successors, heirs, and assigns shall not allow construction on Greyacre of any building or structure that exceeds 12 feet in height." After the A-B deed is recorded, B in turn conveys Greyacre to C. C begins construction of a 30-foot-high home that will block the view.

Can A recover damages from C for breach of the covenant? Here A, the original promisee, is seeking to enforce its benefit; it is not necessary to prove that the benefit runs to A's successors. The only issue is whether the covenant can be enforced against C, as B's successor. Thus, the question here is whether the *burden* of the covenant runs to C.

In order for the burden of a real covenant to "run with the land," and thereby bind the promisor's successors, American law traditionally requires that six elements be established:

(1) the covenant must be in writing,

(2) the original parties must intend to bind their successors,

(3) the covenant must "touch and concern" land,

(4) horizontal privity must exist,

(5) vertical privity must exist, and

(6) the successor must have notice of the covenant.

[2] Covenant in Writing

Almost all modern courts view the real covenant as an interest in land. Accordingly, a writing that complies with the Statute of Frauds is required to create an enforceable real covenant (*see* §23.04[A][1]).[9] In practice, this requirement rarely poses a problem. Covenants are typically set forth in a deed, lease, or other written instrument between the covenanting parties.[10] The hypothetical A-B covenant (*see* [B][1], *supra*) obviously meets this requirement because it is contained in the deed from A to B. A different

technique is commonly used to impose covenants on new subdivision projects; most states allow the developer to record a written “declaration” or a plat map that expressly imposes covenants on the entire subdivision project before any lots are sold.[11] Even an oral covenant is enforceable, however, if one of the standard exceptions to the Statute of Frauds—notably estoppel or part performance—can be proven (*see* §20.04[B][4]).[12]

[3] Intent to Bind Successors

The original parties must intend that the covenant bind the promisor's successors. How can their subjective intent be determined? The requisite intent is most commonly found in the express language of the covenant. Words such as “assigns” or “successors” usually evidence this intent. Intent is clearly shown in the hypothetical A-B covenant (*see* [B][1], *supra*) because B's “successors, heirs, and assigns” are expressly included as parties bound by the height restriction.

Alternatively, an intent to bind successors may be inferred from the nature of the restriction, the situation of the parties, and the other circumstances surrounding the covenant, even if the covenant contains no express language.[13] Suppose the A-B covenant merely provided: “No building or structure in excess of 12 feet in height may be constructed on Greyacre.” Does this covenant bind only B or B's successors as well? Since B is not expressly named, one might infer that the parties intended the covenant to mean that no such building or structure may “ever” be constructed on Greyacre, regardless of the lot owner's identity. This interpretation makes sense in light of the purpose of the covenant; in order to effectively protect the view from Blackacre, it is necessary that B's successors also be bound.

Can an intent to bind successors be inferred simply because the covenant restricts the use and enjoyment of land? Many courts appear to presume that any such covenant was intended to run with the land, absent affirmative evidence that the original parties intended to create only a personal obligation in the promisor.[14] Under this approach, the requirement of intent to bind successors is largely irrelevant. If the covenant meets the “touch and concern” requirement—and thus restricts the use and enjoyment of land—intent is found.

[4] “Touch and Concern” Land

[a] Defining "Touch and Concern"

[i] Use of the Land

What types of promises should run with the land? Most of the required elements for a real covenant concern the status of the parties to the covenant. The only element that examines the content of the covenant is "touch and concern." The burden of the covenant must "touch and concern" land. Unfortunately, there is little modern agreement about what this requirement means. If the law governing real covenants is truly a quagmire, then "touch and concern" is its deepest and most dangerous part.

Certainly, the core of the "touch and concern" requirement is simple. Courts typically state that the burden of the covenant must relate to use of the land. As one court summarized, "the promise must exercise direct influence on the occupation, use or enjoyment of the premises."[15] This standard is easy to understand and apply when a physical use is involved. For example, consider the A-B covenant that restricts the height of future buildings on Greyacre (*see* [B][1], *supra*). This covenant meets the "touch and concern" test because it limits the types of uses that are physically permitted on the land.[16] At the other extreme, suppose that a covenant requires the promisor to perform an act that has no connection whatsoever to the land (e.g., dancing a jig in the village square on New Year's Day). The burden of this covenant does not "touch and concern" the promisor's land.

What about covenants that have little connection with the physical use of the land, such as covenants to arbitrate lease disputes, to pay real property taxes, or to refrain from operating a competing business? Here the "touch and concern" requirement loses its clarity.[17] Broadly speaking, many modern cases seem to recognize a sliding scale—a covenant is less likely to "touch and concern" as its connection to physical use of the land diminishes. As the New York Court of Appeals explained, "whether a covenant is so closely related to the use of the land that it should be deemed to 'run' with the land is one of degree, dependent on the particular circumstances of a case."[18] However, the "sliding scale" approach provides little practical guidance.

Various efforts have been made to fill this doctrinal vacuum.[19] Probably the most influential is a standard pioneered by Dean Harry Bigelow, which focuses on how the covenant affects the fair market value of the respective parties' interests in land.[20] Under this approach, if the covenant lessens the

value of the promisor's interest in land, then the burden is deemed to "touch and concern" the land; and if the covenant increases the value of the promisee's interest, then the benefit will similarly "touch and concern."[21] Yet this standard is circular. Only a covenant that does "touch and concern" the land in the first place is enforceable, and only an enforceable covenant can affect market value.

[ii] Negative Covenants

The burden of a negative covenant that restricts the use of the promisor's land usually satisfies the "touch and concern" requirement.[22] Most of the covenants routinely encountered in residential subdivision or condominium developments fall into this category. For example, covenants to use the land only for residential purposes, to build any structure at least 30 feet behind the front lot line, or to build no more than two homes per acre all "touch and concern" the land.

Covenants not to compete present a more complex problem. Suppose C operates a wine store on Greenacre; when C conveys his adjacent property Blueacre to D, D covenants not to operate a business on the land that would compete with C's wine store. This covenant would seem to satisfy the "touch and concern" requirement with ease, because it restricts D's physical use of Blueacre. Yet—apparently concerned about potential monopolies—many nineteenth-century courts refused to enforce such anticompetitive covenants, reasoning that they did not sufficiently "touch and concern." Although this heritage may linger in a few states, almost all modern courts now conclude that covenants not to compete do meet the "touch and concern" requirement.[23]

[iii] Affirmative Covenants

Most of the controversy about the "touch and concern" requirement involves affirmative covenants—those that require the promisor to perform some affirmative act, usually the payment of money. Traditionally, courts were reluctant to enforce an affirmative covenant against the promisor's successors unless it was closely tied to the land. Suppose E and F, adjacent landowners, agree that F will keep the wooden fence on the E-F property line in good repair. This covenant clearly meets the "touch and concern" standard because it affects the physical use of the land.[24] On the other hand, what if F covenanted to buy a fire insurance policy on the fence? Would a court

enforce this purely monetary obligation?

The traditional view is that covenants to pay money—for example, covenants to pay real property taxes, to purchase insurance,[25] to pay security deposits, or to pay homeowners association dues—do not "touch and concern."[26] Even here, however, there was one glaring exception: the tenant's promise to pay rent to the landlord was uniformly held to "touch and concern" the land. Modern courts have relaxed the traditional approach. There is a clear trend toward holding that monetary payments related to the land do "touch and concern."[27] Probably the clearest example of this trend involves covenants to pay homeowners association dues.[28] Today courts consistently hold that such covenants "touch and concern" the land; otherwise, common interest communities could not function.

[b] Special Problem: What if the Benefit Does Not "Touch and Concern"?

In general, the running of the burden and benefit are analyzed separately. Yet most states recognize an important exception to this rule: the burden does not run if the benefit is *in gross*, that is, if it fails to "touch and concern" land.

For example, in *Caullett v. Stanley Stilwell & Sons*,[29] plaintiff purchased a building lot from the defendant-developer; the deed contained a covenant that gave defendant the right to "build or construct the original dwelling or building" on the land.[30] Plaintiff sued to quiet title, arguing that the restriction was not an enforceable covenant. The court agreed because, among other reasons, the benefit of the covenant was in gross. It did not "touch and concern" any property retained by the defendant; rather, it gave the defendant "a mere commercial advantage in the operation of his business."[31]

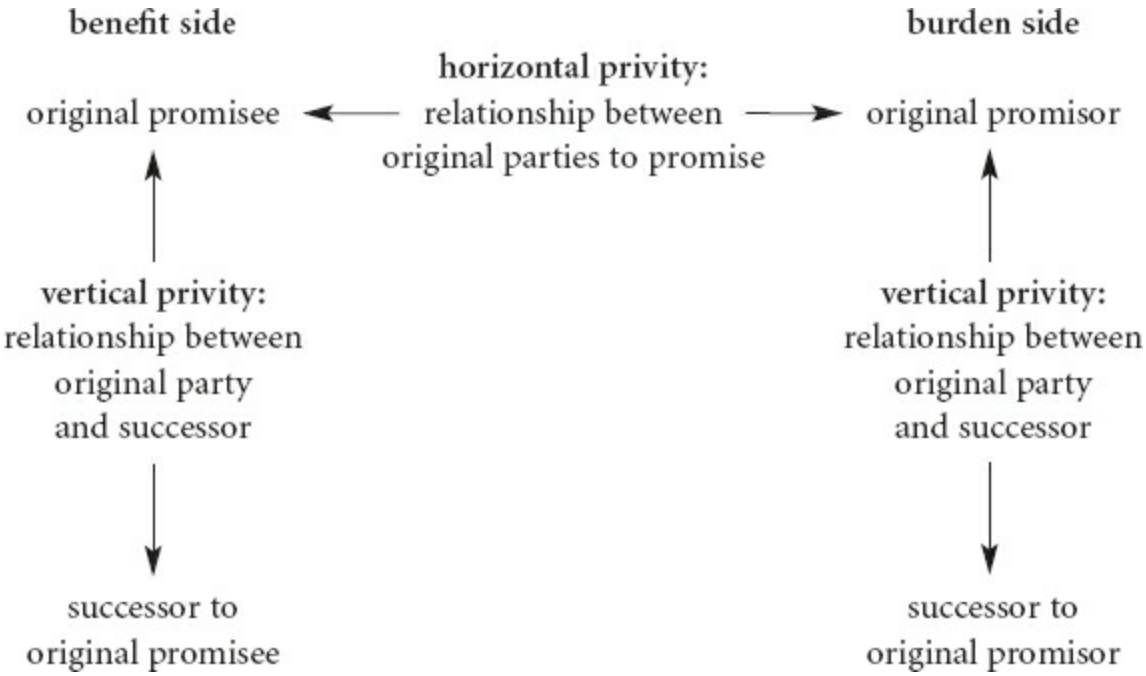
[5] Horizontal Privity

[a] Three Competing Views

The law traditionally requires that the original covenanting parties have a special relationship in order for the burden of a real covenant to run with the land. This relationship is known as *horizontal privity*. In determining whether horizontal privity exists, we consider only the relationship between

the *original parties* to the promise, and ignore their successors (*see* Table 9).

Table 9: Horizontal and Vertical Privity



Under English law, only the privity of estate between landlord and tenant (*see* §18.03[A]) satisfied this requirement. Accordingly, a real covenant could be created only between a landlord and a tenant. The practical effect of this requirement was to restrict the use of the real covenant, and thereby minimize its impact on productive land use. Suppose K and L, owners of adjacent English parcels, expressly agreed in 1800 that their respective lands would be limited "to agricultural use forever." Even if all other elements were met, the lack of a landlord-tenant relationship would prevent K and L from creating a valid real covenant.

The confusion over horizontal privity arises because American courts extended the doctrine far beyond its English confines, to relationships other than landlord-tenant. What relationships create horizontal privity under American law? There are three competing views. First, a few states insist on a landlord-tenant relationship or a similar relationship involving mutual interests in the same land. Second, a majority of states extend the doctrine farther to include all successive interests, including the grantor-grantee relationship. Finally, a number of states have abandoned the requirement altogether. It is difficult to determine the current status of the law on

horizontal privity because modern decisions involving real covenants are rare.[32]

[b] Mutual Interests

This approach finds horizontal privity between the promisor and promisee who hold mutual simultaneous interests in the same land.[33] A landlord and tenant, for example, have mutual interests (respectively, a reversion and a nonfreehold estate) in the same property (the leased premises) at the same time (during the lease term). The other main example is the easement. The owners of the dominant and servient tenements have mutual interests (respectively, an easement and fee simple absolute) in the same property (the land burdened by the easement) at the same time (during the life of the easement).[34]

Suppose landlord L and tenant T enter into a 10-year lease. The lease provides that T, "his successors and assigns" shall not permit hazardous waste to be stored on the property. T assigns the lease to A, who promptly opens a hazardous waste disposal site on the land. L sues A for damages under the lease. The horizontal privity requirement is met because the original covenanting parties—L and T—had mutual interests in the leased premises.

Consider again the height restriction imposed by the hypothetical A-B covenant above (*see* [B][1], *supra*). A and B never held simultaneous interests in the burdened land, Greyacre. Rather, their interests were successive: A conveyed his interest to B. In a jurisdiction using the mutual interests standard, no horizontal privity existed between A and B. Thus, the burden of the height restriction did not run to B's successor C. A cannot recover damages from C.

[c] Successive Interests

In virtually all jurisdictions that still demand horizontal privity, this requirement is met where the original parties have a grantor-grantee relationship, so that they have successive interests in the burdened land.[35] In the A-B hypothetical (*see* [B][1], *supra*), the covenant was created in the deed conveying fee simple absolute in Greyacre from A to B; horizontal privity accordingly arises. Assuming the other elements of a real covenant are present, then, A can recover damages against B's successor C.

Note that this approach—which is followed by most states—incorporates the "mutual interests" approach as well. For example, the landlord who transfers a leasehold estate to the tenant, or the owner who grants a road easement to a neighbor, is conveying an interest in land.[36]

[d] No Horizontal Privity Required

In a growing number of states, horizontal privity is not necessary.[37] Legal scholars roundly condemn the requirement as a meaningless anachronism (*see* §33.07). Moreover, because it can be easily circumvented through a "straw" transaction, it poses difficulty only for unsophisticated parties. There is a clear modern trend toward abolishing the requirement, as the Restatement (Third) of Property: Servitudes advocates.[38]

[6] Vertical Privity

Traditional law also requires *vertical privity* in order for the burden of a covenant to bind successors.[39] Vertical privity concerns the relationship between the original covenanting party and his successors (see Table 9). If the successor succeeds to the *entire estate* in land held by the original covenanting party, vertical privity exists. On the other hand, if the successor acquires *less than the entire estate*, no vertical privity arises. However, today most states no longer require horizontal privity—and it seems likely that all states will eventually adopt this approach.

In the A-B hypothetical (*see* [B][1], *supra*), A conveyed fee simple absolute in Greyacre to B; the A-B deed imposes a height restriction on future buildings. B later transferred his fee simple absolute estate to C. Vertical privity exists between B and C simply because C acquired B's entire estate. The method of transfer—conveyance, devise, or intestate succession—is irrelevant.

On the other hand, if B had transferred less than his entire estate (e.g., a life estate or a term of years tenancy) to C, no vertical privity would arise. Accordingly, if C—as a tenant under a term of years tenancy—builds a home that exceeds the height limit, A cannot enforce the restriction against C as a real covenant. The same result follows if C acquires B's estate through adverse possession; here, no privity of any kind exists between B and C.

[7] Notice to Successors

In most instances, the successor must have notice of the covenant.[40] This requirement arises indirectly from the state recording statutes, not as a direct element of the real covenant. In general, a later purchaser who acquires an interest for value and without notice of a prior adverse claim is protected under the recording laws as a bona fide purchaser (*see* §24.03). Accordingly, a real covenant is enforceable against a later purchaser for value only if the purchaser has notice of the covenant when acquiring the interest. The notice requirement is satisfied by:

(1) actual notice,

(2) record notice,

(3) inquiry notice, or

(4) imputed notice (*see* §24.06).

However, one acquiring an interest by gift is not a bona fide purchaser. Accordingly, a devisee, heir, or other donee is bound by a prior covenant even without notice.

[C] Promisee's Successor vs. Original Promisor: Does the Benefit Run?

[1] Requirements for Benefit to Run

Suppose that the promisee's successor seeks to enforce the covenant against the original promisor. Here, the only question is whether the *benefit* of the covenant runs to the promisee's successor. Reconsider the A-B hypothetical (*see* [B][1], *supra*). A and B enter into a covenant limiting the height of future buildings on B's land Greyacre. Suppose that A conveys his land Blackacre to D; B now begins building a 30-foot-high house on Greyacre that will block the view. In order for D to enforce the restriction as a real covenant, he must demonstrate that the *benefit* of the covenant runs to him, as A's successor. It is not necessary to show that the *burden* also runs because here D seeks to enforce the covenant against B, the original promisor, not a successor to B.

Logic suggests that it should be easier to benefit successors than to burden them. The law reflects this approach. In order for the benefit of a real covenant to run to successors, only three elements are required:

(1) the covenant must be in writing (*see* [B][2], *supra*),

(2) the original parties must intend to benefit successors (*see* [B][3], *supra*), and

(3) the benefit of the covenant must "touch and concern" land (*see* [B][4], *supra*).

In most jurisdictions, horizontal privity, vertical privity, and notice are not required.

The few courts that still require vertical privity have greatly relaxed the standard. These courts find vertical privity in successors even when they received less than their predecessors' entire interest. For example, assume L and K enter into a covenant that bans the sale of alcohol on K's land; L leases her land to M; and K starts selling alcohol. The benefit of the covenant runs to M, as L's successor, even though M did not acquire L's entire estate.

Suppose developer D creates a 100-lot residential subdivision; she records a declaration of restrictions against all the lots that (1) creates a homeowners association; (2) requires lot owners to pay assessments to the association; and (3) imposes various use restrictions. D sells lot 39 to E, and sells the other lots to various buyers. If E now refuses to pay the assessments, presumably any other lot owner is entitled to sue him. Because all lot owners are successors to D, vertical privity exists. But the homeowners association has no privity with D. Can it sue to collect the unpaid assessment? Most courts allow suit on the theory that the homeowners association is acting as an agent for the benefited lot owners.[41]

[2] Example: The "Lawn Covenant"

Assume R and S own single-family residences on the same street; R, S, and the other homeowners on the street all enter into a written agreement that provides, in part: "In order to protect the visual appearance of the neighborhood, and protect property values, each owner agrees that at least 90% of the front yard of his or her property shall consist of a grass lawn that the owner will maintain in good condition. This agreement will bind and benefit all successors." One year later, R sells her home to T. S then removes all the grass from his front yard, and paves the entire area with asphalt, planning to store old cars there. Can T recover damages from S for breach of covenant?

Here, all the lots were simultaneously burdened and benefited by the restriction. But on these facts, T seeks the benefit of the covenant for

himself, and wishes to enforce its burden against S. S is an original party to the covenant, so he is bound by its burden as a matter of contract law. The only question is whether the benefit of the covenant runs to T as a successor to R, an original promisee.

On these facts, the benefit runs to T. The covenant is contained in a writing, which we will presume complies with the Statute of Frauds; and the covenant expressly manifests the parties' intent to benefit and burden their successors. A modern court would undoubtedly hold that the covenant does "touch and concern" the land, because it restricts the physical use of S's property; S must devote 90% of his front yard to lawn. Finally, because R apparently conveyed her entire estate to T, the element of vertical privity is easily satisfied.

[D] Promisee's Successor vs. Promisor's Successor: Do the Burden and the Benefit Both Run?

[1] Requirements for Burden and Benefit to Run

Suppose that the promisee's successor attempts to enforce the covenant against the promisor's successor. In order for this claim to succeed, both the *burden* and the *benefit* must run. Consider the A-B height restriction hypothetical once more (*see* [B][1], *supra*). Suppose that after A and B enter into the covenant, A conveys his land Blackacre to D and B conveys his land Greyacre to C. C now begins building a 30-foot high house on Greyacre. Can D, the promisee's successor, enforce the covenant against C, the promisor's successor? The answer to this question turns on the analysis already discussed above. If both the burden (*see* [B], *supra*) and the benefit (*see* [C], *supra*) run to successors, then D can enforce the restriction as a real covenant. If either the burden or the benefit fails to run, D's claim will fail.

[2] Example: The "Lawn Covenant" Revisited

Consider again the "lawn covenant" among R, S, and their neighbors (*see* [C][2], *supra*). Now suppose that after the covenant is created, R sells her home to T and S sells his home to U. U now replaces the front lawn with pavement. Can T recover damages from U? In order for T to prevail, both the benefit and the burden of the covenant must run to successors. We already established that the benefit runs to T (*see* [C][2], *supra*). So, does the burden run to U?

Three of the six necessary elements (*see* [B][1], *supra*) are easily met. As already discussed in connection with the benefit analysis (*see* [C][2], *supra*), the covenant is in writing, manifests an intent to bind successors, and satisfies the "touch and concern" test. On the facts, vertical privity exists between S and U; it appears that S conveyed his entire estate to U. But no horizontal privity existed between the original parties to the covenant—R, S, and their neighbors; they did not have mutual or successive interests. Unless the jurisdiction has abandoned the horizontal privity requirement, the burden does not run. Notice presents another problem. No facts suggest that U had actual or record notice of the covenant. But did the uniform appearance of front lawns in the area put U on inquiry notice? This seems unlikely, because grass lawns are quite common in residential areas. On balance, the burden of the covenant probably does not run to U.

§33.05 Termination of Real Covenants

Traditional law provides only a few defenses to enforcement of a real covenant.[42] Of course, parties might create a covenant that, according to its terms, continues only for a fixed period (e.g., 30 years); or the party benefited by a covenant might agree to release his rights. Eminent domain or other governmental action might also end a covenant.[43] And when one party acquires ownership of all the land benefited and burdened by a covenant, it is extinguished by the doctrine of merger. Anti-discrimination statutes might also bar enforcement of a covenant (*see* §34.06[B]). Beyond this point, the main potential defenses are: (1) abandonment; and (2) changed conditions.[44]

Abandonment occurs when the conduct of the person entitled to the benefit of the covenant demonstrates the intent to relinquish his or her rights.[45] For example, suppose that Redacre is a 100-lot subdivision subject to a recorded covenant that limits the height of all buildings to one story; the owners of 99 lots proceed to build two-story dwellings. The owner of the 100th lot would reasonably conclude that the conduct of the other lot owners constituted an abandonment of the restriction.[46] As one court explained, abandonment is found "when the average person, upon inspection of a subdivision and knowing of a certain restriction, will readily observe sufficient violations so that he or she will logically infer that the property owners neither adhere to nor enforce the restriction."[47]

Under the *changed conditions* doctrine, a covenant becomes unenforceable when conditions in the neighborhood of the burdened land have so substantially changed that the intended benefits of the covenant cannot be realized (*see* §34.06[C]). This defense originated in equity, and is uniformly held applicable to the equitable servitude. Yet an increasing number of jurisdictions also apply this defense to the real covenant.

§33.06 Remedies for Breach of Real Covenants

The historic remedy for breach of a real covenant is compensatory damages. The successful plaintiff recovers damages equal to the difference between the fair market value of the property before and after the defendant's breach. For example, suppose A builds an oil refinery on his land in violation of a real covenant that permits only residential use; if this violation reduces the fair market value of B's adjacent home from $200,000 to $50,000, B is entitled to $150,000 in general damages. Special or consequential damages may also be recovered.

As a practical matter, the modern plaintiff has a choice of remedies. *Almost any restriction that can be enforced as a real covenant can alternatively be enforced as an equitable servitude* (*see* §34.04). If so, the plaintiff can usually choose between (1) compensatory damages (by enforcing the restriction as a real covenant) or (2) an injunction against future conduct and damages for the past violation (by enforcing it as an equitable servitude).

§33.07 Scholarly Perspectives on Real Covenants

The real covenant has attracted much scholarly attention in recent decades, undoubtedly encouraged by debate over the Restatement (Third) of Property: Servitudes. At this point, there is a general consensus in favor of simplifying the law. Most scholars agree that the requirements of "touch and concern," horizontal privity, and vertical privity should either be abolished or greatly relaxed.

The "touch and concern" requirement has sparked vigorous academic battle. Led by Richard Epstein, opponents charge that this requirement is vague and unpredictable, frustrates the intention of the parties, and fails to serve any useful function.[48] While conceding that some reform is appropriate, Uriel Reichman and other supporters argue that the requirement both (1) promotes the efficient utilization of land (by preventing burdens that impair marketability) and (2) protects the long-term expectations of owners (by ensuring that there is at least a minimal relationship between benefit and burden).[49] Opponents retort that individual owners are best able to determine whether their covenant promotes efficient land use, while the notice requirement already prevents unfair surprise to owners of burdened land.[50]

In contrast, scholars uniformly agree that horizontal privity is obsolete and should be eliminated. Courts traditionally feared that real covenants would impair the productive use of land. In this climate, the horizontal privity requirement arguably served a function: it made the creation of real covenants more difficult, and thereby reduced the number of covenants that could arise. However, given the modern recognition that private land use restrictions can provide social benefits, the reason for this requirement no longer exists.

Further, critics note that the horizontal privity requirement can be easily circumvented through a "straw" transaction. Suppose that R and S, adjacent landowners, wish to prohibit industrial uses on R's property; but because they lack horizontal privity their agreement would not be enforced as a real covenant. A simple solution is available: R conveys her land to S, and S reconveys it to R pursuant to a deed that includes the desired use restriction.

R and S now have successive interests, which satisfy the horizontal privity requirement in most jurisdictions.

Finally, the vertical privity requirement enjoys little scholarly support. The historic rationale for the requirement ended long ago. And its continued existence serves to frustrate party intent. Why should an owner lose the right to enforce a covenant against a successor merely because the owner of the burdened land chooses to transfer less than his entire estate?[51] If A and B enter into a real covenant that restricts B's land Greenacre to residential use, and B later leases Greenacre to C for a 99-year term, C should reasonably be bound by the covenant, just as if B conveyed fee simple absolute. At the other extreme, if B leases Greenacre to C for a very short term (e.g., to use as a fruit stand for a month during strawberry season), enforcement of the covenant against C—who probably lacks actual knowledge of the covenant—might well be inequitable.

§33.08 The Restatement (Third) of Property: Servitudes

The Restatement (Third) of Property: Servitudes greatly simplifies the traditional law of real covenants and equitable servitudes. It combines these two doctrines into one—the *servitude*. Unlike the real covenant, this new servitude is quite simple to create. Broadly speaking, a contract or conveyance creates a servitude if

(1) the parties intend it to do so;[52]

(2) it complies with the Statute of Frauds;[53] and

(3) the servitude is not illegal, unconstitutional, or violative of public policy.[54]

To date, however, no state has adopted the Restatement approach. The impact of the Restatement on real covenants and equitable servitudes is discussed in more detail in §34.08.

---

1. *See generally* Lawrence Berger, *Unification of the Law of Servitudes*, 55 S. Cal. L. Rev. 1339 (1982); Susan F. French, *Highlights of the New Restatement (Third) of Property: Servitudes*, 35 Real Prop., Prob. & Tr. J. 225 (2000); Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. Cal. L. Rev. 1177 (1982); William B. Stoebuck, *Running Covenants: An Analytical Primer*, 52 Wash. L. Rev. 861 (1977).

2. A related planning device—the negative easement—was similarly ineffective because common law courts narrowly limited its scope. See §32.12.

3. *See* Spencer's Case, 77 Eng. Rep. 72 (1583).

4. Edward H. Rabin & Robert R. Kwall, Fundamentals of Modern Property Law 447 (3d ed. 1992).

5. *See* Tulk v. Moxhay, 41 Eng. Rep. 1143 (1848).

6. Restatement (Third) of Property: Servitudes §§1.1, 1.4.

7. Charping v. J.P. Scurry & Co., 372 S.E.2d 120, 121 (S.C. Ct. App. 1988).

8. *See* James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 Wis. L. Rev. 1.

9. In addition, the covenant must satisfy the usual requirements for a valid contract.

10. A deed that imposes the burden of a covenant on the grantee is uniformly held to comply with the Statute of Frauds even though it is not executed by the grantee.

11. *See, e.g.*, Citizens for Covenant Compliance v. Anderson, 906 P.2d 1314 (Cal. 1995).

12. In contrast, the presence of a common plan or scheme may support enforcement of a restriction as an equitable servitude, without a memorandum that satisfies the Statute of Frauds (*see* §34.05[B]).

13. *See, e.g.*, Runyon v. Paley, 416 S.E.2d 177 (N.C. 1992) (finding intent based on overall circumstances despite absence of express language); Deep Water Brewing, LLC v. Fairway Res. Ltd., 215 P.3d 990 (Wash. Ct. App. 2009) (same). *See also* PCS Phosphate Co., Inc. v. Norfolk Southern

Corp., 559 F.3d 212 (4th Cir. 2009) (finding intent based on "language and purpose" of restriction).

14. *But cf.* Charping v. J.P. Scurry & Co., 372 S.E.2d 120 (S.C. Ct. App. 1988).

15. Caullett v. Stanley Stilwell & Sons, Inc., 170 A.2d 52, 54 (N.J. Super. Ct. App. Div. 1961).

16. *See, e.g.*, Deep Water Brewing, LLC v. Fairway Res. Ltd., 215 P.3d 990 (Wash. Ct. App. 2009) (height restriction met "touch and concern" requirement).

17. *See, e.g.*, El Paso Refinery L.P. v. TRMI Holdings, Inc., 302 F.3d 343 (5th Cir. 2002) (covenant not to sue prior owner to recover environmental cleanup costs did not "touch and concern"); Feider v. Feider, 699 P.2d 801 (Wash. Ct. App. 1985) (agreement creating preemptive right to purchase land did not "touch and concern").

18. Eagle Enters., Inc. v. Gross, 349 N.E.2d 816, 819–20 (N.Y. 1976).

19. *See, e.g.*, Davidson Bros., Inc. v. D. Katz & Sons, Inc., 579 A.2d 288 (N.J. 1990) (considering "touch and concern" only as one factor to determine whether a covenant is "reasonable" and thus enforceable).

20. *See, e.g.*, Gallagher v. Bell, 516 A.2d 1028 (Md. Ct. Spec. App. 1986) (endorsing Bigelow standard); Neponsit Property Owners' Ass'n, Inc. v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938) (same); Abbott v. Bob's U-Drive, 352 P.2d 598 (Or. 1960) (same).

21. Harry A. Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. 639 (1914); *see also* Charles E. Clark, Real Covenants and Other Interests Which "Run With Land" (2d ed. 1947).

22. *See, e.g.*, Runyon v. Paley, 416 S.E.2d 177 (N.C. 1992) (covenant restricting land to two residences); Winn-Dixie Stores, Inc. v. Dolgencorp, Inc., 964 So. 2d 261 (Fla. Dist. Ct. App. 2007) (covenant preventing landlord from allowing other tenants to sell groceries in shopping center).

23. *See, e.g.*, Whitinsville Plaza, Inc. v. Kotseas, 390 N.E.2d 243 (Mass. 1979); *see also* 1515–1519 Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp., 43 P.3d 1233 (Wash. 2002) (holding that covenant not to sue does "touch and concern"). *See generally* Susan F. French, *Can Covenants Not to Sue, Covenants Against Competition and Spite Covenants Run with Land? Comparing Results Under the Touch or Concern Doctrine and the Restatement Third, Property (Servitudes)*, 38 Real Prop., Prob. & Tr. J. 267 (2003).

24. *Cf.* Moseley v. Bishop, 470 N.E.2d 773 (Ind. Ct. App. 1984) (covenant to improve and maintain a drainage ditch met test); *see also* Abbott v. Bob's U-Drive, 352 P.2d 598 (Or. 1960) (covenant to arbitrate lease disputes satisfied test).

25. *See, e.g.*, Burton v. Chesapeake Box & Lumber Corp., 57 S.E.2d 904 (Va. 1950) (holding that covenant to insure did not "touch and concern").

26. *Cf.* Eagle Enters., Inc. v. Gross, 349 N.E.2d 816 (N.Y. 1976) (covenant to purchase water did not "touch and concern").

27. *See, e.g.*, Columbia Club, Inc. v. American Fletcher Realty Corp., 720 N.E.2d 411 (Ind. Ct. App. 1999) (covenant to indemnify did "touch and concern"); Gallagher v. Bell, 516 A.2d 1028 (Md. Ct. Spec. App. 1986) (covenant to pay for building street and installing utilities did "touch and concern"); Peyton Building, LLC v. Niko's Gourmet, Inc., 323 P.3d 629 (Wash. Ct. App. 2014) (covenant to pay rent did "touch and concern"). *But see* Caullett v. Stanley Stilwell & Sons, Inc., 170 A.2d 52 (N.J. Super. Ct. App. Div. 1961) (covenant requiring grantee to retain grantor to construct dwelling on land did not "touch and concern").

28. *See, e.g.*, Regency Homes Ass'n v. Egermayer, 498 N.W.2d 783 (Neb. 1993); Neponsit Property Owners' Ass'n, Inc. v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938); *cf.* Streams Sports Club, Ltd. v. Richmond, 440 N.E.2d 1264 (Ill. App. Ct. 1982). *But see* Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n, Inc., 652 S.E.2d 378 (N.C. Ct. App. 2007) (covenant to pay "amenity fees" for off-site recreational facilities did not "touch and concern").

29. 170 A.2d 52 (N.J. Super. Ct. App. Div. 1961).

30. Caullett v. Stanley Stilwell & Sons, Inc., 170 A.2d 52, 53 (N.J. Super. Ct. App. Div. 1961).

31. *Id.* at 55. *See also* Fong v. Hashimoto, 994 P.2d 500 (Haw. 2000) (covenant did not run because

promisee did not own benefited land); Garland v. Rosenshein, 649 N.E.2d 756 (Mass. 1995) (same); Shaff v. Leyland, 914 A.2d 1240 (N.H. 2006) (same).

32. Only a few reported decisions have even mentioned "horizontal privity" in recent years. *See, e.g.*, Wykeham Rise, LLC v. Federer, 52 A.3d 702, 714 (Conn. 2012) (finding horizontal privity on facts, but endorsing Restatement critique of doctrine).

33. *See, e.g.*, Whitinsville Plaza, Inc. v. Kotseas, 390 N.E.2d 243 (Mass. 1979).

34. *See, e.g.*, Columbia Club, Inc. v. American Fletcher Realty Corp., 720 N.E.2d 411 (Ind. Ct. App. 1999). *But see* Feider v. Feider, 699 P.2d 801 (Wash. Ct. App. 1985) (easement relationship insufficient because covenant did not relate to easement); Bremmeyer Excavating, Inc. v. McKenna, 721 P.2d 567 (Wash. Ct. App. 1986) (following *Feider* approach).

35. *See, e.g.*, Runyon v. Paley, 416 S.E.2d 177 (N.C. 1992) (conveyance of title); Deep Water Brewing, LLC v. Fairway Res. Ltd., 215 P.3d 990 (Wash. Ct. App. 2009) (easement); Sonoma Dev., Inc. v. Miller, 515 S.E.2d 577 (Va. 1999) (conveyance of title).

36. *See, e.g.*, Moseley v. Bishop, 470 N.E.2d 773 (Ind. Ct. App. 1984) (easement created horizontal privity under "mutual or successive interest" standard).

37. *See, e.g.*, Gallagher v. Bell, 516 A.2d 1028 (Md. Ct. Spec. App. 1986).

38. *But see* Michael Lewyn, *The Puzzling Persistence of Horizontal Privity*, 27 Prob. & Prop. 32 (2013).

39. *See, e.g.*, Moseley v. Bishop, 470 N.E.2d 773 (Ind. Ct. App. 1984); Runyon v. Paley, 416 S.E.2d 177 (N.C. 1992). *But see* Winn-Dixie Stores, Inc. v. Dolgencorp, Inc., 964 So. 2d 261 (Fla. Dist. Ct. App. 2007) (burden of lease covenant ran to landlord's successor despite lack of vertical privity).

40. *See, e.g.*, Bishop v. Rueff, 619 S.W.2d 718 (Ky. Ct. App. 1981).

41. *See, e.g.*, Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938).

42. In jurisdictions that provide equitable remedies for breach of a real covenant, the standard equitable defenses are also available (*see* §34.06[D]).

43. *But see* Lake Arrowhead Community Club, Inc. v. Looney, 770 P.2d 1046 (Wash. 1989) (tax sale did not terminate covenant requiring owner to pay share of costs for neighborhood recreational facilities).

44. Additional defenses may arise in the specialized context of covenants, conditions, and restrictions that regulate residential condominium projects, single-family residential subdivisions, and other "common interest developments" (*see* Chapter 35).

45. *But see* Pocono Springs Civic Ass'n, Inc. v. MacKenzie, 667 A.2d 233 (Pa. Super. Ct. 1995) (because real property cannot be abandoned under Pennsylvania law, owners could not avoid liability for assessments due under covenant by abandoning their lot).

46. *See also* Western Land Co. v. Truskolaski, 495 P.2d 624 (Nev. 1972) (sporadic violations of covenants were insufficient to constitute abandonment); *cf.* Pettey v. First Nat'l Bank, 588 N.E.2d 412 (Ill. App. Ct. 1992) (isolated failures to enforce covenants was not a waiver).

47. Fink v. Miller, 896 P.2d 649, 653 (Utah Ct. App. 1995).

48. *See* Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. Cal. L. Rev. 1353 (1982).

49. *See* Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. Cal. L. Rev. 1177 (1982); A. Dan Tarlock, *Touch and Concern Is Dead, Long Live the Doctrine*, 77 Neb. L. Rev. 804 (1998).

50. The Restatement (Third) of Property: Servitudes would eliminate the "touch and concern" requirement. *But see* Nickerson v. Green Valley Recreation, Inc., 265 P.3d 1108 (Ariz. Ct. App. 2011) (refusing to adopt Restatement approach).

51. *See* Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. Cal. L. Rev. 1177 (1982).

52. Restatement (Third) of Property: Servitudes §2.1.

53. Restatement (Third) of Property: Servitudes §2.1.
54. Restatement (Third) of Property: Servitudes §3.1.

Chapter 34

Equitable Servitudes

§34.01 The Equitable Servitude in Context

The equitable servitude is the primary modern tool for enforcing private land use restrictions. It evolved because the real covenant (*see* Chapter 33) failed to satisfy the need for an effective method of binding successor owners to promises made by their predecessors. In a sense, the equitable servitude is a response to the shortcomings of the real covenant. Yet both doctrines reflect the law's effort to reconcile two opposing policy concerns: individual liberty and efficient use of land (*see* §33.03).

Suppose A owns Redacre and B owns the adjacent parcel Orangeacre; both parcels are undeveloped, mountainous land.[1] A plans to create a vacation subdivision on Redacre where weary city residents can relax in peace. A and B accordingly enter into an agreement whereby B promises that no industrial uses will be permitted on Orangeacre in exchange for a $50,000 payment from A. A develops the subdivision and conveys all the lots to buyers. B then leases Orangeacre to C for a term of 60 years, and C builds a noisy lumber mill on the land. The lot owners (A's successors) cannot enforce the promise against C (B's successor) as a real covenant because both horizontal and vertical privity are missing. And even if the promise could be enforced as a real covenant, the remedy is inadequate: the lot owners could only recover damages, not an injunction to eliminate the noise.

This example illustrates the limitations of the real covenant. The traditional threshold for establishing a real covenant is quite high. As a result, many restrictions—like the A-B effort to prohibit industrial uses—cannot be enforced against successors. And the damages remedy is often inadequate.

The equitable servitude was invented in the nineteenth century to fill this doctrinal vacuum. It is generally easier to enforce a promise as an equitable servitude than as a real covenant because horizontal and vertical privity are not required. Accordingly, a broader range of restrictions can be enforced against successors. For instance, the lot owners in the above example could enforce B's promise against C as an equitable servitude. The usual remedy for violation of an equitable servitude is injunctive relief, which often provides more effective relief than compensatory damages. Here, the lot

owners presumably could obtain an injunction forcing C to eliminate the noise.

The law of equitable servitudes is well-developed and relatively straightforward, at least when compared to the confusion surrounding the real covenant (*see* §33.07). This chapter focuses on the traditional rules that govern equitable servitudes. These rules somewhat overlap with the principles governing real covenants, already discussed in Chapter 33. This area of the law is in transition, because the line between the real covenant and the equitable servitude—once quite clear—has blurred in recent decades. Accordingly, this chapter examines the proposal of the Restatement (Third) of Property: Servitudes to combine the equitable servitude and the real covenant into a single, simplified doctrine.

§34.02 What Is an Equitable Servitude?

[A] Defining the Equitable Servitude

In general, an equitable servitude is a promise concerning the use of land that (1) benefits and burdens the original parties to the promise *and their successors* and (2) is enforceable in equity. Like the real covenant, the equitable servitude is essentially a tool that allows a promise to be enforced by or against a successor party under limited circumstances (*see* §33.02[A]). The same promise might be enforced either as a real covenant (if the plaintiff desires damages) or as an equitable servitude (if the plaintiff seeks an injunction), assuming all requirements are met.[2]

[B] Distinguished from Other Doctrines

Three factors distinguish the equitable servitude from the real covenant. First, the standard for enforcing a promise as an equitable servitude is easier to meet than the parallel standard for a real covenant (*see* §34.04). Second, a broader array of defenses applies to the equitable servitude (*see* §34.06). Finally, the traditional remedy for violation of an equitable servitude is an injunction, not damages (*see* §34.07).

The boundary between the equitable servitude and the negative easement is more difficult to locate. Both might involve a promise to refrain from performing an act on land that is otherwise allowed; injunctive relief may be available if either is breached; and, under the modern view, both are considered interests in land. Thus, under some circumstances, the same promise might be enforced either as an equitable servitude or an easement. However, the elements required to create a valid equitable servitude differ somewhat from those required for an easement, and the available defenses also vary. More fundamentally, the traditional judicial hostility toward negative easements still restricts the scope of that doctrine (*see* §32.12).[3]

§34.03 Evolution of the Equitable Servitude

The equitable servitude was born in *Tulk v. Moxhay*,[4] a landmark 1848 decision of England's chancery court that demonstrated the shortcomings of the real covenant. Tulk conveyed Leicester Square, a privately-owned park in London, to one Elms. Elms promised in the deed to maintain the property "in an open state, uncovered with any buildings."[5] Apparently, Tulk wanted this promise in order to benefit several houses he owned that fronted on the square; it ensured that Tulk's tenants could both use the park as a private, fenced garden and enjoy the view from their houses.

Moxhay eventually acquired title to the square with actual notice of the promise, but claimed that it did not bind him. This conclusion was correct under existing English law. The promise could not be enforced in the law courts as a real covenant against Moxhay, a successor, because no horizontal privity existed between Tulk and Elms, the original parties;[6] in England, only a landlord-tenant relationship created horizontal privity (*see* §33.04[B][5][a]).[7]

Undaunted, Tulk sued in chancery court for an injunction and prevailed. The key to the ruling was that Moxhay had notice of the promise before his purchase. Given this advance notice, the court reasoned, it would be inequitable to permit Moxhay to violate the restriction. "[F]or if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."[8] Otherwise, the court suggested, an original purchaser (like Elms) could buy land at a price that was reduced due to a restrictive promise and then resell the land for a greater price to a successor (like Moxhay) who could freely ignore the promise.

Yet another theme may lurk below the surface of the opinion. Nineteenth-century London was already an urban metropolis where open parkland was rare. Allowing Moxhay to build on the square might be inefficient; it could potentially cause more damage to the value of Tulk's houses than it would increase the value of the square.[9] In this situation, enforcement of Elms' promise against his successor Moxhay promoted productive land use. The traditional concern of the law courts that restrictions would impair

productivity was inapplicable.

§34.04 Creation of an Equitable Servitude

[A] Perspectives on the Equitable Servitude

The law governing equitable servitudes is closely related to the law of real covenants. Thus, two foundational rules—already discussed in connection with the real covenant—apply equally to the equitable servitude. First, it is important to distinguish between the *original parties* to the promise and their *successors* (*see* §33.04). While the original parties are generally bound as a matter of contract law, property law determines whether the burden and benefit of the promise run to their successors.

Second, each equitable servitude has two "sides," just like a real covenant (*see* §33.04). The promisor's duty to perform the promise is known as the *burden*, while the promisee's right to enforce the promise is called the *benefit*. The requirements for enforcement differ, based on the identities of the plaintiff and defendant, as discussed below.

[B] Original Promisee vs. Promisor's Successor: Does the Burden Run?

[1] Requirements for Burden to Run

In order for the burden of an equitable servitude to bind the promisor's successors, American law generally requires that four elements be satisfied:

(1) the promise must be in writing or implied from a "common plan";

(2) the original parties must intend to bind successors;

(3) the promise must "touch and concern" land; and

(4) the successor must have notice of the promise.[10]

Neither horizontal privity nor vertical privity is required.

[2] Promise in Writing or "Common Plan"

Most jurisdictions view the equitable servitude as an interest in land. Thus, as a general rule, a writing that satisfies the Statute of Frauds is required to create an enforceable equitable servitude (*see* §23.04[A][1]). But American courts recognize a special exception to this rule, known as the "common

plan" or "common scheme" doctrine. As discussed below (*see* §34.05[B]), where a developer manifests a "common plan" to impose uniform restrictions on a subdivision, most courts will find implied equitable servitudes even without a writing.

[3] Intent to Bind Successors

The original parties must intend that the promise bind the promisor's successors in order for the burden to run.[11] The law governing intent to bind successors in connection with real covenants (*see* §33.04[B][3]) applies equally here.

[4] Touch and Concern

The burden of the promise must "touch and concern" land in order for an equitable servitude to run, as in the case of a real covenant. Accordingly, the discussion of the "touch and concern" element for real covenants (*see* §33.04[B][4]) is generally applicable here as well.[12] Courts sometimes neglect to list "touch and concern" as an element of the equitable servitude, fueling academic speculation that it is not required. However, these decisions tend to involve situations where the element is clearly met, such that discussion is unnecessary.[13]

Must the benefit of an equitable servitude "touch and concern" land in order for the burden to run?[14] Under English law, an easement in gross—that is, an easement not attached to a dominant tenement—was invalid. Analogizing the equitable servitude to a negative easement, English courts held that the burden of an equitable servitude did not run unless it benefited a specific parcel of land.[15] American courts are divided on the issue.[16] Although the rationale for the English approach does not apply here—because easements in gross are generally accepted in the United States—many jurisdictions insist that the benefit of an equitable servitude "touch and concern" land. Presumably, this approach reflects the policy concern that land use restrictions are potentially inefficient; thus, in order to restrict one parcel, there must be an offsetting benefit to another parcel.

[5] Notice to Successors

In general, the successor must have notice of the promise before acquiring his interest. The celebrated English decision of *Tulk v. Moxhay* (*see* §34.03)

expressly requires notice as an element of the equitable servitude, apparently in all cases. Under the prevailing American view, however, the notice requirement arises indirectly from the state recording statutes, not as a direct element of the equitable servitude.

Broadly speaking, a later purchaser who acquires an interest for value and without knowledge of a prior adverse claim is protected under the recording statutes as a bona fide purchaser (*see* §24.03). For example, suppose that A and B enter into an agreement by which B promises to restrict his land to single-family residential use only. Eventually, X, a bona fide purchaser without notice of the promise, acquires title to B's land. When X begins construction of a shopping center, A seeks an injunction. Even if all the other elements of an equitable servitude are met, A cannot prevail because X took title free and clear of the prior covenant.

The only potential difference between the English and American rules involves the owner who acquires title by gift. A devisee, heir, or other donee cannot qualify for protection as a bona fide purchaser; under the American rule, a donee is bound by a prior promise even without notice. In contrast, *Tulk v. Moxhay* suggests that in England a promise is unenforceable against any successor who lacks notice, whether purchaser or donee.

The notice requirement can be satisfied by:

(1) actual notice,[17]

(2) record notice,[18]

(3) imputed notice, or

(4) inquiry notice (*see* §24.06).

An example of inquiry notice is *Sanborn v. McLean*,[19] where a buyer purchased a home and lot in a residential area, and later started to build a gas station on part of the land. Neighbors sued for an injunction, arguing that the lot had been impliedly restricted to residential use by the subdivider. The Michigan Supreme Court held that the buyer was charged with inquiry notice of the implied promise due to the residential appearance of the neighborhood —the "uniform residence character given the lots by the expensive dwellings thereon."[20]

[6] Example: The "Pornography Restriction"

Suppose A, B, and ten other owners of small businesses in a small resort

town wish to attract vacationing families to the area, and thereby increase their sales revenues. In order to create a “family atmosphere,” they jointly execute a written document titled “Agreement” by which they all promise not to sell or distribute pornography on their respective properties; the Agreement provides that it is intended to benefit and bind all successors and assigns, and is duly recorded. B then leases his bookstore to C for a term of five years. C immediately begins selling pornographic books. Can A enjoin C?

Here, every parcel was both benefited and burdened by the restriction; every owner who agreed to the restriction was both a promisor and a promisee. But because A is seeking to enforce the promise against C, we classify A as the promisee and C as a successor to the promisor. Here, A (the original promisee) can enforce the promise as an equitable servitude against C (the promisor's successor). The burden runs to C because all four requirements are met. The agreement complies with the Statute of Frauds; it manifests a clear intent to bind successors; the burden of the promise does “touch and concern” land because it limits the manner in which successors like C may use the land; and C is charged with notice of the recorded agreement. The lack of horizontal and vertical privity is irrelevant.

[C] Promisee's Successor vs. Original Promisor: Does the Benefit Run?

Suppose the promisee's successor seeks to enforce the promise against the original promisor as an equitable servitude. Now our question is whether the benefit runs. Only three elements are required for the benefit of an equitable servitude to run to successors:

(1) the promise must be in writing or implied from a “common plan” (*see* [B][2], *supra*),

(2) the original parties must intend to benefit successors (*see* [B][3], *supra*), and

(3) the promise must “touch and concern” land (*see* [B][4], *supra*).

Consider again the “pornography restriction” among A, B, and other business owners (*see* [B][6], *supra*). Suppose that after the Agreement is recorded, A sells his business to D; B immediately begins selling pornographic books at his bookstore. Can D (the promisee's successor)

enforce the promise against B (the original promisor)? Here the benefit runs to D because all elements are satisfied: the Agreement meets the Statute of Frauds; the original parties intended to benefit successors; and the promise does "touch and concern" land.

The law increasingly allows persons other than successors to enforce equitable servitudes. The issue arises most commonly in the subdivision context where uniform restrictions are imposed on a deed-by-deed basis, but the subdivider does not expressly promise to restrict all lots. In this setting, courts routinely permit earlier buyers to enforce uniform restrictions against later buyers, even though earlier buyers are not technically successors (*see* §34.05[C]). Some jurisdictions take the further step of allowing any third-party beneficiary to enforce a promise created for his or her benefit, even absent a common plan (*see* §34.05[C]).[21]

[D] Promisee's Successor vs. Promisor's Successor: Do the Burden and the Benefit Both Run?

Suppose that the promisee's successor seeks to enforce the promise against the promisor's successor. In order for this suit to succeed, both the *burden* and the *benefit* must run to successors. Consider the "pornography restriction" example (*see* [B][6], *supra*). Assume that after the Agreement is recorded, A sells his business to D, while B leases his bookstore to C; C begins selling pornographic books. D (the promisee's successor) can enforce the promise against C (the promisor's successor) because the burden (*see* [B][6], *supra*) and the benefit (*see* [C], *supra*) both run.

§34.05 Special Problem: Equitable Servitudes and the Subdivision

[A] Creation of Subdivision Restrictions

Developers of "common interest communities," such as residential subdivisions, typically impose uniform restrictions on every lot in order to protect the long-run desirability of the neighborhood and thereby attract buyers (*see* Chapter 35). Buyer B, for example, is more likely to purchase a home site in developer D's tract Brownacre if all the lots may only be used for single-family residences[22] and related restrictions are imposed. In order for this to occur, all lots in D's subdivision must be both burdened and benefited by uniform restrictions. This allows each lot owner to enforce the restrictions against any other lot owner.

Suppose D wishes to impose uniform restrictions that burden and benefit all lots in Brownacre. Today the process is simple. In most jurisdictions, D need only record a properly-drafted document (commonly called a *declaration*) containing the restrictions (usually called *covenants, conditions, and restrictions* or *CC&Rs*) against all lots in Brownacre before any sales begin. All later lot buyers receiving title through D or his successors are bound by these previously-recorded restrictions.

Yet in the early days of subdivision development—roughly from the late nineteenth century through the mid-twentieth century—quite a different method was utilized. Subdivider S would insert the restrictions into each individual deed. For example, if S's development Silveracre had 100 lots, then S would ensure that all 100 deeds contained the restrictions. But what happened if a developer like S carelessly failed to insert the restrictions into a few deeds? Were those lots bound? And which lots were benefited by the restrictions under this system? In particular, were earlier buyers entitled to enforce the restrictions against later buyers? Over time, a large body of law developed to answer these and similar questions.

[B] Implied Burden: The Implied Reciprocal Covenant and the "Common Plan"

Can an equitable servitude arise by implication? Suppose developer E subdivides a tract of land into 20 lots and proudly advertises that the subdivision "will be a quiet, single-family residential community." Each lot is sold in sequence to a different buyer. The deeds from E to the first 19 buyers all expressly provide: "Buyer promises to use the property only as a single-family residence." However, the deed from E to the last buyer, Buyer 20, contains no such promise. If Buyer 20 starts building a winery on his lot, can the first lot buyer (Buyer 1) secure an injunction? Is lot 20 burdened by the promise?

If Buyer 1 tried to enforce the promise as a real covenant, Buyer 20 would assert a simple defense: it is not contained in a writing that satisfies the Statute of Frauds, and is thus unenforceable. However, because Buyer 1 seeks to enforce the promise as an equitable servitude, a special exception applies.

If a developer manifests a *common plan* or *common scheme* to impose uniform restrictions on a subdivision, most courts conclude that an equitable servitude will be implied in equity.[23] The common plan or scheme is viewed as an implied promise by the developer to impose the same restrictions on all the retained lots.[24] Under this approach, every lot in the subdivision is both burdened and benefited by the restriction. No lot owner may violate the restriction; and any lot owner can enforce the restriction against another.

Here, when E sold the first lot (lot 1) to Buyer 1, the deed contained an express promise restricting lot 1 to single-family use only. Under the majority approach, the common plan is deemed an *implied* promise by E to Buyer 1 that the other lots E still owns at this time (lots 2–20) will be similarly restricted to single-family use. Thus, when later buyers (including Buyer 20) acquire their lots from E, the lots are already impliedly burdened by the promise.

The leading case on point is *Sanborn v. McLean*,[25] where developers apparently intended to create a 91-lot residential subdivision in Detroit. However, presumably due to carelessness, only 53 of the 91 deeds contained express language restricting the lots to residential use. About 20 years later, after houses had been built on all the lots, defendant McLean purchased one of the seemingly unrestricted lots and started to erect a gas station in its back yard. Plaintiff Sanborn and other lot owners brought suit to enjoin the construction. Responding to the defense argument that the restriction did not

appear in the chain of title, the Michigan Supreme Court held that where "the owner of two or more lots ... sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and ... the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold."[26] The *Sanborn* court described these implied restrictions as "reciprocal negative easements" and this rather misleading usage lingers today. A more accurate label would be "implied reciprocal servitudes."[27]

What evidence proves the existence of a common plan? One key factor is the percentage of deeds that contain the restriction. For example, if the restriction is present in only 20% of the subdivision deeds, a common plan is far less likely to be found than if it appears in 95% of the deeds.[28] Other relevant factors include the subdivider's oral representations to buyers; statements in written advertising, sales brochures, or maps given to buyers; and recorded plat maps or declarations.[29]

A minority of jurisdictions—including California[30] and Massachusetts[31]—refuse to imply equitable servitudes from a common plan, usually on the basis that this would violate the Statute of Frauds.

[C] Implied Benefit

Which subdivision lots are benefited by the promise? Suppose S creates a three-lot subdivision and sells the lots in sequence; buyer A buys lot 1 in 2012, buyer B buys lot 2 in 2013, and buyer C buys lot 3 in 2014. S takes care to ensure that each deed contains an express promise from the buyer that the lot is restricted to single-family residential use, which benefits "S, his successors, and assigns." But S does not expressly promise buyers that other lots will be burdened.

Suppose A now starts building an oil refinery on her lot. Both B and C, as successors to S, are entitled to sue, because the 2012 A-S promise expressly benefited S and his "successors." In short, it is simple to explain why a *later* buyer (as a successor to the subdivider) is entitled to sue an *earlier* buyer.

But what happens if an *earlier* buyer sues a *later* buyer? Assume that A and B comply with the promise, but C uses his lot as an oil refinery. A sues C. Note that S no longer owned A's lot in 2014 when the C-S promise was created. Thus, C will argue that the benefit of the C-S promise does not extend to a prior purchaser like A; rather, it extends only to S and his

“successors”—those who bought from S in 2014 or later. In jurisdictions following the “common plan” approach, the answer to the question is straightforward. The existence of the common plan is seen as evidence of the subdivider's intent to benefit all lots.[32] Under this approach, the S-A deed includes an implied promise by S to restrict his remaining lots for the benefit of A.

But what about the minority of states that reject the common plan approach? The Massachusetts solution to this dilemma, inspired by dicta in *Snow v. Van Dam*,[33] stems from contract law: the third-party beneficiary doctrine. The inclusion of an express promise in a later deed (here, the S-C deed) demonstrates the implied intent of the parties to benefit all other lot owners as third-party beneficiaries, including earlier buyers (like A and B).

§34.06 Termination of Equitable Servitudes

[A] Defenses in General

The law provides many defenses to enforcement of an equitable servitude. Foremost among these are (1) anti-discrimination protections and (2) changed conditions, which are discussed in detail below, along with various additional defenses. Four other defenses—release, abandonment,[34] merger, and eminent domain—are discussed in connection with real covenants (*see* §33.05). Defenses with special application to condominiums and other "common interest communities" are discussed in Chapter 35.

[B] Anti-Discrimination Protections

[1] Racial Covenants

In the landmark case of *Shelley v. Kraemer*,[35] the Supreme Court barred the enforcement of racially restrictive covenants on constitutional grounds. The Shelleys, an African-American couple, purchased a Missouri home burdened with a restriction that prohibited occupancy by "any person not of the Caucasian race."[36] Neighboring owners sued for an injunction to force the Shelleys from their home, and won in state court.

The broad question before the Supreme Court was whether judicial enforcement of the restriction was unconstitutional. The Equal Protection Clause of the Fourteenth Amendment provides that no state may deny any person the "equal protection of the laws." For example, a state cannot discriminate among its citizens based on race; if Missouri had enacted a statute that purported to prevent African-Americans from living within its boundaries, the statute would obviously be unconstitutional. But the Equal Protection Clause does not limit purely private action. The case accordingly presented a relatively narrow issue: did judicial enforcement of a private promise constitute enough "state action" to trigger the Equal Protection Clause? The Court answered this question with a clear "yes." "[B]ut for the active intervention of the state courts ... petitioners would have been free to occupy the properties in question without restraint."[37]

The logic of *Shelley* suggests that judicial enforcement of virtually any

land use promise would be considered “state action,” and accordingly limited by the Constitution. But later decisions seem to confine this approach to cases involving racial discrimination. For example, judicial enforcement of a promise barring religious uses is not state action that violates the First Amendment right to the free exercise of religion.[38]

Twenty years after *Shelley*, Congress adopted the Fair Housing Act of 1968, which prohibits discrimination in the sale or rental of housing based on race, color, religion, sex, national origin, familial status, or handicap (*see* §16.02[B][1]). Accordingly, enforcement of a land use promise that causes such a discriminatory effect will violate the Act.

[2] “Single-Family Residence” Covenants and the Group Home

Suppose a restriction limits the use of all subdivision lots to “single-family residences only.” Lot owner A now uses her house as a group home for mentally handicapped children. Can A's neighbors secure an injunction to close the facility? Questions like this have generated extensive litigation in recent years.

Is a group home a “single-family residence”? Courts are divided on the question.[39] For example, the New Mexico Supreme Court held that operating a group home for four unrelated individuals with AIDS was a use for “single-family residential purposes” in *Hill v. Community of Damien of Molokai*.[40] The court reasoned that the purpose of the home was to give residents a “traditional family structure, setting, and atmosphere,” with only limited administrative oversight.[41] Conversely, some decisions conclude that the language of such restrictions demonstrates that the parties intended to exclude group homes.[42]

A growing number of jurisdictions refuse to enforce such “single-family residence” restrictions against group homes on substantive grounds. Some courts reason that interpreting these restrictions to bar group homes is contrary to the public policy that favors integrating disabled individuals into the mainstream of society.[43] Other courts hold that such restrictions violate the Fair Housing Act's bar on discrimination against handicapped persons.[44] Finally, statutes in a few states expressly prohibit enforcement of such restrictions against group homes.[45]

[C] Changed Conditions

[1] Nature of Defense

The most commonly-asserted defense to enforcement of a promise as an equitable servitude is *changed conditions*. This doctrine applies when conditions in the neighborhood have so changed that the intended benefits of the restriction cannot be obtained in a substantial degree.[46] In other words, when there has been such a major change in conditions since creation of the restriction that its continuation "would be of no substantial benefit to the dominant estate,"[47] the restriction is unenforceable.

For example, *El Di v. Town of Bethany Beach*[48] involved a restriction that banned the sale of alcohol. The restriction was originally imposed in about 1900 by a religious organization that planned to develop a 120-acre parcel as a church-affiliated residential community. By the 1980s, however, the area had become the commercial center of a busy tourist resort, and defendant began selling alcoholic beverages at its restaurant. The Delaware Supreme Court refused to enforce the restriction because—given these changed conditions—it no longer benefited other property owners.

Two policy rationales support the changed conditions doctrine. Early courts reasoned that the doctrine implemented the intent of the original parties, and thus served the goal of individual liberty. Presumably, the parties would not intend a promise to continue running after its benefits were eliminated by changed conditions. The second—and more modern—rationale is purely utilitarian. Obsolete restrictions interfere with the productive use of land. If a restriction produces only small benefit to owner A but imposes a large burden on owner B and society in general, it should be terminated in order to allow efficient land use. Otherwise, A could demand an exorbitantly high price in return for releasing a restriction of little real value.

[2] Special Problem: The "Border Lot"

One typical scenario where the defense arises involves the vacant "border lot" in a residential subdivision. Most of these cases present the same factual pattern:

(1) all lots in the subdivision were restricted to residential use at a time when the region was relatively undeveloped;

(2) over time, development of the surrounding area creates traffic,

congestion, noise, and other offensive conditions along the streets that border the subdivision (e.g., the quiet rural road becomes a high-speed, six-lane expressway);

(3) as a result, vacant lots on the border of the subdivision become unsuitable for residential use;

(4) the owner of one or more border lots wants to develop a commercial use; and

(5) when owners of interior lots sue to enforce the restriction, the border lot owner asserts the "changed conditions" defense.[49]

Under the majority view, changed conditions outside a subdivision that affect only border lots do not trigger the doctrine.[50] Courts reason that interior lots continue to receive substantial benefit from the restriction, even if border lots are harmed.[51] "Although commercialization has increased in the vicinity of the subdivision, ... the restrictive covenants ... are still of real and substantial value to those homeowners living within the subdivision."[52] Indeed, maintaining the restriction on border lots creates a buffer zone that protects the interior lots from these adverse conditions. If border lots were freed from the restriction, the next row of lots inside the subdivision would quickly become the new border and their owners would similarly seek to avoid the restriction. In this manner, "all other lots would fall like ten-pins, thus circumventing and nullifying the restriction and destroying the essentially residential character of the entire area."[53]

On the other hand, the defense does apply if changed conditions outside the subdivision are so substantial and widespread that all lots in the subdivision are adversely affected to the point that the benefits of the restriction cannot be realized. For instance, if smoke and fumes from M's nearby smelter constantly pervade a subdivision—rendering all lots unsuitable for residential use—the residential-only restriction is unenforceable. Similarly, changed conditions occurring inside a subdivision may justify use of the doctrine.

[D] Other Defenses

[1] Acquiescence

The plaintiff who ignores violations of a promise by some owners, but

then seeks to enforce the same promise against the defendant, will lose due to acquiescence.[54] Suppose that all five lots in a residential subdivision are burdened and benefited by a restriction that requires all structures to be located at least 40 feet behind the front lot line. The lots are purchased, respectively, by owners A, B, C, D, and E. A, B, and C build their houses within 30 feet of their respective lot lines, and E never objects. If D now builds her house one foot over the line (that is, within 39 feet of the front lot line), E cannot enforce the restriction against her because of acquiescence.

[2] Estoppel

If the plaintiff manifests an intention not to enforce a land use promise, and the defendant reasonably relies on this conduct to his or her detriment, the defense of estoppel is available.[55] For example, suppose owner E in the above hypothetical (*see* [1], *supra*) tells owner D: “Don't worry about the lot line restriction! Build wherever you want.” If D builds her house one foot over the line in reliance on this statement, E is now estopped to enforce the restriction.

[3] Laches

The defense of laches arises when the plaintiff's unreasonable delay in enforcing a promise causes substantial prejudice to the defendant.[56] Suppose owner D starts building her house one foot over the line (*see* [1], *supra*); owner E watches construction progress and never objects. Six months later, D completes her house at a cost of $500,000. If E now tries to enforce the restriction, his suit will be barred by laches.

[4] Relative Hardship

As a general rule, courts traditionally consider the relative hardship to the parties in deciding whether the successful plaintiff will receive an injunction or other equitable relief. The plaintiff is entitled to an equitable remedy only if (among other things) the “balance of the equities” tilts in his or her favor; otherwise, the remedy is damages. Courts are divided about how the relative hardship doctrine should apply to the equitable servitude.[57] Some courts apply the doctrine as usual; they refuse to issue an injunction for breach of an equitable servitude if the resulting harm to the defendant is greater than the resulting benefit to the plaintiff. A court might not issue an injunction forcing D to remove the portion of her house that violates the lot line

restriction (*see* [1], *supra*) simply because the cost to D would vastly outweigh any benefit conferred on E. Other courts modify the doctrine in the equitable servitude context, granting an injunction unless the resulting benefit is substantially outweighed by the resulting harm; and still other courts seem to ignore the doctrine altogether.

[5] Unclean Hands

The doctrine of unclean hands prevents a plaintiff who has violated a promise from seeking to enforce it in equity against another party.[58] If owner E breaches the restriction by building his house over the line (*see* [1], *supra*), and then seeks to enforce the same restriction against owner D, his suit will be barred by unclean hands.

§34.07 Remedies for Breach of Equitable Servitudes

The standard remedy for breach of an equitable servitude is an injunction. For example, if C successfully enforces a residential-only restriction against D's oil refinery, C will obtain an injunction that bars D from operating the refinery in the future.[59] The court might also award incidental compensatory damages to C for the past violation.

What about breach of a covenant to pay money? Here most courts will impose an equitable lien on the affected property, rather than award compensatory damages. If the obligation remains unpaid, the plaintiff may collect by foreclosing on the lien.[60]

§34.08 The Restatement (Third) of Property: Servitudes

[A] General Approach

The Restatement brings the prospect of revolutionary change to the traditional rules governing equitable servitudes, real covenants, and easements.[61] Its overriding theme is simplification of prior law. Thus, the Restatement combines the equitable servitude, the covenant, and the easement into one doctrine: the *servitude*. It establishes a simplified, uniform set of rules for creating, modifying, terminating, and enforcing a servitude.

This approach reflects the policy view that "servitudes are useful devices that people ought to be able to use without artificial constraints."[62] Accordingly, the law should respect the parties' individual liberty to create a servitude, absent unusual circumstances. In addition to making it easier to create a servitude in the first place, the Restatement also makes it easier to modify or terminate a servitude that becomes harmful over time.

But courts have proven reluctant to adopt the major changes that the Restatement advocates.[63] For example, to date no court has embraced the proposal to merge the equitable servitude, the covenant, and the easement into a single doctrine. It remains to be seen whether the Restatement will have a significant impact.

[B] Creation of Servitudes

[1] Basic Requirements

Under the Restatement approach, it is relatively simple to create a valid servitude. In general, a contract or conveyance creates a servitude if three elements are met:

(1) the parties intend to create a servitude;[64]

(2) the servitude complies with the Statute of Frauds;[65] and

(3) the servitude is not illegal, unconstitutional, or violative of public policy.[66]

Historic requirements such as “touch and concern” and horizontal privity are no longer necessary; the vertical privity requirement is greatly weakened; and lack of notice becomes a defense, not a creation element.

The first two elements—intent and compliance with the Statute of Frauds—are generally required under the traditional law governing real covenants and equitable servitudes. The Restatement generally follows the contours of existing law on these points. Thus, for example, intent may be either express or implied from circumstances,[67] and various exceptions to the Statute of Frauds (e.g., change of position based on reasonable reliance) apply.[68]

The third element is novel. It provides a set of specific, narrow rules for screening the substantive validity of servitudes, mainly in place of the cumbersome “touch and concern” standard. The Restatement explains that these rules address “whether allowing the benefits or burdens to run with the land would create such risks of social harm that a servitude should not be permitted.”[69] A servitude that violates a statute or government regulation,[70] or infringes a constitutional right, is invalid. A servitude is also invalid if it violates any one in a long list of specified public policies.[71] For instance, a servitude that imposes an unreasonable restraint on alienation,[72] trade[73] or commerce is unenforceable; and an arbitrary, spiteful, or capricious servitude is similarly invalid.

[2] Special Issues

Which successors are burdened and benefited by a servitude? The Restatement response hinges on the distinction between negative and affirmative covenants. In general, the benefit and burden of negative covenants automatically pass to all subsequent owners or possessors of the benefited and burdened land, just as in the case of easements. This includes lessees, adverse possessors, and persons who acquire title by foreclosure. On the other hand, the benefit and burden of affirmative covenants run only if vertical privity (*see* §33.04[B][6]) exists.[74] Exceptions to this rule are provided for lessees, life tenants, and adverse possessors under certain circumstances.[75]

Servitudes in gross are expressly permitted. However, the beneficiary must demonstrate a “legitimate interest” in order to enforce such a servitude.[76]

[C] Termination or Modification of Servitudes

Over time, a servitude that once performed a useful social function may become harmful. While endorsing the traditional defenses to enforcement of a servitude, the Restatement also enhances the power of courts to modify or terminate harmful servitudes on a case-by-case basis. For example, it provides that a covenant to pay money terminates after a reasonable time if the instrument lacks a termination date or fails to state the total sum due.[77] In the same manner, a covenant to pay money or provide services may be terminated or modified based on undue burden—when the obligation becomes excessive, for instance, in relation to the value received by the burdened estate.[78]

[D] Remedies for Breach of Servitudes

Under the Restatement, a servitude may be enforced by any legal or equitable remedy, including compensatory damages, punitive damages, injunctions, restitution, imposition of liens, or declaratory relief.[79]

---

1. *See generally* Alfred L. Brophy, *Contemplating When Equitable Servitudes Run with the Land*, 46 St. Louis L.J. 691 (2002); Susan F. French, *Highlights of the New Restatement (Third) of Property: Servitudes*, 35 Real Prop., Prob. & Tr. J. 225 (2000).

2. When discussing equitable servitudes and real covenants, it is common to refer to the underlying promise as a "covenant." To avoid confusion with the real covenant, this chapter generally uses the term "promise" or "restriction" in lieu of "covenant."

3. Indeed, if early courts had recognized a wider range of negative easements, there might have been no need for the equitable servitude.

4. 41 Eng. Rep. 1143 (1848).

5. *Id.*

6. Nor could it be enforced as a negative easement, because it did not fall into one of the four categories of negative easements recognized by English courts (*see* §32.12).

7. *See* Spencer's Case, 77 Eng. Rep. 72 (1583).

8. Tulk v. Moxhay, 41 Eng. Rep. 1143, 1144 (1848).

9. Tulk's ownership of nearby houses was essential to the result. As later decisions made clear, the burden of an equitable servitude does not bind successors if the benefit is in gross. *See* London County Council v. Allen, 3 K.B. 642 (1914).

10. *See generally* Sullivan v. O'Connor, 961 N.E.2d 143 (Mass. App. Ct. 2012); McCrann v. Pinehurst, LLC, 737 S.E.2d 771 (N.C. Ct. App. 2013); Runyon v. Paley, 416 S.E.2d 177 (N.C. 1992).

11. *But see* William B. Stoebuck, *Running Covenants: An Analytical Primer*, 52 Wash. L. Rev. 861, 895 (1977) (arguing that reported decisions do not require intent).

12. *See, e.g.*, Runyon v. Paley, 416 S.E.2d 177 (N.C. 1992) (provisions restricting land to residential use and limiting density to two residences did "touch and concern" land).

13. *See* Lawrence Berger, *Integration of the Law of Easements, Real Covenants, and Equitable Servitudes*, 43 Wash. & Lee L. Rev. 337, 362 (1986). *But see* Davidson Bros. v. D. Katz & Sons, 579

A.2d 288 (N.J. 1990) (holding that "touch and concern" is merely one factor in determining the overall reasonableness—and hence enforceability—of a covenant).

14. *See* Christiansen v. Casey, 613 S.W.2d 906 (Mo. Ct. App. 1981).

15. London County Council v. Allen, 3 K.B. 642 (1914).

16. *See, e.g.*, Caullett v. Stanley Stilwell & Sons, 170 A.2d 52 (N.J. Super. Ct. App. Div. 1961) (no).

17. *See, e.g.*, Cheatham v. Taylor, 138 S.E. 545 (Va. 1927).

18. Difficult questions about the scope of record notice are presented where a common grantor (typically a subdivider) conveys multiple lots, but expressly restricts only some of them. *See* Bishop v. Rueff, 619 S.W.2d 718 (Ky. Ct. App. 1981); Sanborn v. McLean, 206 N.W. 496 (Mich. 1925); *see also* §25.07[B][5].

19. 206 N.W. 496 (Mich. 1925).

20. *Id*. at 498.

21. *See generally* Restatement of Property, ch. 46 int. note; *cf.* Rodgers v. Reimann, 361 P.2d 101 (Or. 1961).

22. Extensive litigation explores the meaning of "single-family residence" as used in such restrictions. *See, e.g.*, Hill v. Community of Damien of Molokai, 911 P.2d 861 (N.M. 1996) ("single-family residence" interpreted to include group home where unrelated people live together); *cf.* Groninger v. Aumiller, 644 A.2d 1266 (Pa. Super. Ct. 1994) (restriction limiting structures to "residential purposes" only affected appearance of structure and did not bar commercial uses).

23. *See, e.g.*, Heatherwood Holdings, LLC v. First Comm. Bank, 61 So. 3d 1012 (Ala. 2010); Turner v. Brocato, 111 A.2d 855 (Md. 1955); Evans v. Pollock, 796 S.W.2d 465 (Tex. 1990); Mid-State Equip. Co. v. Bell, 225 S.E.2d 877 (Va. 1976). *Compare* Riverview Comm. Group v. Spencer & Livingston, 337 P.3d 1076 (Wash. 2014) (common plan may arise based on developer's representations and plat even though no deed contained the restriction) *with* New Castle Cnty. v. Pike Creek Recreational Serv., LLC, 82 A.3d 731 (Del. Ch. 2013) (rejecting common plan claim because no deed contained the restriction).

24. *See also* Nelle v. Loch Haven Homeowners' Ass'n, 413 So. 2d 28 (Fla. 1982) (developer's reservation of right to modify restriction did not negate existence of common plan); *but see* Suttle v. Bailey, 361 P.2d 325 (N.M. 1961) (because subdividers reserved right to modify subdivision covenant, it did not run with the land); Patch v. Springfield School Dist., 989 A.2d 500 (Vt. 2009) (insufficient evidence to prove common plan).

25. 206 N.W. 496 (Mich. 1925).

26. *Id.* at 497.

27. *See* Restatement (Third) of Property: Servitudes §2.14.

28. *See, e.g.*, Fong v. Hashimoto, 994 P.2d 500 (Haw. 2000) (no common plan where restrictions burdened only 3 of 15 lots in subdivision); Steinmann v. Silverman, 200 N.E.2d 192 (N.Y. 1964) (no common plan where restriction appeared in 20% of deeds).

29. *See* Warren v. Detlefsen, 663 S.W.2d 710 (Ark. 1984). *See also* Burke v. Pierro, 986 A.2d 538 (N.H. 2009) (language of instrument, conduct of parties, and surrounding circumstances all relevant to existence of common plan). Of course, if the subdivider clearly intends not to impose restrictions on one or more lots, then they cannot be restricted under a "common plan" theory. *See* Schovee v. Mikolasko, 737 A.2d 578 (Md. Ct. App. 1999).

30. Riley v. Bear Creek Planning Comm., 551 P.2d 1213 (Cal. 1976) (requiring writing that satisfies Statute of Frauds); Citizens for Covenant Compliance v. Anderson, 906 P.2d 1314 (Cal. 1995) (same).

31. Sprague v. Kimball, 100 N.E. 622 (Mass. 1913); Snow v. Van Dam, 197 N.E. 224 (Mass. 1935); Houghton v. Rizzo, 281 N.E.2d 577 (Mass. 1972).

32. *But see* Petersen v. Beekmere, Inc., 283 A.2d 911 (N.J. Super. Ct. Ch. Div. 1971) (insufficient evidence of common plan).

33. 197 N.E. 224 (Mass. 1935).

34. For illustrative cases discussing abandonment as a defense to enforcement of an equitable servitude, see B.B.P. Corp. v. Carroll, 760 P.2d 519 (Alaska 1988) (abandonment found where most owners failed to comply with restriction requiring destruction of certain tree species); Fink v. Miller, 896 P.2d 649 (Utah Ct. App. 1995) (abandonment found where roofs on 23 of 81 houses in subdivision violated restriction requiring wood shingles); and Peckham v. Milroy, 17 P.3d 1256 (Wash. Ct. App. 2001) (no abandonment found where violations occurred only at 4 of about 150 houses in subdivision).

35. 334 U.S. 1 (1948).

36. *Id.* at 5.

37. *Id.* at 19. *But see* Conrad v. Dunn, 154 Cal. Rptr. 726 (Ct. App. 1979) (judicial enforcement of ban on radio antennas did not constitute state action in violation of First Amendment right to free speech).

38. *See, e.g.*, Ginsberg v. Yeshiva of Far Rockaway, 358 N.Y.S.2d 477 (App. Div. 1974).

39. *Compare* Blevins v. Barry-Lawrence County Ass'n, 707 S.W.2d 407 (Mo. 1986) (yes), *and* Rhodes v. Palmetto Pathway Homes, Inc., 400 S.E.2d 484 (S.C. 1991) (yes), *with* Omega Corp. v. Malloy, 319 S.E.2d 728 (Va. 1984) (no).

40. 911 P.2d 861 (N.M. 1996).

41. *Id.* at 866.

42. *See, e.g.*, Omega Corp. v. Malloy, 319 S.E.2d 728 (Va. 1984).

43. *See, e.g.*, Crane Neck Ass'n v. New York City/Long Island County Servs. Group, 460 N.E.2d 1336 (N.Y. 1984); Rhodes v. Palmetto Pathway Homes, Inc., 400 S.E.2d 484 (S.C. 1991).

44. *See, e.g.*, Hill v. Community of Damien of Molokai, 911 P.2d 861 (N.M. 1996) (group home for AIDS patients); Rhodes v. Palmetto Pathway Homes, Inc., 400 S.E.2d 484 (S.C. 1991) (group home for mentally-impaired adults).

45. *See, e.g.*, Cal. Health & Safety Code §1569.87 (group home for up to six elderly people deemed single-family residential use); *see also* Hall v. Butte Home Health, Inc., 70 Cal. Rptr. 2d 246 (Ct. App. 1997).

46. *See, e.g.*, Trustees of Columbia College v. Thacher, 87 N.Y. 311 (1882) (invalidating residential-only restriction on land under elevated railway); *cf.* Garland v. Rosenshein, 649 N.E.2d 756 (Mass. 1995) (applying statute which provided that restriction could be enforced only if it provided "actual and substantial benefit" at time of suit to party seeking enforcement).

47. Restatement (Third) of Property: Servitudes §7.10 cmt. c. *See, e.g.*, Bowie v. MIE Props., Inc., 922 A.2d 509 (Md. 2007) (finding "no radical change in the character of the neighborhood so as to defeat the purpose" of the restriction).

48. 477 A.2d 1066 (Del. 1984). In contrast, the changed conditions defense did not succeed against a restriction banning the sale of alcohol in Vernon Township Volunteer Fire Dept., Inc. v. Connor, 855 A.2d 873 (Pa. 2004). *See also* New Castle County v. Pike Creek Recreational Serv., LLC, 82 A.3d 731 (Del. Ch. 2013) (suggesting that economic unfeasibility might justify removing covenant which required owner to operate golf course, based on changed conditions).

49. *See, e.g.*, Camelback Del Este Homeowners Ass'n v. Warner, 749 P.2d 930 (Ariz. Ct. App. 1987); Bolotin v. Rindge, 41 Cal. Rptr. 376 (App. 1964); DeMarco v. Palazzolo, 209 N.W.2d 540 (Mich. Ct. App. 1973); Western Land Co. v. Truskolaski, 495 P.2d 624 (Nev. 1972); Cowling v. Colligan, 312 S.W.2d 943 (Tex. 1958); River Heights Assocs. Ltd. P'ship v. Batten, 591 S.E.2d 683 (Va. 2004); *cf.* Pettey v. First Nat'l Bank, 588 N.E.2d 412 (Ill. App. Ct. 1992).

50. *See, e.g.*, Western Land Co. v. Truskolaski, 495 P.2d 624 (Nev. 1972); Cowling v. Colligan, 312 S.W.2d 943 (Tex. 1958). *But see* DeMarco v. Palazzolo, 209 N.W.2d 540, 542 (Mich. Ct. App. 1973) (invalidating restriction on border lots but requiring that "green belt or fence area" be established to protect interior lots); Restatement (Third) of Property: Servitudes §7.10 (allowing court to modify servitude if changed conditions render servient estate unsuitable for any use permitted by the servitude, even if servitude still benefits dominant estate).

51. *See, e.g.*, Morris v. Nease, 238 S.E.2d 844 (W. Va. 1977). Of course, this rule creates the risk of a "holdout." Even if 99 lot owners in a 100-lot subdivision agree the public interest is served by allowing non-residential use, the remaining lot owner seemingly holds veto power. *Cf.* Rick v. West, 228 N.Y.S.2d 195 (Sup. Ct. 1962).

52. Western Land Co. v. Truskolaski, 495 P.2d 624, 626 (Nev. 1972).

53. Cowling v. Colligan, 312 S.W.2d 943, 946 (Tex. 1958). *See also* River Heights Assocs. Ltd. P'ship v. Batten, 591 S.E.2d 683 (Va. 2004) (residential-only restriction upheld where "there have been no changes within the ... Subdivision other than the aging of homes and the maturing of trees").

54. *See* Morris v. Nease, 238 S.E.2d 844 (W. Va. 1977) (recognizing rule).

55. *See, e.g.*, Peckham v. Milroy, 17 P.3d 1256 (Wash. Ct. App. 2001).

56. *See, e.g.*, Pettey v. First Nat'l Bank, 588 N.E.2d 412 (Ill. App. Ct. 1992); Peckham v. Milroy, 17 P.3d 1256 (Wash. Ct. App. 2001).

57. *Cf.* Gaskin v. Harris, 481 P.2d 698 (N.M. 1971); Mohawk Containers, Inc. v. Hancock, 252 N.Y.S.2d 148 (Sup. Ct. 1964).

58. *But see* Pietrowski v. Dufrane, 634 N.W.2d 109 (Wis. Ct. App. 2001) (plaintiff did not have unclean hands because her breach was "technical or slight" compared to defendants' breach).

59. *See id.* (upholding injunction that required defendants to destroy garage built in violation of restriction).

60. *Cf.* Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938) (action to foreclose lien).

61. *See* Susan F. French, *Highlights of the New Restatement (Third) of Property: Servitudes*, 35 Real Prop., Prob. & Tr. J. 225 (2000); James L. Winokur, *Ancient Strands Rewoven, or Fashioned out of Whole Cloth?: First Impressions of the Emerging Restatement of Servitudes*, 27 Conn. L. Rev. 313 (1994).

62. Restatement (Third) of Property: Servitudes, ch. 2 intro. note.

63. *See* Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle?: The Disintegration of the Restatement of Property*, 79 Brook. L. Rev. 681, 694 (2014) (noting that "courts have largely ignored the reforms urged by the Restatement (Third) of Servitudes and have instead continued to apply the 'outmoded' common law in determining when servitudes run with the land").

64. Restatement (Third) of Property: Servitudes §2.1.

65. Restatement (Third) of Property: Servitudes §2.1.

66. Restatement (Third) of Property: Servitudes §3.1.

67. Restatement (Third) of Property: Servitudes §2.2 cmt. b.

68. Restatement (Third) of Property: Servitudes §2.9.

69. Restatement (Third) of Property: Servitudes §3.1 cmt. a.

70. *Cf.* Rhodes v. Palmetto Pathway Homes, Inc., 400 S.E.2d 484 (S.C. 1991).

71. Restatement (Third) of Property: Servitudes §3.1.

72. *Cf.* Procter v. Foxmeyer Drug Co., 884 S.W.2d 853 (Tex. Ct. App. 1994).

73. *Cf.* Davidson Bros. v. D. Katz & Sons, 579 A.2d 288 (N.J. 1990).

74. Restatement (Third) of Property: Servitudes §5.2.

75. Restatement (Third) of Property: Servitudes §§5.3–5.5.

76. Restatement (Third) of Property: Servitudes §8.1.

77. Restatement (Third) of Property: Servitudes §7.12(1).

78. Restatement (Third) of Property: Servitudes §7.12(2).

79. Restatement (Third) of Property: Servitudes §8.3.

barbri

Review

New York State Bar Review - 2007

Outlines:

PERSONAL PROPERTY
REAL PROPERTY
CONSTITUTIONAL LAW
NEW YORK TRUSTS
NEW YORK WILLS

III. FIXTURES

A. IN GENERAL

A "fixture" is a chattel that has been so affixed to land that it has ceased being personal property and has become part of the realty. For example, S and B contract to sell and buy a house. Before vacating, S removes a "built-in" refrigerator. B claims that the item was "part of the house." Is the refrigerator a "fixture"? If so, B is entitled to its return or appropriate compensation.

It is important in dealing with "fixture" problems to distinguish between ***common ownership*** cases and ***divided ownership*** cases. Courts treat them differently even though they often purport to apply the same tests. "Common ownership" cases are those in which the person who brings the chattel onto the land owns both the chattel and the realty (*e.g.*, X installs a furnace in her own home). "Divided ownership" cases are either ones where the person who owns and installs the chattel does not own the land (*e.g.*, T installs a furnace in her rented home, which belongs to L); or the person owns the land but does not own the chattel (*e.g.*, it is subject to a security interest held by the seller). In addition, there are cases involving more than two persons (*e.g.*, conflicting claims are made by the person having a security interest in the chattel and the mortgagee of the land).

B. CHATTELS INCORPORATED INTO STRUCTURE ALWAYS BECOME FIXTURES

In both common ownership and divided ownership cases, where the items become incorporated into the realty so that they lose their identity, they become part of the realty. Examples include bricks built into a building or concrete poured into a foundation. Similarly, where identification is possible, but removal would occasion considerable loss or destruction, the items are considered fixtures, *e.g.*, heating pipes embedded in the wall or floor of a house.

C. COMMON OWNERSHIP CASES

1. Annexor's Intent Controls in Common Ownership Cases

In all common ownership cases where a chattel is not incorporated into a structure, whether an item is a "fixture" (*i.e.*, part of the realty) depends upon the ***objective intention*** of the party who made the "annexation." This intention is determined by considering:

(i) The ***nature of the article*** (*i.e.*, how essential the item is to normal use of the premises);

(ii) The ***manner in which it is attached*** to the realty (the more substantially attached, the more likely it was intended to be permanent);

(iii) The ***amount of damage*** that would be caused by its removal; and

(iv) The ***adaptation*** of the item to the use of the realty (*e.g.*, custom window treatments, wall-to-wall carpet).

a. Constructive Annexation

In some cases, an article of personal property is considered a fixture even though it is not physically annexed to the real estate at all. This is because it is so ***uniquely adapted*** to the real estate that it makes no sense to separate it. Examples include the keys to the doors of a house; curtain rods that have been cut and sized to the brackets on the walls of a house, even if the rods themselves are not presently installed; and a carpet that has been cut to fit an unusually shaped room, even if the carpet is not nailed or glued in place.

b. Vendor-Purchaser Cases
The typical situation is where the owner of land affixes chattels to the land and subsequently conveys the land without expressly providing whether the chattels are to pass with the realty. The intention test works fairly well. The question boils down to whether an owner bringing the disputed chattel to the realty would intend that it become part of the realty. Or to put it another way, ***whether a reasonable purchaser would expect*** that the disputed item was part of the realty.

c. Mortgagor-Mortgagee Cases
The intention test is universally applied to determine whether the owner (mortgagor) intended the chattels to become "part of the realty." Where the mortgagor has made the annexation ***prior*** to the giving of the mortgage, the question is what the "reasonably objective" lender expects to come within the security of her lien. However, where the annexation is made ***after*** the giving of the mortgage, the same considerations arguably should ***not*** apply because each item that is "added" to the lien of the mortgage represents a ***windfall*** to the mortgagee should foreclosure occur. Nevertheless, courts universally apply the same intention test regardless of when the annexation was made. (Courts also usually apply the intention test where items are annexed by one in possession of land under an ***executory contract*** to purchase.)

2. Effect of Fixture Classification

a. Conveyance
If a chattel has been categorized as a fixture, it is part of the real estate. A conveyance of the real estate, in the absence of any specific agreement to the contrary, passes the fixture with it. The fixture, as part of the realty, passes to the new owner of the real estate.

b. Mortgage
To the extent that the owner of the real estate mortgages the realty, in the absence of an agreement to the contrary, the mortgage attaches to all fixtures on the real estate.

c. Agreement to Contrary
Even though the concept of fixtures may apply and a chattel becomes a fixture, an agreement between a buyer and seller (similarly, between a mortgagor and mortgagee) can cause a severance of title. For example, a buyer and seller may agree that the seller will retain the right to remove fixtures. Similarly, a mortgagor and mortgagee can agree that the mortgage lien shall not attach to specified fixtures. The effect of such an agreement is to de-annex, so far as relevant, the chattel from the realty and reconvert the fixture into a chattel.

D. DIVIDED OWNERSHIP CASES

In divided ownership cases, unlike the ones just discussed, the chattel is owned and brought to the realty by someone who is not the landowner (*e.g.*, a tenant, a licensee, or a trespasser). The question is whether the ownership of the chattel has passed to the landowner. Courts often say that the intention test (C.1., *supra*) is to be applied in these cases too. But the exceptions disprove the rule.

1. Landlord-Tenant
Early English law favored the landlord. However, American law created a trade fixtures exception under which tradesmen-tenants could remove an item that otherwise would have been a "fixture." Later, this exception was expanded to include all tenants generally. Some courts have treated the trade fixtures exception as consistent with the annexor's-intention test; *i.e.*, a tenant's annexations are removable because "it was not the intention of the tenant to make them permanent annexations to the freehold and thereby donations to the owner of it."

a. Agreement
An agreement between the landlord and tenant is controlling on whether the chattel annexed to the premises was intended to become a fixture. To the extent that the landlord and tenant specifically agree that such annexation is not to be deemed a fixture, the agreement controls.

b. No Intent If Removal Does Not Cause Damage
In the absence of an express agreement to the contrary, a tenant may remove a chattel that he has attached to the demised premises as long as the removal does not cause substantial damage to the demised premises or the virtual destruction of the chattel. In other words, the tenant will ***not*** have manifested an intention to permanently improve

the freehold (and the concept of fixtures will be inapplicable) as long as the removal of the chattel does not cause substantial damage to the premises or the destruction of the chattel.

c. **Removal Must Occur Before End of Lease Term**
Generally, a tenant must remove his annexed chattels before the termination of his tenancy or they become the property of the landlord. If the duration of the tenancy is indefinite (*e.g.*, tenancy at will), the removal must occur within a reasonable time after the tenancy terminates. Similarly, a tenant has a reasonable time for removal if he holds over during unsuccessful negotiations for a new lease.

d. **Tenant Has Duty to Repair Damages Resulting from Removal**
Tenants are responsible for repairing damages caused by removal of "fixtures."

2. **Life Tenant and Remainderman**
The same rules should apply here as in the landlord-tenant cases. Historically, however, results have been more favorable to the remaindermen (or reversioners). Apart from statute, the removal privilege has been unrealistically limited to the duration of the term.

3. **Licensee and Landowner**
Licenses to bring items onto land usually contain agreements respecting removal. In the absence of agreement, licensees are permitted to remove the items subject to a duty to repair damages caused thereby.

4. **Trespasser and Landowner**
Trespassers (*e.g.*, adverse possessors before the running of the statute of limitations) normally lose their annexations whether installed in good faith or not. Moreover, the trespasser can be held liable for the reasonable rental value of the property on which she annexed the item.

a. **Trespasser's Recovery Limited to Value Added to Land**
Some courts allow a good faith trespasser to recover for the improvement, but the recovery is measured by the value added to the land, not the cost to construct the improvement.

E. THIRD-PARTY CASES

Any of the foregoing cases is complicated by the addition of third-person claimants. The situations can be classified under two headings.

1. **Third Person Claims Lien on Land to Which Chattels Affixed**
Suppose Landowner mortgages her land to Mortgagee. Landowner then leases the land to Tenant, who annexes an item (*e.g.*, a machine) that is a "trade fixture" and thus removable at the end of the term. Landowner defaults before the end of the term, and Mortgagee forecloses. Is the item subject to the lien of the mortgage?

(i) Generally, no. In this situation, the mortgagee has no greater rights than the mortgagor, provided only that the original sufficiency of the security is not impaired (*e.g.*, removal would not substantially damage a building in existence when the mortgage was given).

(ii) The same result occurs where a buyer under an installment land contract leases to a tenant, the tenant makes annexations, and the buyer then defaults. The seller is treated in the same manner as the mortgagee in the first example.

If, in the above example, the land mortgage is made ***after*** the lease and after the tenant has annexed an item that is a "trade fixture" as against the landlord-mortgagor, and, as is usual, the land mortgagee has ***notice*** of the tenant's rights, the mortgagee is in no better position than the landlord-mortgagor. If the mortgagee does not have notice, he wins if the item would have been considered a fixture as between the mortgagee and the mortgagor. (The same result pertains in cases where the landlord ***sells*** the property after the making of a lease.)

2. **Third Person Claims Lien on Chattel Affixed to Land**
Suppose Landowner purchases a furnace from Seller and installs it in her house. She owes a balance on the purchase price of the furnace, and therefore grants Seller a ***security interest*** in the furnace (in accordance with Article 9 of the Uniform Commercial Code). Suppose further that Landowner also executes a ***mortgage*** on her house, to Mortgagee. If Landowner subsequently defaults on her payments, both on the furnace and the house, is Seller or Mortgagee entitled to priority? (Same issue where Landowner ***sells*** the house without mentioning the security interest.)

a. U.C.C. Rules
Normally, the rule is that whichever interest is ***first recorded*** in the local ***real estate records*** wins. (Thus, if the chattel security interest was recorded first, it constitutes "constructive notice" to all subsequent lenders or purchasers.) However, an ***exception*** allows a ***"purchase money security interest"*** in an affixed chattel (here, the interest given Seller to secure payment on the furnace) to prevail even over a ***prior recorded*** mortgage on the land, as long as the chattel interest is recorded ***within 20 days*** after the chattel is affixed to the land. [U.C.C. §9-334]

The document used to record the chattel security interest is known as a ***"fixture filing."*** (This is a separate instrument from the "financing statement," which is required to be filed to perfect the chattel security interest in the first place.)

b. Liability for Damages Caused by Removal
In the above example, if Seller were entitled to priority, she would be entitled to re-move the furnace. However, she would have to reimburse Mortgagee for any ***damages or repair*** necessitated by the removal (but ***not*** for diminution in value of the property due to the lack of a furnace).

EXAMPLES & EXPLANATIONS

Property

Sixth Edition

Barlow Burke and Joseph Snoe

Wolters Kluwer

CHAPTER 7

Fixtures

Most property may be characterized as real property (land and permanent improvements) or personal property (all other property) (tangible personal property in some historical contexts is called chattel). ***Real property*** includes land as well as buildings and other immovable, permanent improvements attached to the land. ***Personal property*** includes a broader range of property, from tangible items such as furniture, cars, books, and machinery, for example, to intangible items such as stock and bonds. The distinction between real property and personal property informs many areas of the law. This chapter explores a hybrid asset: the fixture.

A ***fixture*** is a form of chattel or personal property that, while retaining a separate identity, is so connected to the real property that the law considers it a part of the realty. A furnace, for example, is commonly thought of as a fixture in a house. Other common fixtures in a house would be a dishwasher, light fixtures, bathtubs, and toilets. A fixture thus stands on the definitional border between personal property and real property.

A fixture has three elements, all of which are essential. First, the personal property must be annexed to the realty. ***Annexation*** means attachment to the realty. It may be either actual or constructive. In older cases, this is the most important of all three elements.

Second, it must be adapted or applied to a particular use or purpose beyond itself and made a part of some larger component of or function on the realty. Parts of a heating or cooling system are examples. This second, ***adaptation*** factor has sometimes been absorbed into the first, by a doctrine of constructive annexation. Under this doctrine, although not physically annexed, the item at issue is taken to be essential to the functioning of the property.

Third, there must be an ***intention to annex*** it to the realty. Whose intention controls is the question here. In many American decisions, intention is the most important element of the three-prong test for a fixture. The most cited American case on the subject, Teaff v. Hewitt, 1 Ohio St. 511 (1853), uses the intent of the annexor, actual or inferred from a combination of several factors: the nature of the property annexed, the relation and situation of the annexor, the method of annexation, and the purpose or use of the personal property. The element of intention does not refer to the annexor's subjective mental state; instead, it is the objective intention of a reasonable person acting within the facts and circumstances of the transaction(s) in dispute.

The law of fixtures is context-specific. A theater seat is a fixture, whereas a living room chair is not. A pipe organ is a fixture in a church, but not in a house unless its removal would cause substantial destruction. A woodstove may not be a fixture in an urban residence (where other means of heating are available), but might be in a cabin in the north woods. An air conditioner may well be a fixture in Tucson, but not in Seattle.

What difference does it make that personal property is called a fixture? The consequences can be seen in two situations, the first involving vendors and purchasers of the underlying real property. Absent an agreement to the contrary, a fixture is automatically transferred to the next grantee of the realty. This transfer occurs, then, when the contract of sale and the deed to the real property are silent on the matter. It is said to happen "by operation of law." The best advice for the parties to such a transfer is to agree what will and will not pass with the title to the realty. Otherwise, what a vendor (seller) of property might consider personal property may, upon transfer to a purchaser, become a fixture. If an item is expressly bargained over, and the vendor is given an express right to remove it in a contract of sale, the vendor has a license to enter the property and do so within a reasonable time. In the vendor/purchaser context, that reasonable time is likely to be until the day the

vendor delivers the deed to the property to the purchaser. After that time, the vendor is deemed to have waived his right of removal.

A second situation occurs when the real property is used as security or collateral for repayment of a loan (in a word, "mortgaged"). If the debtor does not pay back the loan, the mortgaged real property may be sold and the sales proceeds used to pay back the loan. The issue arising in this context is whether a particular piece of equipment or attached personal property is part of the collateral securing the loan and can be sold to satisfy the debt. The answer depends on whether the law regards the disputed property as a fixture. Here, again, the issue is context-specific: Personal property alleged to be a fixture, but not necessary to lend its value to the property in order to repay the debt, will likely not be found a fixture. On the other hand, the property necessary to provide security or to attract purchasers to a forced sale of the property will likely be regarded as a fixture.

Examples

Range Removal

1. Vendors executed a contract of sale to sell their house, but had another house on the real property they sold. The second house was rented to a tenant. The contract reserved the right to remove a gas range from the vendor's house. Can the vendors remove an identical stove from the rental house?

Farm Fixture

2. The Farmers and Mechanics Bank holds a mortgage on Fred's farm in a semi-arid region of the country. The farm's fields are watered by a standard irrigation system that has three components: first, lightweight and portable gated pipes of various lengths and diameters, with gates or windows on one side that can be opened or closed and thus regulate the flow of water onto a field; second, riser pipes permanently connecting the gated pipes to underground water pipes buried under the fields; and third, the underground water pipes attached to the water supply. Fred defaults on the repayment of the mortgage loan, and the bank forecloses. At the sale of the farm, will the gated pipes, riser pipes, and underground water pipes be included in the real property and sold as fixtures?

Explanations

Range Removal

1. No. The rental house was presumably sold as a unit, not in discrete parts. What seems important to the purchasers about the rental house is that it is an economic unit for collecting rent money. What is a fixture in one setting (e.g., the main house) may not be so in another (e.g., the rental unit). Here the reservation of the right to remove the stove in the main house is presumed to be exclusive unless the vendors reserve further items in the contract. In this instance, they did not do so.

Farm Fixture

2. The gated pipes are not fixtures. They are portable, are used in the various lengths and diameters needed for irrigation, and can be easily removed without damage to the underground and riser pipes. It is also possible that the risers could be attached to sprinklers, hoses, and other devices, and so the fields could be irrigated in other ways and without the use of the gated pipes. With all these features, these pipes are not fixtures. See Wyoming State Farm Loan Bd. v. Farm Credit Sys. Capital Corp., 759 P.2d 1230 (Wyo. 1988).

   In contrast, the underground water pipes are part of the realty, or at least fixtures, and will remain with the farm. The riser pipes are a closer issue. Since they are permanently attached to the underground water pipes, they likely will be found to be fixtures passing with the farm.

barbri

Review

New York State Bar Review - 2007

Outlines:

PERSONAL PROPERTY
REAL PROPERTY
CONSTITUTIONAL LAW
NEW YORK TRUSTS
NEW YORK WILLS

V. ADVERSE POSSESSION

G. IN GENERAL

Title to real property may be acquired by adverse possession. (Easements may also be acquired by prescription.) Gaining title by adverse possession results from the operation of the statute of limitations for trespass to real property. If an owner does not, within the statutory period, take legal action to eject a possessor who claims adversely to the owner, the owner is thereafter barred from bringing suit for ejectment. Moreover, title to the property vests in the possessor.

H. REQUIREMENTS

1. Running of Statute

The statute of limitations begins to run when the claimant goes adversely into possession of the true owner's land (*i.e.*, the point at which the true owner could first bring suit). The filing of suit by the true owner is not sufficient to stop the period from running; the suit must be pursued to judgment. However, if the true owner files suit before the statutory period (*e.g.*, 20 years) runs out and the judgment is rendered after the statutory period, the judgment will relate back to the time that the complaint was filed.

2. Open and Notorious Possession

Possession is open and notorious when it is the kind of use the usual owner would make of the land. The adverse possessor's occupation must be ***sufficiently apparent*** to put the true owner on ***notice*** that a trespass is occurring. If, *e.g.*, Water Company ran a pipe under Owner's land and there was no indication of the pipe's existence from the surface of the land, Water Company could not gain title by adverse possession because there was nothing to put Owner on notice of the trespass.

Example: A's use of B's farmland for an occasional family picnic will not satisfy the open and notorious requirement because picnicking is not necessarily an act consistent with the ownership of farmland.

3. Actual and Exclusive Possession

a. Actual Possession Gives Notice

Like the open and notorious requirement, the requirement of actual possession is designed to give the true owner notice that a trespass is occurring. It is also designed to give her notice of the ***extent*** of the adverse possessor's claim. As a general rule, the adverse possessor will gain title only to the land that she actually occupies.

1) Constructive Possession of Part

Actual possession of a portion of a unitary tract of land is sufficient adverse possession as to give title to the whole of the tract of land after the statutory period, as long as there is a ***reasonable proportion*** between the portion actually possessed and the whole of the unitary tract, and the possessor has color of title (*i.e.*, a document purporting to give him title) to the whole tract. Usually, the proportion will be held reasonable if possession of the portion was sufficient to put the owner or community on notice of the fact of possession.

b. Exclusive Possession—No Sharing with Owner

"Exclusive" merely means that the possessor is not sharing with the true owner or the public at large. This requirement does not prevent two or more individuals from working ***together*** to obtain title by adverse possession. If they do so, they will obtain the title as tenants in common.

Example: A and B are next door neighbors. They decide to plant a vegetable garden on the vacant lot behind both of their homes. A and B share expenses and profits from the garden. If all other elements for adverse possession are present, at the end of the statutory period, A and B will own the lot as tenants in common.

4. Continuous Possession

The adverse claimant's possession must be continuous throughout the statutory period. Continuous possession requires only the degree of occupancy and use that the average owner would make of the property.

a. Intermittent Periods of Occupancy Not Sufficient

Intermittent periods of occupancy generally are not sufficient. However, constant use by the claimant is not required so long as the possession is of the type that the usual owner would make of the property. For example, the fact that the adverse possessor is using the land for the intermittent grazing of cattle will probably not defeat continuity if the land is ***normally*** used in this manner.

b. Tacking Permitted

There need not be continuous possession by the same person. Ordinarily, an adverse possessor can take advantage of the periods of adverse possession by her predecessor. Separate periods of adverse possession may be "tacked" together to make up the full statutory period with the result that the final adverse possessor gets title, provided there is privity between the successive adverse holders.

1) "Privity"

Privity is satisfied if the subsequent possessor takes by descent, by devise, or by deed purporting to convey title. Tacking is not permitted where one adverse claimant ousts a preceding adverse claimant or where one adverse claimant abandons and a new adverse claimant then goes into possession.

2) Formalities on Transfer

Even an oral transfer of possession is sufficient to satisfy the privity requirement.

Example: A received a deed describing Blackacre, but by mistake built a house on an adjacent parcel, Whiteacre. A, after pointing the house out to B and orally agreeing to sell the house and land to her, conveyed to B, by a deed copied from her own deed, describing the property as Blackacre. The true owner of Whiteacre argues that there was no privity between A and B because the deed made no reference to Whiteacre, the land actually possessed. Nonetheless, the agreed oral transfer of actual possession is sufficient to permit tacking.

5. Hostile

The possessor's occupation of the property must be hostile (adverse). This means merely that the possessor does ***not have the true owner's permission*** to be on the land. It does not mean anger or animosity. The state of mind of the adverse possessor is irrelevant. By the large majority view, it does not matter whether the possessor believes she is on her own land, knows she is trespassing on someone else's land, or has no idea of who owns the land.

a. If Possession Starts Permissively—Must Communicate Hostility

If the possessor enters with permission of the true owner (*e.g.*, under a lease or license), the possession does not become adverse until the possessor makes clear to the true owner the fact that she is claiming "hostilely." This can be done by explicit notification, by refusing to permit the true owner to come onto the land, or by other acts inconsistent with the original permission.

b. Co-Tenants—Ouster Required

Possession by one co-tenant is not ordinarily adverse to her co-tenants because each co-tenant has a right to the possession of all the property. Thus, sole possession or use by one co-tenant is not adverse, unless there is a clear repudiation of the co-tenancy; *e.g.*, one co-tenant ousts the others or makes an explicit declaration that he is claiming exclusive dominion over the property.

c. If Grantor Stays in Possession—Permission Presumed

If a grantor remains in possession of land after her conveyance, she is presumed to be there with the permission of her grantee. Only the grantor's open repudiation of the conveyance will start the limitation period running against the grantee. Likewise, if the tenant remains in possession after the expiration of her lease, she is presumed to have the permission of the landlord.

d. Compare—Boundary Line Agreements

There is a separate but related doctrine that may be helpful here. It operates where a boundary line (usually a fence) is fixed by agreement of the adjoining landowners, but later turns out not to be the "true" line. Most courts will fix ownership ***as per the agreed line***, provided it is shown that: (i) there was original ***uncertainty*** as to the true line; (ii) the agreed line was ***established*** (*i.e.*, agreed upon); and (iii) there has been ***lengthy acquiescence*** in the agreed line by the adjoining owners and/or their successors.

1) Establishment Requirement

The establishment requirement can be implied by acquiescence. A past dispute is not necessary to show uncertainty, although it can be good evidence of it. But a showing of original uncertainty is required; otherwise, in a court's view, a parol transfer of land would result.

6. Payment of Property Taxes Generally Not Required

Only a minority of states require the adverse possessor to pay taxes on the property. However, in all states, payment of property taxes is good evidence of a claim of right.

C. DISABILITY

1. Effect of Disabilities—Statute Tolled

The statute of limitations does not begin to run for adverse possession (or easements by prescription) if the true owner was under some disability to sue ***when the cause of action first accrued*** (*i.e.*, the inception of the adverse possession). Typical disabilities are: minority, imprisonment, and insanity.

Example: O, the true owner, is five years old when A goes into adverse possession. The statute will not begin to run until O reaches the age of majority.

Compare: O, the true owner, is declared insane six months after A begins using a pathway adversely. The statute is ***not*** tolled because O's disability arose ***after*** the statute began to run.

2. No Tacking of Disabilities

Only a disability of the ***owner*** existing at the time the cause of action arose is considered. Thus, disabilities of successors in interest or subsequent additional disabilities of the owner have no effect on the statute.

Examples: 1) O is a minor at the time A goes into adverse possession of O's land. One year before O reaches the age of majority, O is declared insane. The statute is not tolled by reason of O's insanity (a subsequent disability). Thus, the statute begins to run from the date O reaches the age of majority, whether she is then sane or insane.

2) O, the true owner, is insane when A begins an adverse use. Ten years later, O dies intestate and the land goes to her heir, H, who is then 10 years old. The statute of limitations begins to run upon O's death and is not tolled by H's minority. H's minority is a "supervening" disability and cannot be tacked to O's.

3. **Maximum Tolling Periods**
In some states, the maximum tolling period is 20 years; thus, the maximum period of the statute of limitations would be the regular statute of limitations period plus the maximum 20-year tolling period.

D. ADVERSE POSSESSION AND FUTURE INTERESTS

The statute of limitations does not run against the holder of a future interest (*e.g.*, a remainder) until that interest becomes possessory. Until the prior present estate terminates, the holder of the future interest has no right to possession, and thus no cause of action against a wrongful possessor.

Examples: 1) A devises Blackacre to B for life and then to C. Thereafter, X goes into possession and possesses adversely for the statutory period. X has acquired B's life estate by adverse possession, but has not acquired any interests against C. Of course, if following B's death, X or her successor stays in possession for the statutory period, X will have acquired C's rights also.

2) X enters into adverse possession of Blackacre. Four years later, A devises Blackacre to B for life and then to C. X continues her adverse possession for seven more years. The statute of limitations is 10 years. In this case, X has acquired the whole title by adverse possession. An adverse possession begun against the owner of the fee simple absolute cannot be interrupted by a subsequent division of the estate.

1. **Possibility of Reverter—Statute of Limitations Runs on Happening of Event**
In a conveyance "to A for so long as" some event occurs or fails to occur, on the happening of the event the fee simple determinable automatically comes to an end and the grantor (or his successors) is entitled to present possession. At that point, the grantor has a cause of action to recover possession of the property. If he does not bring the action within the period specified by the applicable statute of limitations (and if A or her successors have the requisite open, notorious, continuous, and adverse possession), his action will be barred.

2. **Right of Entry—Happening of Event *Does Not* Trigger Statute of Limitations**
In the case of a right of entry, on the happening of the stated event the grantor (or his successors) has only a right to reenter the property, a power to terminate the grantee's estate. Until the grantor asserts his right of entry, no cause of action arises because the grantee's continued possession of the land is proper: her fee simple estate has not been terminated. Thus (in most states), the statute of limitations does not operate to bar assertion of a right of entry even though the condition triggering the right of entry has been breached.

   a. **Grantor Must Act Within Reasonable Time to Avoid Laches**
   However, to avoid the title problems that might otherwise be presented, most courts hold that the holder of the right of entry must bring his action within a reasonable time after the event occurs. If he fails to do so, his action is barred by laches. As for what constitutes a reasonable time, many courts look to the statute of limitations governing actions for possession of real property.

E. EFFECT OF COVENANTS IN TRUE OWNER'S DEED

The exact nature of the title obtained depends on the possessor's activities on the land. For example, assume there is a recorded restrictive covenant limiting use of the land to a single-family residence. If the possessor uses the land in violation of that covenant for the limitations period, she takes title free of the covenant. But if she complies with the covenant, she takes title subject to it, and it remains enforceable against her (at least in an equitable action).

F. LAND THAT CANNOT BE ADVERSELY POSSESSED

The statute of limitations does not run against government-owned land (federal, state, or local) or land registered under a Torrens system.

CONCISE HORNBOOKS

PRINCIPLES OF

Property Law

SIXTH EDITION

HERBERT HOVENKAMP
SHELDON F. KURTZ

THOMPSON
WEST

PRINCIPLES OF PROPERTY LAW

Sixth Edition

By

Herbert Hovenkamp
Ben V. & Dorothy Willie Professor of Law
University of Iowa

Sheldon F. Kurtz
Percy Bordwell Professor of Law and Professor of Surgery
University of Iowa

CONCISE HORNBOOK SERIES®

THOMSON
WEST

Mat #40188384

Chapter 4

RIGHTS OF POSSESSORS OF LAND, INCLUDING ADVERSE POSSESSION

Table of Sections

SUMMARY

§ 4.1 Possession and Prior Possession

1. The possession of real property consists of dominion and control over the property with the intent to exclude others.

2. In order to constitute possession, the acts of dominion and control must reasonably correspond to the size of the tract, its condition and appropriate use. The act must be of a character that usually accompany the ownership of similarly situated land. In other words, the acts must be consistent with how a reasonable owner of similar land might have used it.

3. In controversies concerning possession, it is normally the function of the jury to determine what the physical acts of dominion and control were, and then to determine whether those acts constituted possession in accordance with the legal standard set by the court.

4. The prior possessor of real property has title against the whole world except the rightful owner. As with personal property, the "rightful owner" may be merely a prior peaceful possessor.

5. Generally a possessory interest in real property can be conveyed by deed or devised by will. If the possessor dies without a will, the land passes to the possessor's heirs.

6. A prior possessor sues to recover possession from another person who is in possession of the land. This is sometimes called an action in ejectment. The defendant in this action cannot defeat the plaintiff's claim merely by showing that a third party has a title superior to the plaintiff's title unless the defendant's rights derive from that third party.[1]

7. A possessor is entitled to recover damages from a wrongdoer. Courts are divided whether the amount of damages is limited to the value of the possessor's interest or the value of the land. If land is condemned, the possessor may be entitled to receive compensation for the value of the condemned land.

§ 4.2 The Concept of Adverse Possession

1. The doctrine of adverse possession is based on statutes of limitation for recovery of real property. Statutes of limitation operate to bar one's right to recover real property held adversely by another for a specified period of time. These statutes also vest the adverse possessor with as perfect title as if there had been a conveyance by deed. However, this title is not a matter of public record until a court determines that title has been acquired by adverse possession and the court's judgment is entered on the public records. Common statutes of limitation to recover the possession of real property are 5, 10, 15 or 20 years. The purposes of such statutes of limitation are to suppress dormant claims, to quiet titles, to require diligence on the part of the owner and penalize those who sit on their rights too long, and to reward the economic activities of a possessor who is utilizing land more efficiently than the true owner is. Many cases with similar facts but divergent results can be explained by considering which of these policies weighed more heavily in the decision making process.

Statutes vary considerably as to such matters as adverse possession under color of title and not under color of title, types of disability and the effect of a disability in specific instances, and whether or not the statute of limitation may run against governmental entities.

1. See Tapscott v. Cobbs, 52 Va. (11 Grat.) 172 (1854). The action of ejectment is available even though the plaintiff is not the absolute owner of the land but a mere prior possessor.

§ 4.3 The Five Elements of Adverse Possession

1. In order to acquire a title to real property by adverse possession, the possession throughout the statutory period must be:

a. actual;

b. open, visible and notorious (meaning, not secret or clandestine but occupying as an owner would occupy for all the world to see if the owner cared to look);

c. exclusive (meaning sole physical occupancy or occupancy by another with the permission of the person claiming a title by adverse possession);

d. continuous and peaceable (meaning without abatement, abandonment or suspension in occupancy by the claimant, and also without interruption by either physical eviction or action in court. In other words there must be an unbroken continuity of possession for the statutory period); and

e. hostile and under claim of right (meaning that the possession is held against the whole world including the true owner; that the possessor claims to be the owner whether or not there is any justification for her claim, or whether or not there is "color of title" being a paper or other instrument that does not qualify as an effective legal conveyance but that the claimant may believe is effective).[2]

Possession under a mistaken belief that one is the owner of the land can be adverse under the majority view. Likewise, good faith on the part of the adverse possessor is generally deemed immaterial. Thus, the possessor can prevail with no rightful claim at all if the above five elements exist.

2. The five elements must coexist to enable one to acquire title by adverse possession.

3. Whether each of these elements exists is primarily a question of fact.

§ 4.4 Burden of Proof

The burden of proof to establish a title by adverse possession is on the adverse possessor. Generally, this burden can be met by a preponderance of the evidence or, as some courts say, by "clear and positive evidence." Most courts say that possession is presumed to be in subordination and not adverse to the legal owner.

2. In some jurisdictions, however, color of title may be required or, if present, may operate to reduce the time necessary to acquire a title by adverse possession. See Mich. Comp. Laws Ann. § 600.5801 (1987). Color of title may also be used to acquire constructive adverse possession.

§ 4.5 Nature of Title Acquired by Adverse Possession

1. Once a title is acquired by adverse possession, the quality of that title is the same as a title acquired by deed, will or intestate succession. Such a title is good as against the whole world. Of course, to have that title reflected as a matter of public record, it is necessary for it to be reflected in a court judgement. Thus, the possessor might initiate a "quiet title" action to establish the acquisition of title by adverse possession.

2. An adverse possessor cannot acquire a larger estate or interest in the land than that which was claimed throughout the entire period of his adverse possession. For example, if the possessor has claimed only a life estate she can mature title only to a life estate. Likewise, the possessor can acquire no greater title than the person who had the cause of action had during the period of possession. Thus, if the only person who had the right to sue the possessor had a mere life estate, then at the end of the statutory period the possessor acquires only a life estate.

3. A title acquired by adverse possession relates back to the time of the possessor's entry when the true owner's cause of action accrued. Thus, once the title is acquired, the true owner can have no other causes of action against the possessor for acts relating to the land on which the statute has not yet run. For example, if A possesses Blackacre and cuts its timber for the statutory ten year period, once A has acquired title by adverse possession the true owner loses any action for the taking of the timber during the period of A's possession before the statute had run. By contrast, if the true owner had asserted her right before the full running of the statute, she could have had an action for the wrongful taking of the timber as well as the recovery of the land.

4. The title acquired by adverse possession is an original title and not derived from the dispossessed owner. Thus, the adverse possessor takes the title and estate free of all claims which could have been asserted against the former owner during the statutory period.

§ 4.6 When Statute of Limitation Begins to Run

The statutory period on adverse possession begins to run when a cause of action for possession accrues against the adverse possessor.[3] The time when a cause of action accrues depends upon the facts in a particular case. Typically, the cause accrues and the statute begins to run when a possessor without right enters into clearly visible possession of another's land claiming adversely.

3. Generally, the statute of limitation does not run against the holder of a future interest in existence at the time the adverse possession begins because the holder of the future interest is not presently entitled to possession.

§ 4.7 Tacking

1. The period of adverse possession of one possessor can be tacked to the period of adverse possession of another possessor if the possessors are in privity with each other. Privity exists when the possession is passed from one to the other by deed, will, descent, written contract, oral contract, mere oral consent or permission. A mere parol transfer, however, is not sufficient for tacking periods of constructive adverse possession where color of title is required.

2. If the occupants are in privity with each other, the period within which a cause of action can be brought by one person is tacked to the period the cause of action can be brought by another.

3. Tacking also occurs for those entitled to bring a cause of action against an adverse possessor who are in privity with each other. Privity exists when the right to bring a cause of action passes from one to another by deed, will, descent, written contract, oral contract, mere oral consent or permission.

§ 4.8 Effect of Disabilities

1. If the person with the cause of action is under a disability at the time the cause of action against the adverse possessor accrues, most states extend the time to bring the cause of action to some period beyond the removal of the disability. While state laws differ, disabilities typically include minority, legal incompetence, and imprisonment. State laws must be carefully scrutinized to determine what extension is available.

2. Under some but not all statutes, the protection which is afforded by a disability is wholly personal to the disabled person and is not available to anyone who may be a successor, either as heir, devisee or purchaser. In some states, the protection afforded by a disability ends at death but the personal representative of the estate of the person who had the cause of action is granted a fixed time in which to bring the cause of action against the adverse possessor.

3. The running of the statute on adverse possession is not affected by either an intervening or a supervening disability. Thus the disability must exist when the cause of action first begins.

4. There is no tacking of disabilities, whether of successive disabilities in the same owner or of disabilities in successive owners.

5. If the original owner has two or more disabilities at the time the cause of action accrues, the owner may take advantage of the disability which lasts the longest.

§ 4.9 Constructive Adverse Possession

1. Constructive adverse possession applies only when the adverse possessor enters under color of title. Color of title means a writing which the adverse possessor may believe conveys a good title but really is so defective that it cannot operate as a conveyance.

Constructive possession is a fiction by which an actual possession of a portion of land is extended to include the remaining area of the tract encompassed within the instrument or decree constituting color of title. For constructive adverse possession there must be an actual possession by the claimant of at least a part of the land. The amount of land that can be constructively possessed must be reasonable in size.

2. While the recording statutes have no application to title by adverse possession, some states require the recording of the instrument upon which the claim is based in order to satisfy the requirements of adverse possession under color of title.

§ 4.10 Rightful Possession Becoming an Adverse Possession

Certain relationships, such as that of co-tenants,[4] give rise to a presumption or inference that the possession of one of the parties is with the permission of, and in subordination to, the rights of the other party or parties. However, if the possessor makes an open disclaimer or repudiation of the title or rights of the other parties, and knowledge of such disclaimer is brought home to them or such disclaimer or repudiation is otherwise implied by law, and the possession and disclaimer is continued for the statutory period, then title will vest in the possessor in derogation of the rights of the others.

§ 4.11 Whose Interests Are Affected

1. The adverse possessor's title does not affect the interest of any person unless that person had a cause of action because of the adverse possession. Thus if there is a severance of the surface and sub-surface when adverse possession starts, adverse possession of the surface does not give a cause of action to the owner of coal under the surface. Similarly, if at the time adverse possession begins the estate is divided into present and future interests, adverse possession of the parcel does not give rise to a cause of action in favor of the reversioner or remainderman. In these two instances the adverse possessor would gain title only to the surface

4. Co-tenants are persons who are concurrently entitled to the possession of real estate. Co-tenants may be tenants in common, joint tenants with right of survivorship, or tenants by the entirety.

in the first situation, and only to a possessory interest in the second.

2. An adverse possession that begins when the title is unified is not affected solely by a subsequent division of the title. Thus, if after adverse possession starts, the rightful owner separates the mineral estate, or creates possessory and future interests, the adverse possession continues to run against all parties, with the adverse possessor ultimately getting a fee simple absolute in the whole unless the owner of the sub-surface starts mining operations or otherwise ousts the adverse possessor, or unless the owners of the future interests effectively assert their titles, which may require filing a law suit.

§ 4.12 Innocent Improver Doctrine

1. Under the doctrine of annexation, improvements to real estate made by a wrongdoer belong to the owner of the real estate.

2. However, where the improvements were made by one who mistakenly believed that he or she owned the land on which the improvements were made, principles of unjust enrichment could compel a court of equity to refuse to quiet title in the improvement in the landowner, absent payment of fair consideration to the "good faith" innocent improver.

§ 4.13 Adverse Possession of Chattels

1. Generally, a thief cannot acquire or transfer title to stolen personal property, even to an innocent purchaser.

2. But title to personal property can be lost by adverse possession. Typically statutes of limitation for adverse possession of chattels run from two to six years.

3. At common law, the statute of limitation began to run when possession became hostile, actual, open, exclusive and continuous, rather than at that point that the goods were stolen or the true owner discovered their location. More recently, it has been held that the statute should begin to run when the true owner discovers or should have discovered the whereabouts of the stolen property.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 4.1 Possession and Prior Possession

PROBLEM 4.1: Blackacre is a large peninsula containing about 1,000 acres, surrounded on three sides by a creek, a bay, and a marsh. S repaired an ancient stone wall which crossed the mouth of the peninsula at S's own expense. S also erected a

gate and a gatekeeper's hut. By these actions S controlled land access to Blackacre. S used the peninsula to graze horses. S later deeded the land to R. R continued to use the land for grazing live stock. D entered the land and R brought an action for ejectment. During the pendency of the action, R died and P, as administrator of R's estate, was substituted as plaintiff. During the trial the court charged the jury as follows:

> If the jury is satisfied from the evidence that S entered upon Blackacre in the year 1850, and is further satisfied that S then made a complete enclosure of the same, and that such enclosure was sufficient to turn and protect stock, and that S actually used this enclosure for such purpose up to the time of the alleged conveyance to R, and that S deeded the same to R, and that the land was subsequently used by R for pasturage, and that the land was suitable for pasturage; and that D entered without any claim of right and subsequent to the completion of said enclosure, and while the said land was being so used by said S prior, and, by said R, after said conveyance, you will find for the plaintiff against such defendant, provided such defendant was occupying the premises at the time of the commencement of this suit.

After a judgment for the plaintiff, defendant appealed, assigning the above instruction as error. Should the judgment be reversed for improper instruction?[5]

Applicable Law: Possession of real property requires acts of dominion and control with an intent to possess and exclude others. It is normally the function of the jury to determine what physical acts of dominion and control were exercised and then to apply the legal standard set by the court as to what acts are sufficient to constitute possession.

Answer and Analysis

Yes. The general principle is that the acts of dominion and control which establish possession must correspond in a reasonable degree with the size of the tract, its condition and appropriate use. The acts must be such as usually accompany the ownership of similar land. The jury decides whether or not the acts relied upon by the plaintiff establish possession, considering the size of the

5. Bradshaw v. Ashley, 180 U.S. 59, 21 S.Ct. 297, 45 L.Ed. 423 (1901), restating the rule in ejectment "that the plaintiff must recover upon the strength of his own title and not upon the weakness of the title of the defendant" and held where the plaintiff proved he was in the actual, undisturbed, and quiet possession of the premises, and the defendant thereupon entered and ousted him, the presumption of title arises from the possession, and, unless the defendant proves a better title in himself, the defendant must himself be ousted.

tract, its particular condition and appropriate use. Under the instruction given, the court invaded the province of the jury by instructing it that certain acts were sufficient to constitute possession. The court should have permitted the jury to decide whether such acts of dominion and control which it found to have taken place were sufficient to comply with legal standards of possession as set forth by the court.

This problem, like the next one, involves a conflict between two possessors. In neither case is the plaintiff claiming a title, other than by some right acquired through possession. Each problem raises the question of what is necessary to constitute possession. The task is to distinguish between a series of trespasses and possession. This is normally the function of the jury under proper guidance from the court. Unless none of the facts is in dispute, and the results are so clear that reasonable minds cannot differ, the jury should determine what the physical facts are, and then apply the standard given by the court. Because the court, instead of the jury, in effect decided that certain acts constituted possession, the judgment should be reversed and a new trial ordered.

PROBLEM 4.2: O was the owner of Blackacre in fee simple.[6] He went on a hunting expedition to Africa. While O was gone A took possession of Blackacre and claimed it as if the owner. Later, A died intestate. P was A's only heir. Prior to P's taking actual possession of Blackacre, D took possession. P sues to recover the possession of Blackacre from D who defends on the basis that O is the rightful owner of Blackacre. May P recover possession of Blackacre from D?[7]

Applicable Law: (a) Prior possession is good against the whole world except the rightful owner. (b) A possessory interest in land descends from the possessor to the heir. (c) A prior possessor, even though having no absolute title, can maintain an action in ejectment. (d) A defendant in an ejectment action cannot set up the right of a third person as a defense. (e) A plaintiff in ejectment must rely on the strength of his own title,

6. Generally land that is owned in fee simple gives the owner an estate or interest of potentially infinite duration. Since the owner cannot live that long, the estate or interest continues in the owner's successors because the estate or interest is alienable, devisable, and descendible. An estate in fee simple absolute is the "highest and best" estate (ownership interest) recognized by the common law. Other forms of fee simple estates include the fee simple determinable and the fee simple on condition subsequent. See Ch. 5.

7. Tapscott v. Cobbs, 52 Va. (11 Grat.) 172 (1854). Accord, Bradshaw v. Ashley, 180 U.S. 59, 21 S.Ct. 297, 45 L.Ed. 423 (1901) (plaintiff who was in prior possession was ousted by defendant even though defendant showed that unrelated third party had titled to the land; plaintiff's prior possession creates presumption of title and defendant cannot defeat plaintiff by showing title in another).

but as against a wrongdoer, prior possession is sufficient. This is no more than a recognition that as against a wrongdoer, prior possession is the equivalent of a good title.

Answer and Analysis

Yes. O is not a party to this lawsuit. Rather, the suit is strictly between two possessors. In such a suit the general rule is that prior possession is good against the whole world except the rightful owner. Furthermore, a possessory interest in land descends from the possessor to the possessor's heir if the possessor dies intestate or to the devisee under the possessor's will if the possessor disposes of the possessory interest in the will. Lastly, a defendant in ejectment cannot set up the right of a third person (*jus tertii*) as a defense.

As between A and D, A is the prior possessor. Upon A's death intestate, A's possessory interest descends to P. P acquires whatever rights A had in the land including the right to possession. This right is sufficient to create the fiction that P is in constructive possession, if not actual possession, of the land at the time D enters. This constructive possession is prior to D's actual possession.[8] P, having prior possession which gives P rights against the whole world except the rightful owner, can eject D. Further, D cannot set up the *jus tertii* (the right of a third person) in defense unless D can show that D is holding under the real owner, O, (in which case D is really asserting a superior right) or D can show that P never did have prior possession by showing that O possessed Blackacre continuously right down to the instant when D took possession (in which case D is disputing P's claim of prior possession). Since neither of these propositions is true, the general rule applies and D has no defense. Of course, O, the real owner, can eject P or D.

A similar rule applies if D had merely trespassed upon the land and caused damage. In this case, P could sue D for the amount of damages to the land. D cannot reduce P's damages to the value of P's possessory interest by showing a superior title in O, for the same reasons that D could not defeat P's right to possession. As against the wrongdoer, P's prior possession is as good as an absolute title.[9]

8. If the rule were otherwise, then upon the death of any mere possessor there would be a scramble for the land rather than an orderly descent to a person claiming under the prior, but now deceased, possessor.

9. See, Rogers v. Atlantic, G & P Co., 213 N.Y. 246, 107 N.E. 661 (1915). Contra, Zimmerman v. Shreeve, 59 Md. 357 (1883), where an action was brought by a tenant for life against a trespasser who cut timber, the court held that the measure of damages should have been restricted to the injury done to the estate of the plaintiff by the trespass of the defendant, in this case the possessory

There is another way to analyze the facts and reach the same conclusion. It is commonly asserted that the plaintiff in ejectment must recover on the strength of his own title and not on the weakness of the defendant's title. As a corollary, however, it also is sometimes stated that the defendant can effectively defend by showing that the title is not in the plaintiff but in a third person. However, an exception to that rule exists when the plaintiff is relying not on title as showing a right to possession but simply on his or her rights as a prior peaceful possessor. Under this rationale, the *jus tertii* defense is unavailable as against a prior peaceful possession. The cases generally agree, regardless of how the *jus tertii* rule is stated.

The rationale stated in the first paragraph above is the better approach and is not inconsistent with the rule that the plaintiff in ejectment must recover on the strength of his own title. As against a wrongdoer or trespasser, the prior peaceful possession of a plaintiff in ejectment is a sufficient and superior title. In ejectment, the question at issue is the right to possession, and peaceful possession is a protected interest.

§ 4.2 *The Concept of Adverse Possession*

PROBLEM 4.3: O was the true owner of Blackacre. A took possession of the land as an adverse possessor. While A was in adverse possession, O conveyed all of O's rights in Blackacre to B. Before A had possessed the land for the statutory period to acquire a title by adverse possession, B sues A in ejectment. May B recover?

Applicable Law: The owner of land in the possession of an adverse possessor can convey title to that land. The grantee will have the right to eject the adverse possessor who has not been in possession long enough to acquire a title by adverse possession.

interest of the tenant in the timber, and not include any injury done to the estate of the remainder.

In Winchester v. City of Stevens Point, 58 Wis. 350, 17 N.W. 3 (1883) the defendant municipality defeated the plaintiff-possessor's suit for damages resulting from negligent flooding caused by defendant. Plaintiff pleaded but failed to prove an absolute title. The effect of the holding was to limit plaintiff to damages for the loss of the possessory interest. This result might have been based upon an unstated concern: that if a true owner ever appeared and full damages had been paid to plaintiff, the municipality would have to pay again. However, under the *Winkfield* doctrine, the municipality having paid plaintiff in full could have had a defense in any action by a true owner. *The Winkfield,* [1902] P. 42 (1901); Comment, Bailment: the Winkfield Doctrine, 34 Cornell L.Q. 615 (1949). See also Berger v. 34th Street Garage, 274 App.Div. 414, 84 N.Y.S.2d 348 (1st Dept. 1948) (bailee can recover full value of goods from negligent third party who then has a defense if he is later sued by the bailor).

Answer and Analysis

B can recover possession from A. At early common law there were two reasons why B should not recover. First, A was in possession and claiming a freehold interest in the land. Therefore, A was seised[10] of the land and no one but A could transfer the fee in the land because there had to be livery of seisin. This was the only way by which a freehold could be transferred. Since O was not seized of the land and had only a right of re-entry, O could not convey the land to B by livery of seisin. Therefore, the early common law judges held that O's deed conveyed no interest to B. Second, O had only a right of re-entry which was a "chose in action." Choses in action were not transferable. Transactions involving these were considered contrary to public policy. Thus, the early common law judges had to hold that O's deed did not transfer to B the chose in action which O held to eject A. The most that it could do was to permit or empower B to sue in O's name to eject A. These are the historical reasons for concluding that B cannot sue A for possession.

Today these reasons are completely obsolete and O is free to convey all of his rights in Blackacre to B, even if those rights include a running cause of action against A for possession. Thus, B can maintain an ejectment action against A.[11]

§ 4.3 The Five Elements of Adverse Possession

PROBLEM 4.4: T owned Blackacre which consisted of a block of land in City K with paved streets on all four sides. T built a church on Blackacre and gave Y Church Corporation (Y) permission to occupy Blackacre for church purposes. This was done for many years.

T died leaving an invalid will devising Blackacre to Y. Thus, as a matter of law, T's estate passed to his heir, H. Nonetheless, following T's death, Y continued to occupy and use the church building in all respects as it had before T's death, conducting services in the building and parking cars around the church building, thus covering the entire block on Sunday. All this was done, however, under the devise in the invalid will.

10. The concept of seisin at the early common law contemplated the coupling of a possessory interest with the obligation to perform certain feudal incidences of tenure to one's overlord. For example, if a person was seised of land, that person was possessed of the land but was also obliged to contribute money to ransom an overlord who had been captured by his enemies.

While the word "seisin" continues to find expression in both statutes and cases in the United States, today, it generally means little more than possession.

11. See generally, Powell on Real Property ¶ 882.

H wrote several letters to Y advising it that T's will was invalid and insisted that Y cease using Blackacre for church purposes. In these letter H stated that if Y continued to occupy the property despite H's objections, it did so with H's permission. Y did not answer H's letters and following T's death continued to use the property for church purposes for a period longer than the statute on adverse possession. H sues Y in ejectment. May H recover notwithstanding Y's defense of title by adverse possession?

Applicable Law: A person can acquire title by adverse possession if the person's possession is (a) actual, (b) open and notorious, (c) exclusive, (d) continuous and peaceable, and (e) hostile and under claim of right for the entire statutory period.

Answer and Analysis

H cannot recover if Y's possession was (a) actual, (b) exclusive, (c) open and notorious, (d) continuous and peaceable, and (e) hostile and under claim of right for the entire statutory period. These five elements are discussed in order. If Y, however, fails to satisfy all five elements, then H can recover. The burden of proof to establish a title by adverse possession is on the possessor.

(a) Actual and exclusive possession requires only that the property be occupied and used as the average owner of similar property would occupy and use it[12] and not necessarily that it be occupied every minute of the day and night.[13] Y seems to have occupied Blackacre during its Sunday services and presumably during perhaps one or two evenings of the week as churches usually do. This is fairly typical occupancy for a church No facts indicate the property was being used by an other person. If, then, Y occupied and used the property as a church and no one else shared such possession, then the church's possession was actual and exclusive.[14]

12. Jarvis v. Gillespie, 155 Vt. 633, 587 A.2d 981 (1991) (adverse possessor must act towards land as an average owner would taking into account the nature of the land).

13. Shilts v. Young, 567 P.2d 769 (Alaska 1977) (person who flew over property, occupied it one day per year, and walked around the boundaries did not establish sufficient possession); ITT Rayonier, Inc. v. Bell, 112 Wash.2d 754, 774 P.2d 6 (1989) (houseboat owner who (1) moored his boat to land; (2) partially constructed and then abandoned a sauna; and (3) failed to object when others moored their boats there as well, did not establish sufficient possession to acquire land by adverse possession).

In some jurisdictions statutes may require specific acts of possession. For example, in Van Valkenburgh v. Lutz, 304 N.Y. 95, 106 N.E.2d 28 (1952), the possessor lost because he did not substantially enclose or cultivate the premises as required by local statutes.

If T occupies land with the permission of A, T's possession can be attributed to A for purposes of A asserting a title by adverse possession against the true owner. See, Taffinder v. Thomas, 119 R.I. 545, 381 A.2d 519 (1977).

14. In Nevells v. Carter, 122 Me. 81, 119 A. 62 (1922) the court held that an owner's son acquired title by adverse possession even as against the owner

The concept of actual use does not mean the property must be put to the highest and best use. Thus, suppose the church had been located on the lot adjacent to Blackacre and Y used Blackacre solely for parking cars. That use could be viewed as sufficient actual use. It would not be necessary to successfully claim a title by adverse possession that the possessor have actually built structures on the property.[15] There are numerous cases in which the actuality requirement is satisfied even though no structures were built on the property and the adverse use consisted of acts such as cultivation, grazing, and the like.

There is some dispute whether the exclusivity requirement can be satisfied if the adverse possessor and persons, other than the owner with the cause of action for possession, use the property. For example, suppose the church was located on land adjacent to Blackacre on the east and used Blackacre as a parking lot only on Sundays and Tuesdays. However, B, the owner of land adjacent to Blackacre on the west, without O's or Y's permission, occasionally used Blackacre when changing the oil in his RV. Here, Y uses the lot but so does B. While all courts agree that at a minimum the exclusivity requirement is not met if the owner and the adverse possessor both use the property,[16] they are divided whether the exclusivity requirement can be satisfied if two possessors independently use the property. The better view, at least when seen through the eyes of courts favorably disposed to the concept of adverse possession, is yes, since O failed to sue for possession in a timely manner and Y used the property as a reasonable owner might do.[17]

(b) Apparently Y continued to use the church property in the same manner it did when T was alive. It seems, therefore, that its possession was open and notorious, visible to everyone in the neighborhood including T's heir, H. The concept of openness, however, does not require that the holder of the cause of action actually have witnessed the adverse use. Rather, the element is met so long as a reasonably diligent owner, had he or she taken the opportunity to look, could have ascertained that the property was being adversely possessed.

(c) The facts seem to say specifically that Y "continued" to use the church as a church for the statutory period unless H's acts of

who invalidly conveyed the property to the son and resided on the property with the son. The court concluded that the owner's occupation was with the permission of the son. Therefore, the son met the exclusivity requirement.

15. See Jarvis v. Gillespie, supra note 12; Houston v. United States Gypsum Company, 652 F.2d 467 (5th Cir. 1981).

16. But see Nevells v. Carter, supra note 14.

17. See Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826 (Alaska 1974).

writing letters to Y Church constituted an interruption. An occupancy of property is continuous and peaceable if it is not interrupted either by physical eviction by another or by the bringing of an action in court for possession of the property. The interruption must be of a kind that had the occupant been the true owner, the act of interruption would have given him a cause of action. The writing of letters by H to Y would not, had Y been the title holder, given it a cause of action against H. Thus, there was no interruption of the possession as a matter of law. Under these facts, Y's possession was continuous and peaceable. The fact that Y did not use the property daily is irrelevant since its intermittent use during the week is entirely consistent with how a church corporation would occupy the land.[18] On the other hand, if the nature of the possession warranted actual possession on a daily basis, a break in the continuity of that possession would result in a cessation of the statute of limitation and any further possession would result in the statute running anew at least, if during the break period, the land was used by the true owner.[19] The continuity requirement is satisfied, however, even though the possessor goes on vacation if that would be consistent with how the true owner would have used the land.

The purpose of the actual, open, exclusive, and continuous requirements is to assure that an inquiring absentee owner would be able to ascertain that someone was possessing his or her land. It is not important that the owner have had actual knowledge of an adverse possession, but only that the owner could have discovered the possession had he or she taken the opportunity to inquire. On the other hand, where an owner has actual knowledge of an adverse claim and fails to timely sue, courts may be more liberal when looking at facts for the purpose of considering whether the possession was actual and open.[20]

(d) If Y Church's corporate mind was to the effect that it was possessing and using Blackacre as the devisee in T's will, whether justified or otherwise, then it was possessing and using Blackacre in its role as owner and not in subordination to any other title or

18. Similarly, if the nature of the land is to encourage seasonal rather than constant use, seasonal use is sufficient to satisfy the requirements of adverse possession. See, e.g., Howard v. Kunto, 3 Wash.App. 393, 477 P.2d 210 (1970) (summer occupancy sufficient to establish "continuous" element of adverse possession since summer occupancy was consistent with how a true owner would have used resort property).

19. See Mendonca v. Cities Service Oil Co., 354 Mass. 323, 237 N.E.2d 16 (1968) (three cessations of use by a gas station of a 24' strip of land and the use of that land by the true owner broke the continuity of the possessor's use).

20. See Houston v. United States Gypsum Company, supra note 15. (While facts of possession were close, owner's attorney had provided possessor with map showing location of property line and evidencing wrongful possession prior to the running of the statute)

owner. It was occupying and holding Blackacre against the whole world, including T's heir, H. Accordingly, Y's possession would be hostile and under claim of right.[21]

The hostility requirement has often proved the most difficult for the courts to apply. One important question is whether the test of hostility is objective or subjective. The better test is the objective test. That test is "whether ... the claimant acted toward the land as if he owned it. [The claimant's] beliefs as to the true legal ownership of the land, [the claimant's] good faith or bad faith in entering into possession, (i.e, whether he claimed a legal right to enter, or avowed himself a wrongdoer), all are irrelevant."[22] The notion that a claim of adverse possession can be defeated merely because the possessor lacked the requisite intent seems wholly inconsistent with the underlying operation of the statute of limitation as it affects the acquisition of title by adverse possession. If A enters O's land and remains in actual, open, exclusive and continuous possession throughout the statutory period and a court were to conclude that O is still entitled to possession because A lacked the requisite intent even though A has been in such possession more than the statutory period, the effect of that judgment is that the statute did not run against O. But if the statute did not run against O then it must not have commenced to run when A entered the land, a conclusion that is preposterous since it suggests that upon A's entry O had no cause of action for possession. Probably, courts that use a lack of the requisite intent to conclude that an otherwise adverse possession does not ripen into title do so because of an inherent dislike of the concept of adverse possession and a repugnance to the notion that a true owner can lose his or her title as a result of the actions of an interloper.[23]

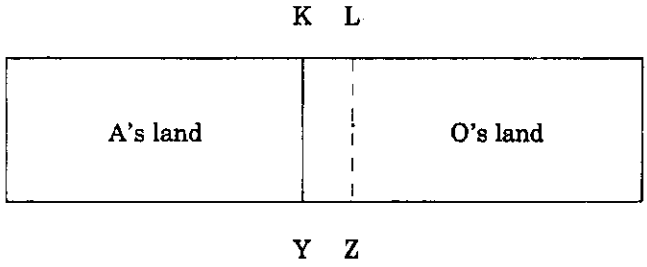
21. The "hostility" requirement is not met if the possessor enters with the permission of the true owner. For example, if a landlord leases property to a tenant, possession of the tenant is not adverse to the landlord because tenant entered with landlord's permission.

Sometimes one who enters *rightfully* remains *wrongfully*. For example, a tenant who remains in possession beyond the term fixed in the lease is a wrongdoer. In this case the landlord may elect to treat the tenant as a holdover or as a wrongdoer (see Ch. 9). If a court were to conclude that the landlord elected to treat the tenant as a wrongdoer and then failed to sue in ejectment prior to the running of the statutory period, the tenant might acquire a title by adverse possession assuming the four other elements were satisfied.

22. Peters v. Juneau–Douglas Girl Scout Council, 519 P.2d 826 (Alaska 1974) (where a claim of adverse possession was made by a 71–year–old Alaskan Tlingit Indian whose possession of property was permissive, the court held his possession was sufficiently hostile under an objective test of hostility); Patterson v. Reigle, 4 Pa. 201 (1846) (affirming title by adverse possession even where the plaintiffs declared that they intended "to leave when the real owner came," but where the statute of limitation expired prior to the owner's appearance).

23. See also Helmholz, Adverse Possession and Subjective Intent, 61 Wash. Univ. L. Q. 331 (1986); Cunningham, Adverse Possession and Subjective Intent: A Reply to Professor Helmholz, 64 Wash. Univ. L. Q. 1 (1986); Helmholz,

PROBLEM 4.5: O owned Blackacre, which was the northeast quarter of a given section of land. A was the owner of the northwest quarter of the same section. These quarter sections had a common boundary line one half mile long determined by the points K and Y, O's land being to the east and A's land being to the west of such line.



By an honest mistake A placed his boundary line fence on a line exactly 6' to the east of the line KY and occupied the strip KLZY strip on O's land for the statutory period. O then had a survey made and discovered that A had wrongfully occupied that strip. A refused to surrender possession of the strip, claiming title by adverse possession. O sued to eject A. At the trial A testified, "I occupied that strip of land because I thought it was mine but I never intended to take the land of anyone else." Following A's testimony, the court directed a verdict for O. Was the court correct?

Applicable Law: One important element of adverse possession is that the possession be hostile and under claim of right. In other words the possessor must have the state of mind to claim against the interest of the true owner. This intention may be proved either by objective acts or by testimony of the adverse possessor as to his subjective intention. Under the better view a possession is adverse although the occupant wrongfully believes that the land is his. In other words, if the actions of the possessor are inconsistent with the rights of the true owner, those actions are sufficient indicia of a hostile intent. There is another view: that the possessor must claim land he or she knows is not his; if the possessor mistakenly believes the land is his or hers and has no intent to claim what is not his or hers, the possessor lacks the requisite hostile intent.[24]

More on Subjective Intent: A Response to Professor Cunningham, id.

24. There are also cases in which the adverse possessor must have a good faith belief that the adversely possessed land was his or her. Absent this good faith belief, title cannot be acquired by adverse possession. See, e.g, Carpenter v. Ruperto, 315 N.W.2d 782 (Iowa 1982);

Answer and Analysis

In most jurisdictions the court would be incorrect[25] although there is a minority view.[26] A possessed the disputed strip honestly, but mistakenly, believing she was in possession of her own land. There is no question that A occupied and used the land as an owner. A's possession was (a) actual, (b) exclusive, (c) open and notorious, and (d) continuous for the statutory period. But did A have the requisite hostility?

Some courts hold that the possessor does not hold adversely unless he intends to hold against the whole world, including the rightful owner, but the really significant fact is that the possessor holds against, and not under or in subordination to, the rights of the legal owner.[27] Under this view the holding is adverse.

A minority of courts following the more subjective test of adverse possession hold that when A testified she did not intend to claim any land but her own, that testimony evidenced that A lacked the requisite hostile intent to claim against O. In many cases of this type the principal issue may be more a question of evidence than of property law. Testimony of the purely subjective intent of the adverse possessor may be circumspect since there is ample motive for coloring the actual intent. The whole case can succeed or fail on a single yes or no to a question as to whether the claimant intended to claim the land irrespective of whether or not it was his. Further, this so-called "Maine" rule creates a heavy incentive to commit perjury, if a (properly briefed) possessor knows that her testimony that she did not intend to claim what was not hers will result in a judgment for the true owner. The Maine rule penalizes the honest, yet mistaken possession, but rewards the possessor who knowingly claims what she knows is not hers. Thus, the view expressed by the Connecticut court is believed the sounder position:

Price v. Whisnant, 236 N.C. 381, 72 S.E.2d 851 (1952).

25. French v. Pearce, 8 Conn. 439 (1831) (where the owner of land bordering on the land of another, through a mere mistake of the place of the dividing line, occupied and possessed as his own a portion of land beyond that line for more than 15 years, there was adverse possession sufficient to establish a title in the possessor because the occupation was presumptive evidence of the true boundary, and the motive of the possessor in taking and retaining possession was immaterial in determining the adverse character of the possession).

26. Preble v. Maine Cent. R. Co., 85 Me. 260, 27 A. 149 (1893) (where a person by mistake occupied for 20 years land not covered by deed, without any intention to claim title to land beyond his actual boundary, title by adverse possession to land beyond the true line was not established because there was no hostile intent to claim title, which is "an indispensable element of adverse possession.... ").

27. Maas v. Burdetzke, 93 Minn. 295, 101 N.W. 182 (1904). A possessor holds against a true owner even though the possessor realizes that if the true owner sues for possession prior to the running of the statute of limitation the true owner will prevail. Patterson v. Reigle, note 22.

> The possession alone, and the qualities immediately attached to it, are regarded. No intimation is there as to the motive of the possessor. If he intends a wrongful disseisin, his actual possession for fifteen years, gives him a title; or if he occupies what he believes to be his own, a similar possession gives him a title. Into the recesses of his mind, his motives or purposes, his guilt or innocence, no inquiry is made. It is for this obvious reason: that it is the visible and adverse possession, with an intention to possess, that constitutes its adverse character, and not the remote views or belief of the possessor.[28]

Many mistaken boundary line cases involve very small encroachments. For example, A and B may be neighbors and A's garage or driveway may encroach on B's land by 3 inches. In such cases it is difficult or impossible to ascertain whether there have been any encroachments without a costly survey. The difficulty with applying the Connecticut rule in these situations is that facts of possession may not have been sufficiently stark to put the true owner on notice that someone was in wrongful possession of his or her land. Recently one court which had adhered to the Maine rule abandoned that rule in favor of the Connecticut rule. However, the court recognized the unfairness to true owners that could result in applying the Connecticut rule to small encroachments. Therefore, it concluded that:

> Generally, where possession of land is clear and unequivocal and to such an extent as to be immediately visible, the owner must be presumed to have knowledge of the adverse occupancy . . .
>
> However, when the encroachment of an adjoining owner is of a small area and the fact of an intrusion is not clearly and self-evidently apparent to the naked eye but requires an on-site survey for certain disclosure as in urban sections where the division line is only infrequently delineated by any monuments, natural or artificial, such a presumption is fallacious and unjustified. . . . Accordingly, we hereby hold that no presumption of knowledge arises from a minor encroachment along a common boundary. In such a case, only where the true owner has actual knowledge thereof may it be said that the possession is open and notorious.[29]

28. French v. Pearce, note 25 at 443. See also: Norgard v. Busher, 220 Or. 297, 349 P.2d 490 (1960) ("possession under a mistaken belief of ownership satisfies the element of hostility of adverseness in the application of the doctrine of adverse possession."); Schertz v. Rundles, 48 Ill.App.3d 672, 6 Ill.Dec. 674, 363 N.E.2d 203 (1977) (possession under mistake may be adverse).

29. Mannillo v. Gorski, 54 N.J. 378, 388–89, 255 A.2d 258, 263–64 (1969). See also Penn v. Ivey, 615 P.2d 1 (Alaska 1980) (property owner who built fence and admitted he did not know where the true line was and suspected

In this type of case, as well as others, where the possessor loses by failing to establish satisfaction of all five elements to acquire a title by adverse possession, there is the possibility of potential unjust enrichment by the true owner where the possessor had improved the property whose possession reverts back to the true owner. At common law, either the improvement inured to the true owner's benefit or the adverse possessor was obligated to remove it. Under the so-called "innocent improver" doctrine, however, either the adverse possessor is entitled to compensation for the value of the improvement or the true owner is required to deed the property on which the improvement was mistakenly made to the possessor.[30] Typically, the possessor must have made an "honest mistake" or otherwise be a person whom the courts believe is entitled to equitable relief from the common-law rule.

§ 4.5 Nature of Title Acquired by Adverse Possession

PROBLEM 4.6: O owned Blackacre. A took possession of Blackacre and held it adversely for more than the statutory period. Thereafter O regained possession of the property and after being in possession for about a month, conveyed it to B who traced the record title and found it to be a perfect chain of title down to O. B had no actual notice or knowledge of A's claim and, of course, nothing on the record disclosed A's title acquired by adverse possession. Immediately after B purchased Blackacre and took possession, A sued B in ejectment. May A succeed?

Applicable Law: Once the adverse possessor has complied with all the requirements for adverse possession for the statutory period, the possessor's title is good against all the world. The recording statutes have no application to a title matured by adverse possession. Thus, the fact that A's title is not a matter of public record does not bar A's claim.

Answer and Analysis

A may successfully sue B in ejectment. This set of facts involves two questions: (a) what is the effect of A's adverse possession for the statutory period and (b) assuming B to be a bona fide purchaser, may B rely on the record of title as against an adverse possessor? A title acquired by adverse possession is good against all the world. It is not merely a defensive weapon if the possessor is sued for possession. It is a substantive title as valid as though the possessor had received the title by deed from O. Further, the title

he might be encroaching, nevertheless acquired property by adverse possession, for fence gave constructive notice to neighbor of an adverse claim).

30. See generally, Somerville v. Jacobs, 153 W.Va. 613, 170 S.E.2d 805 (1969).

relates back to the time of entry and will support an action to recover the land. Thus, A can eject any possessor from Blackacre who does not derive title through A or who does not take title from A by adverse possession.

Even though B facially appears to be a bona fide purchaser who relied on the record, the recording acts have no application to a title acquired by adverse possession. Thus, A prevails notwithstanding that B had no actual knowledge or notice of A's claim because A was not in possession, the records showed O to be the record title holder, and O was in actual possession.

Although a title acquired by adverse possession is as good as an original title, it is not a marketable title until such time as the possessor has the title acquired by adverse possession evidenced by some publicly recorded document.

The title acquired by the adverse possessor relates back to the time of the possessor's initial entry on the property. Thus any other causes of action the true owner had against the possessor resulting from the adverse possession are also extinguished. For example, the possessor, during the period of adverse possession, may have cut trees from the property giving the true owner a damage action. This action also is extinguished if that action in not brought before the running of the statute of limitations on the adverse possession claim.

§ 4.6 When Statute of Limitation Begins to Run

PROBLEM 4.7: In 1970 O, who owned Blackacre, conveyed it to B for life. The deed further provided that upon B's death Blackacre should pass to C. In 1975, A wrongfully entered into possession of Blackacre and remained in possession for the statutory period. B then died and C immediately sues A in ejectment. May C recover?

Applicable Law: An adverse possessor cannot mature title against a remainderman because the remainderman has no cause of action against the adverse possessor until the death of the life tenant.

Answer and Analysis

C can recover Blackacre from A. At the time A entered Blackacre, B had a life estate and C had a vested remainder. Since only B was entitled to possession at the time A entered, A trespassed only on B's right of possession, not on the possession of C. Indeed, C had no right to possess Blackacre until B's death. Therefore, C had no cause of action against A and no statutory period began to run against C. At the end of the statutory period A acquired only B's life estate by adverse possession, which estate ended when B died.

This rule also evidences the principle that the adverse possessor can only acquire that title which the person with a cause of action had. C had no right to possess Blackacre until B died and not until then did C have a cause of action for possession as against A. In order for A to acquire a fee simple title to Blackacre, A will have to adversely possess Blackacre for another statutory period beginning at B's death when C's cause of action against A first accrues. While these rules are onerous to the adverse possessor, they arise because of a concern that it is otherwise inappropriate to penalize C who had no cause of action for possession while B was living. However, a better rule might be to allow A to acquire a title by adverse possession as against both B and C as a result of his possessing the property only during B's lifetime and then allowing C to have a cause of action for waste as against B or B's estate.

If A had entered Blackacre prior to 1970 such that O had a running cause of action against A at the time of the conveyance to B for life, with remainder to C, A would acquire title by adverse possession at the end of the statutory period following the date of actual entry. In this case both B and C would have a cause of action against A passing to them from O at the time of the conveyance of the life estate and remainder interest.

§ 4.7 *Tacking*

PROBLEM 4.8: O owned Blackacre. In a jurisdiction where the statutory period to recover the possession of real property was 20 years, A went into adverse possession of Blackacre and remained in possession for 5 years. A then died intestate. H was A's sole heir. H took possession of Blackacre, remained in possession for the next 3 years and then conveyed Blackacre to M. M remained in possession of Blackacre for 2 years and then died. Under M's will Blackacre was bequeathed to P who took possession of Blackacre for 5 years and then orally conveyed the premises to X. X possessed the premises for 3 years and leased it to L for one year. When the lease was terminated X re-possessed Blackacre. Two weeks later X joined the United States Army. Before leaving for military service, X called D and advised him to take over Blackacre and make the most of it and that X would make no further claim to it. D took possession at X's suggestion and remained in possession for 2 months when D was called to another state on account of her father's serious illness. She went and stayed with her father for 3 months and then returned to Blackacre and remained in possession for more than 3 years. D then called O and said to him: "O, I have decided to abandon Blackacre. It is yours if you want it." D then moved off Blackacre with no intent to return. Who owns Blackacre?

Applicable Law: An adverse possessor can abandon his interest in the land at any time before the statute has fully run. However, in common with record title holders of land, an adverse possessor cannot abandon his interest in the land after the statute has run and the possessor has acquired title to the land.

The interest of one adverse possessor may be tacked to that of another if there is privity between the two. Privity exists between adverse possessors if the interest of one is apparently passed to the other by descent, deed, will, written contract, oral contract, oral gift or by mere oral permission. In general, the passing of the interest need not be legally valid, but it must have some validity in the minds of the parties.

Answer and Analysis

D owns the land. One can abandon an adverse possession which has not yet matured title. But one cannot abandon a fee simple title acquired by conveyance or adverse possession. In this case, assuming that the possession of each occupant was adverse, D had acquired the fee simple to Blackacre and could not abandon it, even to the original owner, O.

This problem involves the issue of "tacking" one adverse possession to another. This can be done provided there is privity between the adverse possessors. Privity exists when the possessory interest of an adverse possessor is passed from one to another by descent, deed, will, agreement oral or written, by oral gift or by mere permission. Thus the descent from A to H, the deed from H to M, the devise from M to P, the oral transfer from P to X, the lease from X to L, and the mere permission from X to D to take possession from X, each constituted privity and permitted the tacking of the adverse possession of each to that of his successor to make up the total period of adverse possession. The periods consisting of 5 years for A, 3 years for H, 2 years for M, 5 years for P, 3 years for X, 1 year for L, 2 more weeks for X, and D's subsequent possession of more than 3 years make up successively more than the 20 year period.

Two questions remain. Did the lease to L break the continuity of possession? Did D's three months visit to her father break the continuity of possession. X's lease to L meant nothing more than that L's possession was the possession of his landlord X for the purpose of adverse possession. Thus, during that year X was still legally in possession as against the owner, O.

D's three months visit to her father's bedside had no effect in the absence of her intention to abandon her possession of Blackacre and no such intention appears. She appears still to be occupying the

property as an owner, since owners often are required to be temporarily absent from their property. These adverse possessions, when tacked to each other making more than the 20 year period required by the statute, make D the owner of Blackacre.

§ 4.8 *Effect of Disabilities*

PROBLEM 4.9: O, age 5, owned Blackacre in 1980 when A took possession adversely. The statute of limitation was 20 years with an added provision that, if the person entitled to bring the cause of action for possession was under a disability at the time the cause of action accrued, such person would have 10 years after the removal of the disability in which to bring the action.[31] How long must A continue in adverse possession against O to acquire a title by adverse possession?

Applicable Law: An adverse possessor cannot claim the benefit of the running of the statute of limitation until the statute of limitation has run against the owner of the property who had a cause of action of possession. All state statutes toll the running of the statute if the person entitled to bring the cause of action at the time it accrues is under a disability. Tolling the statute is inconsistent with one of the two policies underlying the doctrine of adverse possession: to reward the possessor for the possessor's utilization of the property. On the other hand, tolling is justified on the ground that it is inappropriate to penalize persons with a disability who fail to bring their cause of action within the statutory period.[32]

Answer and Analysis

A acquires title in the year 2003 if the age of majority is eighteen[33] and if A continues in actual, open, exclusive, continuous and hostile possession for the next 23 years. O was under a disability at the time of the accrual of the cause of action. Disabilities that arise after the cause of action accrues do not result in any tolling of the statute whether the disability is acquired by the owner at the time of entry or the cause of action passes to another

31. The disability cases in this chapter, except as may be otherwise indicated, are based on a statute which is similar to the following:

> . . . but if a person entitled to bring such action, at the time the cause thereof accrues, is within the age of _____ years, or of unsound mind, or imprisoned, such person, after the expiration of _____ years from the time the cause of action accrues, may bring such action within _____ years after such disability is removed.

32. This argument ignores the fact that persons under a disability are likely to have someone available to represent their interests. For example, minors who own real property are likely to have conservators who are in a position to bring the cause of action for possession.

33. The age of majority is a matter of state law, and commonly varies from eighteen to twenty-one.

who is under a disability. O's disability ceases when O reaches 18 or dies before that time. Assuming O reaches age 18 in 1993, O must bring the action for possession within the next ten years. If O fails to bring the action before 2003, A will acquire a title by adverse possession. If O had not been under a disability in 1980 when O's cause of action accrued, A could have acquired a title by adverse possession in the year 2000.

Suppose O had been 15 in 1980 when A entered. In this case O's disability would end in 1983. Since ten years thereafter is within the initial twenty year period within which to bring a cause of action, A does not acquire a title by adverse possession prior to the year 2000. In other words, a disability can operate to extend the statute beyond the time when it otherwise would have run; it never shortens the time of possession to acquire title by adverse possession even though the disability and the extension period end before the regular statute has run.

The conditions or status constituting a disability depend on the terms of the statute. Common disabilities are minority, legal insanity (non compos mentis) and imprisonment. While at one time, there may have been good justification for extending the statutory period to take account of disabilities, that practice today is open to question if the person with a disability can be represented by a conservator who can initiate a suit against the possessor on the person's behalf.

PROBLEM 4.10: O, age 5, owned Blackacre in 1980 when A entered and took possession adversely. O died in 1992 and Blackacre passed by descent to O's sole heir, H who sued A in 2001 in ejectment to oust A from possession of Blackacre. The statute of limitation on adverse possession in the jurisdiction was 20 years, with an added 10 years after the removal of any disability which existed at the time of the accrual of the cause of action. May H eject A?

Applicable Law: The defense of disability under many statutes is wholly personal to the person who is under a disability at the time of the accrual of the cause of action but may be taken advantage of by the person's estate or successor. A successor to the holder of the initial cause of action, however, cannot claim the benefit of a disability which the successor has. Similarly, an intervening disability of the person who initially had a cause of action in most jurisdictions will not stop the running of the statute, which means there is no tacking of disabilities.

Answer and Analysis

H may eject A because H sued within 10 years after O's disability ended. If O had not died, O's disability would have ended

in 1993 and O (or O's estate or successor of the estate) would have until 2003 to bring a suit for possession. In this problem, O died at age 17 in 1992. Death terminates disabilities. Thus O's successor (who can take advantage of the extension on the intestate's disability) has until 2002 to bring suit. Since H sued in 2001, the suit was timely.

Suppose O was age 10 when A entered and O's disability ended in 1988. In this case O would have had until 2000 to sue A. If O died in between 1988 and 2000 and H was under a disability, that disability would not have resulted in any extension in the running of the statute of limitation for two reasons. First, the defense of disability is personal to the person under disability at the time of the accrual of the cause of action. Second, no intervening disability tolls the running of the statute of limitation. Applying the first principle to the facts discloses that O and O alone can take advantage of the 10 year extended period.[34] If the law were otherwise, then a series of intervening disabilities would prolong for an indefinite period the time during which an adverse possessor would have to hold. Of course, if a statute provided for such protection of intervening disabilities, the statute would be applied according to its terms.

PROBLEM 4.11: O, age 2, owned Blackacre in 1980 at the time A entered and took possession adversely. When O was 5 years of age O was injured in an automobile accident which rendered O mentally incompetent. The statute of limitation provided for a period of 20 years but with an added provision of 10 years after the disability was removed for one who was under a disability at the time of the accrual of the cause of action. When could A acquire a title by adverse possession?

Applicable Law: A supervening disability will not toll the running of the statute. Supervening disabilities refer to more than one disability in the same person whereas intervening disabilities refer to disabilities in different persons. There is no tacking of either intervening or supervening disabilities.

Answer and Analysis

A could acquire a title by adverse possession by 2006. O must bring the action to recover possession of Blackacre before he is 28 years of age if the age of majority is 18. O was under one disability, that of minority, when the cause of action accrued. A disability added later to the one existing at the time of the accrual of the cause of action and affecting the same person is a supervening

34. Of course, since O is under a disability O may have to be represented by a guardian or other representative.

disability. A supervening disability does not stop or affect the running of the statute of limitation. The only disability which provides additional time is the one existing when the cause of action accrues against the wrongdoer. Thus, the disability of insanity or mental incompetency has no effect and O must bring his action within ten years after the minority disability is removed: before O's twenty-eighth birthday.

If O had been both mentally incompetent and a minor when A took possession, O would have ten years after the removal of the longer of the two disabilities to bring his action against A.

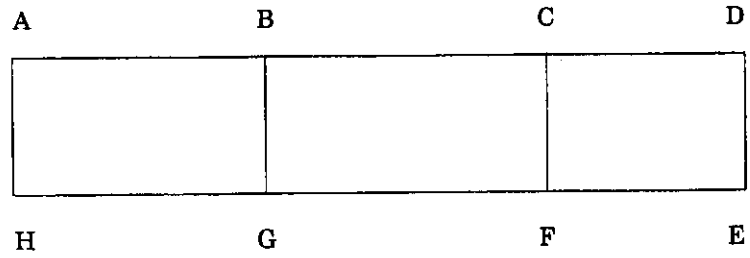
§ 4.9 Constructive Adverse Possession

PROBLEM 4.12: O was the owner of Blackacre, a tract 300' wide and 1,500' long containing approximately 10 acres. O died intestate. X mistakenly thought he was O's sole heir. In fact, H was O's sole heir.

X executed a deed to all of Blackacre to A in fee simple. Under X's deed A took actual possession of the east end of Blackacre comprising an area of 300' by 500'. A built a small house on this property and fenced it. This area is marked "CDEF" on the map below.

Y claimed to own all of Blackacre under an alleged will left by O under which alleged will Y took possession of the west end of Blackacre comprising an area 300' by 500'. This alleged will was invalid and gave Y no title. Y built a small house on this portion of Blackacre and fenced it. This area is marked "ABGH" on the map below.

Between the two areas occupied and claimed by A and Y respectively, was an area 300' by 500' which was the center part of Blackacre. This area is marked "BCFG" on the map below. From this center tract a third person, W, cut a tree. All of these areas are depicted on the following map:



Does either A or Y have a cause of action against W?

Applicable Law: A person who enters under the authority of a written instrument but takes actual possession of only a

portion of the entire area described in that instrument may claim the remainder of the area described in that instrument constructively, if reasonable in size. This is known as constructive adverse possession. Constructive adverse possession must be based on paper title, called color of title, founded on a written instrument. A later constructive adverse possession cannot oust a former constructive adverse possession.

Answer and Analysis

A has a cause of action against W. Y does not have a cause of action against W. It is obvious that upon O's death the title to Blackacre descended to H. This title gave H constructive possession of all of Blackacre.

When A entered Blackacre A trespassed upon H's possession. A entered under a deed which was inoperative for lack of any interest in the property held by the grantor, X. Under a claim based on mere occupancy an adverse possessor can claim no greater area than that which is actually occupied. But under color of title an adverse possessor can claim both the property that is actually occupied as well as the balance of the adjacent property that is described in the instrument that purports to convey title, which is the "color of title" (X's deed in this case), provided this additional area is a "reasonable appendage" to the area actually occupied. Under the doctrine of constructive adverse possession, assuming the obvious, that A's possession is adverse, A took actual possession of the east 3 1/3 acres of Blackacre and took constructive adverse possession of the rest of the tract which was only 6 2/3 acres. This small tract is clearly a "reasonable appendage" to that part that was actually occupied. No definite limitation can be laid down as to the extent of one's constructive adverse possession. This depends on the facts of each case.

When Y took actual possession of the west end of Blackacre covering 300' by 500' and fenced the same, Y ousted A of A's constructive adverse possession of that area. But who possesses the center area from which W cut the tree? The answer is that a subsequent constructive adverse possession cannot oust a former constructive adverse possession. Thus, A's prior constructive adverse possession takes priority over Y's later constructive adverse possession and A not Y constructively possesses the center area of 3 1/3 acres from which W took the tree. W trespassed upon A's land and A, not Y, can recover damages from W.[35]

35. See Ralph v. Bayley, 11 Vt. 521 (1839), where the defendant had actual possession of part of a lot and constructive possession of the whole lot, and the plaintiff chopped timber on that part of the lot in which the defendant had constructive possession while himself claiming constructive possession. The court held that a subsequent constructive pos-

Could A have recovered possession of the westerly portion of Blackacre actually possessed by Y for less than the statutory period on the theory that as the prior constructive adverse possessor A's rights are superior to Y's rights in that land? If A's color of title was sufficient to create a reasonable belief in A's mind that A owned all of Blackacre, it would be inappropriate to penalize A for failure to take actual possession of all of Blackacre which would be the result if Y's rights are superior to A's rights. On the other hand, as between A and Y, the underlying concepts of protecting possessors tends to favor Y. However, if A has sufficient color of title such that, if the true owner (H) were to sue after the running of the statute, a court would conclude that A acquired title by constructive adverse possession, it is hard to hold that color of title insufficient for A to prevail against Y in a suit for possession prior to the running of the statute of limitation. Therefore, it is likely that in a suit between A and Y, A would prevail. If, on the other hand, Y possessed that portion for more than the statutory period, Y would acquire a title to that portion as against all others, including A, by adverse possession.

Of course, any analysis of the respective rights of A and Y would require more information concerning the nature of their respective color of title. For example, if A had only a wild deed[36] but Y claims under the invalid will, a court might conclude that A's claim should be denied. This may be precisely what would happen if the true owner (H) sued A for possession of BCFG after the running of the statute since A's alleged color of title is not sufficiently colorable to sustain a claim for constructive adverse possession.

As noted, to claim constructive adverse possession, the portion of the property not actually possessed must be adjacent to the portion that is actually occupied and both parcels must have the same owner. Suppose O owned three distinct tracts of land, numbered Tracts 1, 2 and 3 and A entered Tract 1 under color of title by an instrument describing Tracts 1 and 3. If Tracts 1 and 3 are separated by Tract 2, A cannot acquire title to Tract 3 by constructive adverse possession. Likewise, if A entered Tract 1 and the deed described adjacent Tracts 2 and 3 but these tracts were owned by O–1 rather than O, A would only acquire title by adverse possession to Tract 1 which A actually possessed. A would not have constructively possessed Tracts 2 and 3 because these tracts were owned by

session cannot defeat a prior constructive possession.

36. A wild deed is a deed from a grantor who has no title or colorable claim to the property described in the deed. For example, if O conveyed the Brooklyn Bridge to B, that would be a wild deed. Likewise, if O owns Blackacre and Y conveys Blackacre to A, that would be a wild deed. See Ch. 17.

O–1 who had no cause of action for possession against A because A possessed no property owned by O–1.

§ 4.11 Whose Interests Are Affected

PROBLEM 4.13: O owned Blackacre in fee simple. O conveyed all the coal beneath Blackacre to B. O gave a mortgage on Blackacre to C, and conveyed to D a right to install and maintain a pipeline through Blackacre three feet beneath the surface. D installed the pipes. A went into adverse possession of Blackacre and held it during the entire statutory period. A sues O, B, C and D to quiet title to Blackacre. Should A succeed as to any of these defendants?

Applicable Law: Title by adverse possession is acquired by a statute of limitation running against a person with a cause of action for possession. Only persons with a possessory interest have a cause of action against an adverse possessor.

Answer and Analysis

A should succeed as against O. A should not succeed as to B, C or D. Prior to the running of the statute of limitation and while A was an adverse possessor, A had title to the surface of Blackacre against the whole world except O. When the statutory period had run, A acquired title against O and O's rights were terminated. Thus, as against O, A has a right to Blackacre.

But did A's adverse possession of the surface of Blackacre give B, C or D a cause of action against A? No. There is no inconsistency between the existence of B's ownership of the coal under the surface and A's occupancy of the surface, nor between the lien of C's mortgage and A's occupancy of the surface, nor between the existence of O's easement involving pipes under the surface and A's occupancy of the surface. If no cause of action accrued in their favor, then no statute of limitation could run against them. Had B's ownership of coal involved surface rights with which A had interfered, had C reduced his mortgage by decree to a right to possess Blackacre before A took possession, or had D's easement involved the use of the surface of the ground and A interfered with such use, then A's adverse possession would have given each of them a cause of action and their respective rights would have been cut off by A's matured title by adverse possession. The test would seem to be whether or not the adverse possession gives the person claiming an interest a cause of action at the time the adverse possession commences.

§ 4.12 Innocent Improver Doctrine

PROBLEM 4:14:

1	2	3	4	5	6

A owned lots 1–3; O owned lots 4–6. A built a building on lot 4 mistakenly believing that it was lot 3. Prior to the running of the statute of limitation, O called A and told A that under the doctrine of annexation[37] O was entitled to Lot 4 as well as the building A mistakenly built on Lot 4. Prior to O filing a suit in ejectment, A brought a suit in equity to seek either the value of the building from O or an order compelling O to convey Lot 4 to A upon A paying O fair consideration for the property. Can A prevail?[38]

Applicable Law: Under the doctrine of annexation, improvements to real estate made by a wrongdoer belong to the owner of the real estate. However, where the improvements were made by one who mistakenly believed that he or she owned the land on which the improvements were made, principles of unjust enrichment could compel a court of equity to refuse to quiet title to the improvement in the landowner absent payment of fair consideration to the "good faith" innocent improver.

Answer and Analysis

If A can establish that A acted in good faith when A erected the building on the wrong lot, either A will be allowed compensation for the value of the building or can compel the true owner of the land on which the building was mistakenly built to convey the land to A upon payment to the true owner of an amount equal to its fair market value unimproved. These alternative remedies are provided A so long as A acted under a reasonable mistake of fact and in good faith. While the building was wrongfully erected by A on O's land, if the building were to pass to O, under the doctrine of annexation O would be unjustly enriched. This is known as the "innocent improver" doctrine.

Of course, if A can compel O to convey Lot 4 to A, then O is forced against O's will to convey the title to A. This amounts to a

37. Under this doctrine, improvements made by a wrongdoer belong to the landowner. See generally, 2 Tiffany, Real Property, § 625.

38. Somerville v. Jacobs, 153 W.Va. 613, 170 S.E.2d 805 (1969) (where the plaintiffs, through a reasonable mistake in fact and in good faith, erected a building on land owned by the defendant, they were entitled to recover the value of the building or could purchase the land for the value of the land minus the building).

condemnation of property by a private party—something that many courts find distasteful.[39] Thus, it is not accepted in all states.

§ 4.13 *Adverse Possession of Chattels*

PROBLEM 4.15: O owned a painting that had been stolen from O's home. O failed to report the theft to the police. For five years O actively searched for the painting but when the search proved unsuccessful, she abandoned it. Twelve years later (17 years after the theft), O learned that the painting had been sold by S to P. S, however, claims that the painting had been in S's family for over 25 years and that throughout that entire period had been claimed to be owned by S's father and then by S. O sues to recover the painting from P. P moves to dismiss on the grounds that if the painting had been stolen, the statute of limitation had expired and that S and S's predecessors had acquired a title by adverse possession to the painting. Should the motion be granted?

Applicable Law: Generally, a thief cannot acquire or transfer title to stolen personal property, even to an innocent purchaser. On the other hand, title to personal property can be lost by adverse possession. Typically statutes of limitation run from two to six years. At common law, the statute of limitation began to run at that time that the possession became hostile, actual, open, exclusive and continuous, rather than at that point in time that the goods were stolen or the true owner discovered their location. More recently, it has been held that the statute should begin to run when the true owner discovers or should have discovered the whereabouts of the stolen property.

Answer and Analysis

Under the common law, it appears the motion should be granted, assuming that for more than the requisite statutory period S and S's predecessor's possession was hostile, actual, exclusive and continuous.

This rule has recently been subject to criticism. Unlike real property, personal property is movable. This makes it difficult for a true owner, who is otherwise diligent, to easily determine who is adverse, or whether someone is claiming title adversely. It also makes it easier for a possessor to conceal the property. Thus, the penalty theory for permitting the acquisition of title by adverse possession is not so easily applied when the subject of the adverse claim is personalty rather than realty.

39. The innocent improver doctrine also is reflected in some state statutes. See Iowa Code ch. 560 (occupying claimants).

The common law as to when the statute runs ignored the diligence of the true owner who actively sought to ascertain the whereabouts of the lost property under what might be difficult circumstances. It is probably for this reason that at least the New Jersey court rejected the common law rule in favor of applying a so-called "discovery rule."[40]

If the true owner is to benefit from the discovery rule, the court should consider the following issues: (1) whether the true owner used due diligence to recover the stolen property at the time it was stolen and thereafter; (2) whether at the time the property was stolen there was an effective method to alert the marketplace that the property had been stolen; and (3) whether the lost property was subject to any form of registration that could put the world on notice of ownership claims. Because personal property can be easily concealed, use of the discovery rule rather than the common law rule makes it easier for true owners to protect their rights so long as they use due diligence in seeking to ascertain the whereabouts of the lost property. Under this rule, so long as the search continues the statute does not begin to run.[41] The statute starts to run when the true owner actually knows or reasonably should know that she has a cause of action, and knows the identity of the possessor.[42]

Under the discovery rule, the true owner has the burden of proving that she has acted with the appropriate due diligence.[43] Diligent pursuit[44] prevents the statute of limitation from running against the true owner.

Other courts have rejected both the common-law rule and the discovery rule in favor and the demand and refusal rule. Under this rule, the statute of limitations runs from the time the true owner demands that the chattel be returned and the possessor refuses. Furthermore, the true owner is not penalized for failing to use reasonable diligence to recover the chattel although lack of dili-

40. O'Keeffe v. Snyder, 83 N.J. 478, 416 A.2d 862 (1980).

41. Subsequent transfers of the personal property can affect the application of the discovery rule since each transfer complicates the ability of the true owner in ascertaining the whereabouts of the personal property.

42. *O'Keefe,* note 40

43. Ordinarily the burden is on the possessor to establish that the five elements to acquire a title by adverse possession have been met.

44. In *O'Keefe,* note 40, the court noted that the meaning of diligence would vary depending upon the nature of the personal property and its value. As the court noted, for example, if the lost property is jewelry of moderate value, merely reporting the loss to the police may be sufficient, whereas for an art work of greater value more might be required. But see, Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311, 567 N.Y.S.2d 623, 569 N.E.2d 426 (1991) rejecting the discovery rule in favor of the rule that as against a bona fide purchaser the statute begins to run when the true owner makes demand and the person in possession refuses to return the goods.

gence, while not affecting the time with the cause of action accrues, could give the possessor the equitable defense of laches.[45] This rule gives the most protection to the true owners and was adopted in New York apparently as the most desirable rule to protect art owners.

45. Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311, 567 N.Y.S.2d 623, 569 N.E.2d 426 (1991).

emanuel®
law outlines

Property

Ninth Edition

Steven L. Emanuel

Wolters Kluwer

PROPERTY

NINTH EDITION

STEVEN L. EMANUEL

Founder & Editor-in-Chief, *Emanuel Law Outlines* and
Emanuel Bar Review
Harvard Law School, J.D. 1976
Member, NY, CT, MD and VA bars

The *Emanuel*® *Law Outlines* Series

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

eISBN: 978-1-4548-7855-1

About Wolters Kluwer Legal & Regulatory U.S.

Wolters Kluwer Legal & Regulatory U.S. delivers expert content and solutions in the areas of law, corporate compliance, health compliance, reimbursement, and legal education. Its practical solutions help customers successfully navigate the demands of a changing environment to drive their daily activities, enhance decision quality and inspire confident outcomes.

Serving customers worldwide, its legal and regulatory portfolio includes products under the Aspen Publishers, CCH Incorporated, Kluwer Law International, ftwilliam.com and MediRegs names. They are regarded as exceptional and trusted resources for general legal and practice-specific knowledge, compliance and risk management, dynamic workflow solutions, and expert commentary.

CHAPTER 3
ADVERSE POSSESSION

I. INTRODUCTION

A. Ejectment actions: Just as there are Statutes of Limitation that bar the bringing of criminal prosecutions or suits for breach of contract after a certain period of time, so there are Statutes of Limitations that eventually bar the owner of property from suing to ***recover possession*** from one who has wrongfully entered the property. A property owner's cause of action against a wrongful possessor of it is known as the action of ***ejectment***. In virtually all states, the owner must bring his ejectment action within 20 years of the time the wrongdoer enters the land; some states allow only a shorter period, e.g., 10 years. (See *infra*, p. 34.)

1. Barring of stale claims: One reason, of course, for the existence of a time limit on the bringing of an ejectment action is to ***bar stale claims***. With the passage of time, witnesses' memories grow dim and unreliable, and the reliance interest of the defendant (the wrongful possessor) in not having to face a lawsuit becomes stronger. Therefore, it is not unfair to have a cut-off point after which no further ejectment action may be brought.

B. Gaining title by adverse possession: But a statute of limitations on actions to recover real property has an additional major effect, not shared by other Statutes of Limitations: once the limitations period has passed, the wrongful possessor now in reality has ***title to the land***, since the original owner can no longer recover it from him. This title is said to have been gained by ***adverse possession*** (or ***"AP"***).

1. Clearing titles to land: The doctrine of adverse possession thus furnishes the additional benefit of ***clearing titles to land***.

> **Example:** A state has a 20-year statute of limitations on ejectment actions. X claims that he holds title to Blackacre, and wants to sell it to Y. Y will only have to check the land records going back 20 years — plus perhaps some additional period to cover the possibility that the running of the statute of limitations might have been "tolled" for

some reason — in order to check X's claim of ownership. The fact that, say, 100 years ago X's alleged "predecessor in title" took the property by wrongfully entering on it, is irrelevant, since the right of the rightful possessor to regain possession has long since been barred by the statute of limitations.

C. Scope of this chapter: Most of this chapter is devoted to a discussion of how one becomes the owner of property by adverse possession. A final section at the end of the chapter (*infra*, p. 35) discusses the kind of title which one gets by adverse possession, including the boundaries of the property acquired.

D. Components of adverse possession: To obtain title by adverse possession, the possessor must satisfy ***five main requirements***:

[1] the possession must be ***"open, notorious and visible"***;

[2] the possession must be ***"actual"***;

[3] the possession must be ***"hostile,"*** i.e., without the owner's consent;

[4] the possession must be ***continuous***; and

[5] the possession must be for at least the length of the ***statutory period*** (perhaps longer if the owner was under a disability).

We consider the first two requirements in "II. Physical Requirements" (*infra*, p. 28), the third in "III. Mental Requirements" (p. 29); the fourth in "IV. Continuity of Possession" (p.32); and the fifth in "V. Length of Time Required" (p. 34).

II. PHYSICAL REQUIREMENTS

A. Summary of physical requirements: The concept of gaining title by adverse possession requires, of course, that the person entering the land actually physically ***"possess"*** it. However, the concept of possession is a vague one. Accordingly, courts have developed a number of catch-words by which to determine whether the requisite physical possession exists. The precise wording varies from state to state, but typically the physical possession must meet these three requirements:

[1] It must be ***"open, notorious,*** and ***visible"***;

[2] It must be ***"actual"***; and

[3] It must be ***"exclusive"*** (a minor requirement discussed briefly *infra*, p. 29).

B. "Open, notorious and visible": One of the functions of a statute of limitations is to penalize a claimant who "sleeps on his rights". The owner of real property who fails to bring an action for ejectment should be penalized (by the drastic step of taking his title away from him) only if he could reasonably be ***expected to know*** that another person has entered the property, and was asserting a claim to it. Therefore, nearly all courts require that the adverse possessor's use of the land be ***"open, notorious and visible."***

1. **Effect of actual notice by owner:** If the possessor can show that the owner had ***actual*** notice that the former was in possession of the land and asserting a claim to it, the "open, notorious, and visible" requirement is met. Powell, Par. 1013, p. 1089.
2. **Measured against typical owner's conduct:** Where actual knowledge by the true owner cannot be shown, the "open, notorious, and visible" test is met if the adverse possessor's use of the property is similar to that which a ***typical owner*** of ***similar property*** would make of it.
   a. **Nature of land taken into account:** Thus the ***nature of the land*** is taken into account. A more noticeable possession would be required for land within a city or town (e.g., the building of a structure) than for land in a sparsely settled area or wilderness.
   b. **Effect of fence or other enclosure:** The necessary possession will often be shown by the fact that the possessor has put up a ***fence*** or otherwise enclosed the land. The existence of such an enclosure is not likely to be sufficient in a densely populated and built-up area, but in rural areas this will often be dispositive. A few states have statutes ***requiring*** enclosure for adverse possession. See Burby, p. 271, fn. 31.

C. Actual possession: Courts often say that the possession must be ***"actual."*** This term, however, largely overlaps with the requirement that possession be "open, notorious and visible."

1. **Percentage of land used:** At least a ***reasonable percentage*** of the land claimed by the adverse possessor must be actually used. Again, however, the precise percentage of use required will vary depending

upon the nature and utility of the property. For instance, if a mine or quarry were located on a one-acre plot, use of the mine without use of any other land might constitute sufficient possession; use of a similar mine on a tract of 1,000 acres, on the other hand, would not be enough for possession of the entire plot.

2. **Occupation by tenant of adverse possessor:** The adverse possessor does not necessarily have to be in possession of the property ***personally***. For instance, if he leases his possessory interest to a ***tenant***, the tenant's possession may suffice for meeting the "actual possession" requirement. Burby, p. 272.

   a. **Important point:** This is an important point, because you will encounter scenarios in which the adverse possessor purports to rent the property out to a tenant and collects rent from her rather than physically occupying the property directly. In this scenario, the "landlord" typically ***meets*** the "actual possession" requirement.

      Example: *O* owns Blackacre. *A* physically occupies the property for a short while. *A* then purports to lease the property to *T*. *A* collects rents from *T* for the statutory period, and does not remit any of this rent to *O* or otherwise acknowledge that *O* is the record owner. *T*'s possession will be imputed to *A*, and *A* will therefore become the owner by AP at the end of the statutory period. That's because although *T*'s possession was not hostile as to *A* (see *infra*, p. 29, for the requirement of hostility), *A*'s constructive possession (via *T*) was hostile as to *O*.

3. **Distinguished from constructive possession:** The concept of "actual" possession should be distinguished from that of ***"constructive"*** possession. The latter, discussed *infra*, p. 36, applies where one holds a defective, but written, title to a described parcel of land, and takes actual possession of only a small portion of it; by doing so, he may be held to have "constructive" possession of the entire parcel. But except in this defective-instrument situation (often called holding "color of title"), actual possession of the entire parcel is necessary for obtaining title by adverse possession to it.

D. Exclusive possession: The adverse possessor must be in ***exclusive*** control

of the property. This really only means that he must not be sharing control of the property with the true owner, and the property must not be available to the public generally. However, it is possible for two persons (neither of them the record owner) to be in joint possession of property, in which case they would eventually gain joint title to the property by adverse possession. Burby, p. 273.

III. MENTAL REQUIREMENTS

A. "Hostile" possession: Most courts require that the adverse possession be ***"hostile."*** However, this does not mean that the possession must be characterized by ill-will towards the true owner. Rather, it refers to the fact that the possession must be inconsistent with the true owner's rights and ***without the owner's consent***.

1. **Possession by tenant:** A prime example of a possession that is ***not*** "hostile" is possession by a ***tenant*** under a valid lease. The tenant's possession is obviously with the landlord's permission, so the tenant does not become the owner of the property by adverse possession merely because he has been there under a lease for more than the statutory period. (However, if the tenant repudiates the lease, or in some states if the lease term ends and the tenant stays in possession, his possession may be transformed into a "hostile" possession; see *infra*, pp. 32 and 141.)
2. **Measured by objective evidence:** In determining whether the necessary hostility exists, courts generally do not attempt to delve deeply into the subjective thoughts of the adverse possessor. Instead hostility is determined by looking at the possessor's ***actions***, and his ***statements*** to the owner and to others.
   a. **Offer to buy property:** An ***offer*** by the possessor to ***buy*** the property from the owner may sometimes indicate that the possessor acknowledges that he has no lawful claim to the property. But such an offer may merely represent the possessor's attempt to avoid litigation in such a matter where he believes that he has a valid claim to the property.

B. "Claim of right": Some courts insist that the possession must be pursuant to a ***"claim of right"*** by the possessor. However, such courts vary in the

meaning they attach to the phrase “claim of right.”

1. **Majority usage is synonymous with “hostile”:** Most courts hold that the requirement that the possessor have a “claim of right” merely means that his possession must be hostile, i.e., ***not with the owner’s permission.***

   Example: In most jurisdictions, a ***squatter*** who takes possession of land while acknowledging he has no right to be there may gain title by adverse possession.

   a. **Minority rules out bad faith possessor:** But a ***minority*** of courts hold that the possessor must have a ***bona fide belief*** that he has ***title to the property***. Under this view, a squatter would never gain title by adverse possession, no matter how long his occupancy of the land was undisturbed.

2. **Color of title:** One may possess property under a ***written instrument*** purporting to give him title to that property. If the instrument is invalid for some reason (e.g., because the property described in the deed does not match the property occupied), the possession is said to be under ***“color of title.”*** Such “color of title” is virtually always ***sufficient*** to meet the hostility requirement.

3. **Starts as permissive and then becomes hostile:** A possession that ***starts as a non-hostile*** one can ***become hostile.*** When this happens, the period of possession starts running at the moment the possession turns hostile. So, for instance, if the possessor holds a valid possessory interest that is ***less than a fee simple***, and the interest ***terminates***, the possessor's period of hostile possession will begin right afterward, as long as the possessor somehow indicates that his occupancy is inconsistent with the record owner's rights.

   a. **Life estate *per autre vie* or fee simple determinable:** For instance, the possessor might be someone who holds a ***life estate per autre vie***, or a ***fee simple determinable***— if the holder continues in possession after the end of the life estate or fee simple determinable, this period of additional possession will typically count for adverse-possession purposes.

C. Boundary disputes and other mistakes: The layman's notion of the

utility of adverse possession is that it validates claims by squatters. But in the vast majority of cases where the doctrine applies, the possessor is operating under the ***mistaken, but honest belief***, that he has title to the property in question. Such a situation most commonly involves a mistake as to the location of a ***boundary line***.

1. **Majority view:** The majority view is that one who possesses an adjoining landowner's land, under the mistaken belief that he has only possessed up to the boundary of his own land, ***meets the requirement of "hostile" possession***, and will become an owner by adverse possession.

   Example: O is the true owner of Blackacre. *A* is the true owner of Whiteacre. When *A* moves onto Whiteacre, he mistakenly believes his land goes all the way up to a creek, which is in fact 15 yards into Blackacre. Accordingly, he builds a fence up to the creek, and uses the enclosed portion of Blackacre for farming. At the end of the statutory period, according to most courts, *A* becomes the owner of that portion by adverse possession, even though he would not have used it had he known the true boundaries.

   a. **Minority view:** But a minority of courts holds that the possessor in this kind of "mistaken boundary" situation does ***not*** hold "hostilely," if it can be shown that he would not have held the land had he known that he lacked title to it.

2. **Agreement on boundaries:** It often happens that the two adjoining landowners realize that there is some uncertainty about where the true boundary lies, and therefore make an ***agreement*** fixing the boundary. If this agreement turns out to be wrong, when measured against the true state of title, can the party who has gotten the better end of the agreement gain title up to the agreed boundary by adverse possession?

   a. **Majority view allows adverse possession:** Most courts hold that in this situation, a claim of adverse possession may be made. 3 A.L.P. 790. This is not really a situation in which the encroached-upon landowner "consents" that the other party occupy his land. Rather, it is a case of mistake, and under the majority view would presumably be dealt with like any other mistaken possession (so that the requisite "hostility" is present).

D. Co-tenants: Suppose that *A* and *B* hold title to Blackacre as ***co-tenants***. If *A* has sole possession of the property for the statutory period, does he thereby take title by adverse possession to *B*'s one-half interest (thereby becoming sole owner)?

1. **Other co-tenant must be on notice:** The answer is, "not necessarily." In a co-tenancy, each party is entitled to occupy the premises, and one cannot exclude the other. Thus unless *A* has ***actively blocked*** *B* from taking joint possession, or has otherwise put *B* on notice that he is repudiating *B*'s one-half interest, the requisite hostility as to *B* does not exist.

   Example: The Ps and Ds are all co-tenants of Blackacre. The Ps (or their predecessors in interest) occupy and farm the property for the statutory period, pay the taxes, and execute leases and mortgages concerning the land. The Ds never occupy the premises.

   Held, these facts are not enough to give the Ps full possession by adverse possession. There must be a showing that the Ds were actually put on notice that the Ps claimed the full property, which could have been done by refusing to allow the Ds to enter. The payment of taxes, execution of leases and mortgages, etc., were not inconsistent with joint ownership, since a co-tenant can take these actions on behalf of the other co-tenants. *Mercer v. Wayman*, 137 N.E.2d 815 (Ill. 1956).

2. **Conveyance of fee simple by one tenant:** If one co-tenant purports to ***make a conveyance in fee simple*** to a third person, and the other co-tenant knows of the conveyance, the conveyance will be held to represent the necessary declaration of hostility. (Then, possession by the third party purchaser would also be adverse to the non-conveying co-tenant. Burby, p. 278.)

E. Tenant's hostility to landlord: Where one occupies property as a ***tenant*** of the true owner, this possession is not hostile, since it is with the owner's (the landlord's) permission. But there are at least two situations in which possession begun as a tenant can turn into the sort of hostile possession required for the adverse-possession doctrine.

1. **Repudiation or disclaimer:** First, if the tenant ***repudiates or disclaims*** the lease, hostile possession will begin.

Example: Tenant tells Landlord that in Tenant's opinion the lease is invalid because it fails to meet the Statute of Frauds. This is sufficient to make his possession thereafter hostile. If Tenant then keeps the property for the statutory period following the disclaimer, he will be the owner by adverse possession. 3 A.L.P. 792-3.

2. **Holdover tenant:** Secondly, the tenant may become an adverse possessor if he ***holds over*** at the end of the lease term. In most states, the landlord faced with a holdover tenant may ***elect*** either to eject the tenant, or to treat him as a "tenant at sufferance" (one who is allowed to remain only as long as the landlord wishes.) If ejectment proceedings are started, this is sufficient to make the tenant's further possession adverse. But if the landlord does nothing, thus creating a tenancy at sufferance, this would probably be treated as "permissive" possession, and therefore the adverse-possession doctrine does not apply.

IV. CONTINUITY OF POSSESSION

A. The continuity requirement generally: The adverse possession must be ***"continuous"*** throughout the statutory period. However, this requirement does not mean that the possessor must occupy the property every day throughout the statutory period, or else begin all over again. A number of special rules, discussed below, may permit him to use even time when he is not in actual occupancy towards the statutory period, or at least prevent him from having to start all over again following an interruption.

1. **Abandonment:** However, it is clear that if the possessor ***abandons*** the property, his possession is deemed to end. Then, if he returns, the statutory period starts all over again.

B. Seasonal possession: Suppose the possessor occupies the property only ***seasonally*** (e.g., during the summers). If the property is such that this kind of seasonal use is ***all that most owners of similar property would make***, the possession is deemed to be continuous, and the entire twelve months of the year will be counted towards the statute of limitations.

Example: Suppose the property consists solely of forest. An adverse possessor, X, who each year comes onto the land and cuts the timber

during the standard timber-cutting season for that region would probably meet the continuity-of-possession requirement, because notwithstanding the gaps in his presence on the land he has behaved as an average owner of such forested land would behave. Therefore, the entire 12 months of the year would count towards X's adverse possession.

1. **Intermittent activities like hunting:** But intermittent activities that are ***not the sort of activities done only by true owners***— like occasional ***hunting*** on the property — are generally ***not*** enough to constitute continuous possession.

C. Interruption by non-owner: An entry onto the property ***by a third person*** may interrupt the adverse possessor's possession.

1. **Ouster by second adverse possessor:** For instance, suppose *A* adversely possesses property owned by O, and is then ***ousted*** by *B*, who starts his own adverse possession of the property. If *B* in this situation continues to hold the property, A's possession has obviously been interrupted. Nor will *B* be allowed to "tack" A's time of possession onto his own possession (see *infra*, p. 34).

D. Tacking: Possession by two adverse possessors, one after the other, may be ***"tacked"*** if the two are in ***"privity"*** with each other. That is, their periods of ownership can be ***added together*** for purposes of meeting the statutory period.

1. **Meaning of "privity":** "Privity" in this context means that the two parties have ***some direct relationship*** with each other, usually either a familial or economic one. So, for instance, if *A* purports to ***sell or give*** the property to *B*, *B*'s holding period may be tacked on to *A*'s for purposes of reaching the statutory holding period.

   Example: *A*, who owns Whiteacre, adversely possesses a small strip of the adjacent Blackacre, due to confusion about boundaries. *A* adversely possesses that piece of Blackacre for 15 years; he then sells Whiteacre to *P*, who holds for another seven years (and who adversely possesses the same strip). *A*'s 15 years of possession can be "tacked" to *P*'s seven years, so that *P* meets a 20-year limitations period. (In most courts, this is true whether *A*'s deed to *P* recited the

false boundary lines that *A* and *P* believed to be correct, or recited the true boundary lines that do not include part of Blackacre.)

2. **No privity:** But if the two successive adverse possessors are ***not*** in ***"privity,"*** i.e., do not have some ***continuity of interest***, then ***tacking will not be allowed***.

   Example: *A* adversely possesses Blackacre for 15 years. He then abandons the property. *B* then enters and adversely possesses for another seven years. *B* cannot "tack" his holding period to *A*'s holding period, since they had no continuity of interest. But if *A* had purported to give *B* his interest by oral gift, deed, bequest or inheritance, then *B* could tack.

3. **Tacking on owner's side:** An "inverse" tacking problem is presented where the ***true owner*** of the property ***conveys*** it during the time an adverse possessor holds it. This problem is discussed *infra*, p. 34.

V. LENGTH OF TIME REQUIRED

A. Statutory period: The basic length of time for which the property must be adversely possessed varies from state to state. Two-thirds of the states require fifteen years or longer. Powell, Par. 1019, p. 1098. In some states, the period becomes shorter if one pays taxes, or if one has "color of title" (i.e., a defective written instrument purporting to give title).

B. Disabilities: If the true owner of property is under a ***disability***, in nearly all states he is given ***extra time*** within which to bring an ejectment action, and the adverse-possession period is correspondingly lengthened.

1. **Disability must exist at time adverse possession began:** Most disability statutes apply only to ***disabilities existing at the time the adverse possession began.***

   a. No tacking: Thus there can be no "tacking of disabilities," either in the case of successive disabilities in the same owner, or disabilities in each of two successive owners. Burby, p. 277.

2. **Types of disability:** Disability statutes typically cover ***infancy*** (i.e., anything less than the age of majority), insanity, imprisonment, and

occasionally, being outside the jurisdiction. Powell, Par. 1022, p. 1102.

3. **Statutes giving grace period:** One common kind of statute provides that where a disability exists at the time adverse possession begins, the true owner may bring his action anytime within some stated ***"grace period,"*** i.e., some specified period of time (usually ten years) after the lifting of the disability.

C. Tacking on owner's side: Suppose that after an adverse possession has begun, the true owner conveys his record title to another, either by deed, will, or inheritance. Does the time of possession against the first owner get added to the time against the subsequent owner? The answer is "***yes***." This might be termed ***"tacking"*** on the ***owner's side***. See Cribbet, pp. 335-36.

> **Example:** O is the owner of Blackacre in 1980, when *A* enters and begins to adversely possess. In 2000, O conveys the property to X. Under a 21-year statute of limitations, *A* gains title by adverse possession in 2001, even though by then he has not held for 21 years against either O or X separately.

VI. RIGHTS OF ADVERSE POSSESSOR

A. Rights before end of statutory period: Prior to the end of the statutory period, the adverse possessor has, of course, not yet obtained title to the property. But he does have some rights, at least against persons other than the true owner.

1. **Suit against third person:** Thus the adverse possessor is entitled to bring a ***trespass*** action against one who enters the land; this is because trespass is an action that vindicates possessory, rather than ownership, interest in the land. (To put it another way, the trespasser may not raise the defense that the plaintiff lacks title). Burby, p. 270. However, the measure of damages is likely to be reduced to take into account the fact that the adverse possessor does not yet have a permanent interest in the land.

2. **Relations with owner:** The adverse possessor does not, however, yet have any meaningful rights as against the ***true owner*** of the land. In fact, if the owner brings suit before expiration of the statutory period, he can recover ***mesne profits***, an amount equal to the reasonable rental value of

the land for the period that the adverse possessor has held it. Burby, p. 270.

B. Rights after expiration of statutory period: Once the statutory period has expired, so that the adverse possessor gains title, his position is of course improved.

1. **Possessor gains good title:** In fact, a title gained by adverse possession is almost as good, as a legal matter, as one obtained by a deed from the record owner.
2. **Easements may not be extinguished:** If an adjoining landowner has an ***easement*** against the adversely-possessed property, this easement will probably not be extinguished by the passage of the statutory period. This is because the holder of an easement normally does not have a right of action against a mere possessor, so there is nothing for the statute of limitations to run against. 3 A.L.P. 825-26.
3. **Not valid against interest of government:** Generally, it is not possible to gain title by adverse possession to land owned by the ***federal government***, or by a ***state*** or city. 3 A.L.P. 827.
4. **Not recordable:** It is usually not possible to ***record*** a title gained by adverse possession, since there is no deed. However, if a judicial determination is made that title by adverse possession has vested, then the decision can be recorded. 3 A.L.P. 830.
    a. **No need to record:** As a corollary, there is no penalty for failing to record a title gained by adverse possession. This means that one who wishes to purchase property from its record owner ***cannot be sure*** that title has not passed to someone else by adverse possession, unless he makes a ***physical inspection*** of the property. In fact, even if he finds that the record owner is currently in possession, he cannot negate the possibility that title by adverse possession vested in someone else, and that the record owner is himself now an adverse possessor who has not yet held long enough to reacquire title! However, such a sequence of events is so unlikely that it is, for practical purposes, disregarded by title examiners.
5. **Hard to prove marketability:** Although one who holds title by adverse possession theoretically holds a title as good as record ownership, he will find it difficult to sell the property. His contract of sale will usually

require him to convey ***"marketable"*** title (*infra*, p. 308). It will often be impossible to prove that there is no person who could assert a valid claim, since a claimant's time to sue may have been extended, under many statutes, due to disabilities, the non-possessory status of the remainder interests, etc.

a. Modern view: However, modern courts will generally find a title to be "marketable" once the statutory period and another ten or so years have passed, even though there is some remote possibility that the record owner's claim may still be alive.

6. Transferred like any other title: A title gained by adverse possession is transferred in the same way as any other title. The transfer must thus be ***in writing***, in accordance with the Statute of Frauds. This means that an ***oral transfer***, or a ***disclaimer of interest*** in the property, or an ***abandonment*** of it, will not by itself suffice to strip the adverse possessor of his title.

a. Compare with transfer made before title passes: Contrast this with a transfer made *before* the statutory period has expired. Before the end of the statutory period, the adverse possessor may convey his possessory interest ***orally***, since the Statute of Frauds does not cover such a transfer. Similarly, he may lose his interest by ***abandoning*** it, or by ***permitting the true owner to enter***.

C. Scope of property obtained: By hypothesis, there will never be a valid, enforceable deed describing the property obtained by adverse possession. (If there were, the adverse-possession doctrine would not be necessary). Consequently, there will often be a serious question about exactly what land the adverse possessor acquires.

1. Property actually occupied: Normally, he acquires title only to that property ***"actually"*** occupied. The amount of property so occupied by a particular act of dominion will vary with the nature of the property. Thus where property is not suitable for cultivation, fencing in a large area, and hunting over a portion of it, may suffice to occupy the whole enclosed area. Conversely, in more densely populated areas, direct use and occupancy of each portion of land may be necessary. See the discussion of the "actual possession" requirement *supra*, p. 29.

2. Constructive adverse possession: There is, however, one important exception to this rule requiring "actual" possession. By the doctrine of

"constructive" adverse possession, one who enters property under ***"color of title"*** (i.e., a written instrument that is defective for some reason) will gain title to the ***entire area described in the instrument***, even if he "actually" possesses only a portion of it.

Example: X conveys to P a deed to a parcel of rural property. The metes and bounds description in the deed covers 100 precisely-defined acres, which as it happens are enclosed by a fence. P physically occupies 3 acres, where he builds a house and garden. X turns out (unbeknownst to P) never to have owned the property at all. P occupies the 3 acres for the statutory period. Because the entire tract was included within P's deed, he will be deemed to have been in possession of the entire tract, even though he occupied only part of it.

a. Must be recognized as unit: The parcel of land claimed to be constructively possessed must be one which is recognized in the community as a ***single parcel*** likely to be owned by a single owner. In a farming area where most farms are small, for example, it would be difficult to establish constructive possession of a huge tract of woodlands. (That's why, in the above Example, it makes a difference that the entire parcel was enclosed by a single fence.) 3 A.L.P. 820.

i. Must be contiguous: This means that, at the very least, the part actually occupied and the part constructively claimed must be ***contiguous***.

Example: O is the record owner of lot X in Boston and lot Y in Chicago. *A* executes a deed of both lots to *B*. *B* takes actual occupancy of lot X, and holds it for the statutory period. He has not gained title to lot Y by constructive adverse possession, since the two lots are not contiguous, or recognized in the community as being a single parcel.

VII. CONFLICTS BETWEEN POSSESSORS

A. Nature of problem: Up to now, we have been concerned with conflicts between the adverse possessor and the "true" owner. Now we consider conflicts between two persons whose interests are solely possessory, where

one has ousted the other from possession.

B. "First in time, first in right": The general rule is that the ***first possessor has priority over the subsequent one***.

> **Example:** O owns Blackacre. P moves on to the land, claiming he is the rightful owner. Before expiration of the statutory period, D forces him off the land, and occupies it himself. P can successfully sue to regain possession of the land (by use of an action called "ejectment"). See *Tapscott v. Cobbs*, 52 Va. 172 (1854). See also Boyer, pp. 235-36.

1. Passage by gift or will: The prior possessor can also pass along his possessory interest by gift or will, so that the person who takes by that gift or will can recover the property from the dispossessor.

C. Remedy of ejectment: As the above example indicates, a person who has the right to possess land, and who is ousted from that possession by another, may bring an action of ***ejectment*** to regain possession.

Quiz Yourself on
ADVERSE POSSESSION

5. In 1960, Beck purchased valid title to Blackacre, located in Ames. That same year, Warren purchased valid title to Whiteacre, the adjoining parcel. Both parties reasonably but mistakenly believed that the boundary line between Blackacre and Whiteacre was a large oak tree, so in 1961 both fenced their property accordingly. In reality, the proper boundary between the two parcels is 30 yards to the south of the oak tree, so that the existing fencing has been depriving Warren of the use of land which belongs to him. In 2008, Warren discovered the error, and has brought an action to recover the 30-yard strip. May Warren recover the strip? (Assume a 20-year statute of limitations for this and Q. 6-7).

_____

6. In 1960, Osmond, the owner of Blackacre, left the property "to my son Steve and my daughter Deborah in equal shares." Steve moved onto the property and lived there for the next 40 years. Deborah never liked the

property, and made no attempt to live there at any time. In 2008, Deborah died, leaving all of her personal and real property to her son Frank. If Frank now seeks a judicial declaration that he is the owner of a one-half interest in Blackacre, will he succeed? _____

7. Orlando acquired Blackacre in 1960. In 1970, Alice acquired Whiteacre, the adjacent parcel. Alice built a fence on what she thought was the border between the two properties. In fact, her fence encroached 40 yards into Orlando's property. Alice actively, openly and continuously occupied this 40-yard strip for the next 35 years. In 2005, Orlando discovered the error, and informed Alice that she had been using his property. Alice said, "O.K., I now recognize that this strip is your property." She also moved the fence. Shortly thereafter, Alice died, leaving Whiteacre to her son Stokes. Who owns the strip, Stokes or Orlando? _____

Answers

5. **No, probably.** Beck obtained title to the 30 yard strip by the doctrine of ***adverse possession***, 20 years after he first fenced in the property (i.e., in 1981). One of the requirements for adverse possession is that the possession be ***"hostile."*** But most courts hold that one who possesses an adjoining landowner's land, under the mistaken belief that he has only possessed up to the boundary of his own land, meets the requirement of hostile possession. (But a minority of courts would disagree with the result, and would hold that Warren may recover possession because Beck's possession was not hostile.)
6. **Yes.** Steve and Deborah held the property as co-tenants. As a general rule, co-tenants each have equal access to the premises. If Steve had refused Deborah's attempt to live on the premises, then Steve's occupancy for the statutory period would have been "hostile," and Steve would have taken Deborah's half interest by adverse possession. But since Deborah never asked to live on the premises, and Steve never said that she couldn't, Steve's occupancy was not hostile, so he does not take her interest by adverse possession even though he was in sole occupancy for more than the statutory period. Consequently, Deborah still owned her one-half interest at the time of her death, and that interest passed to

Frank.

7. **Stokes.** In 1990, Alice became the owner of the strip by adverse possession. Once she gained title by adverse possession, her title was of the same quality, and subject to the same rules, as if she had gotten title by deed. Therefore, she could not convey that title to anyone else except by compliance with the Statute of Frauds. Her oral "grant" to Orlando was ineffective because it was not in writing as required by the Statute of Frauds. Therefore, Alice owned the strip at her death, and it passed to Stokes.

Exam Tips on ADVERSE POSSESSION

Whenever it appears that a person has ***encroached on another's property***, check to see whether the encroacher may have taken title by adverse possession. Adverse possession questions are favorites of profs, in part because an adverse-possession issue can be well-hidden inside an essay fact pattern involving other topics.

Note: In the examples in this section, we assume a 20-year adverse-possession statute unless otherwise noted.

Adverse possession generally

Remember to list and discuss *all* the requisite elements even if they are obvious. In your analysis, discuss in greater detail the elements that are less clear. Also, note the ***state statutory period***. If one isn't mentioned, write that you're assuming the occupation has occurred for the requisite length of time.

- **Hostility requirement:** Make sure the occupation is ***hostile***. If the rightful owner ***assents*** to the occupation (e.g., by giving ***verbal permission*** to the occupier, or by ***accepting rent*** from the occupier, then this requirement has ***not*** been met).
  - **Owner's knowledge:** The rightful owner's ***knowledge of the***

encroachment, coupled with his ***lack of response*** to it, will likely be viewed as **assent**.

Example: The occupier, AP, tells the rightful owner, O, that AP knows he is encroaching and he will remove the encroachment if O so requests. O remains silent. O's silence will be construed as permission. Therefore, AP is not holding with the required hostility, and his holding won't count toward the statutory period.

- **Co-tenancy:** If the contest is between two co-tenants (call them *A* and *B*), and *A* claims to have taken sole title by adverse possession, look for clear actions indicating the ***ouster*** of B, the other cotenant. If there's no ouster — no sign that A kept *B* from the premises — A won't take *B*'s share by adverse possession.

  Example: A and *B* inherit Blackacre as co-tenants. A decides to live on the property; *B* continues to live far away. A pays all taxes and insurance, and makes all repairs on the property. A pays nothing to *B* for imputed rent. At the end of the statutory period, has A taken *B*'s one-half interest by adverse possession? No. If there is no evidence that A prevented *B* from using the premises and thus ousted her, the court will presume that *B* consented to the arrangement. Therefore, A won't take *B*'s interest by adverse possession.

- **Physical requirements:** Look in your fact pattern for, and note in your answer, the ***physical actions*** that would reasonably ***give notice*** to a rightful owner that her land is being hostilely occupied. (*Examples:* AP builds a fence around O's property, or plants and harvests crops, or pays property taxes — any of these would put O on notice that AP is occupying the property.)
- **Continuity requirement:** Remember that the claimant must possess the property ***continuously*** for the statutory period. Be careful to note when the occupier's possession is interrupted.
  - **Exception:** But if the interruptions are ***consistent*** with the

appropriate use of the property, then the occupier's claim is ***not*** affected. (*Example:* A summer cabin need only be occupied during the summer months.)

- **Requirement of actual possession:** The occupier must ***"actually possess"*** the property. But possession does not necessarily require that the occupier be physically present on the property.
  - **Lease:** For instance, if the occupier ***leases*** her interest to another, the lessee's time on the premises will count toward the occupier's holding period.

    Example: AP moves onto Blackacre, which belongs to O. AP remains there for 10 years, then purports to lease his interest to T. T remains for another 10 years. At the end (assuming a 20-year statute), AP owns by adverse possession — the time T was in possession under claim of right from T will be credited to AP. (But these 10 years won't count towards any claim of adverse possession by *T* against either AP or O, because T is there with AP's permission.)

  - **Possession under color of title:** Also, look for a situation where a party receives a ***defective deed*** and is therefore not in legal possession of the property. In that situation, she is entering the property under ***color of title*** (which meets the "hostility" requirement in most states), and she will be deemed to have gained possession of the ***entire area described in the deed,*** even if she ***does not use part of the described land.***

    Example: AP purchases realty at a foreclosure sale, unaware of the fact that O purchased it six months earlier and has not defaulted on any payments. AP records her deed, constructs a house on part of the property, and encloses the house and a small area around it with a fence, but does not use any of the other land around it. At the end of the requisite period of time, AP can claim title by adverse possession of the *entire plot* that is described in the deed.

- **Future interest:** Be on the lookout for a possessor who is claiming against the holder of a ***future interest*** in the property — profs love to test this, because it's tricky. You have to check whether the future interest existed at the moment the adverse possession began, because the solution depends on this.
  - **Interest exists when possession starts:** If the future interest ***already exists*** at the time the adverse possessor enters, the statutory period does ***not*** begin to run against the holder of the future interest until the future interest ***becomes possessory***.

    Example: Z makes a will leaving Blackacre "to *B* for twenty years; the remainder to *C*. However, if *C* is not alive at the termination of *B*'s estate, *C*'s oldest child at the death of Z shall take the remainder." When Z dies, in 1975, *B* and *C* are alive and D, a minor, is *C*'s oldest child alive. AP moves on to the property in 1976 and *C* dies in 1984. Twenty years after Z's death (in 1995) D discovers that AP has been in possession of the realty for 19 years. However, D attempts to have AP ejected from the realty only after two more years have passed (in 1997), at a time when AP has been in possession for 21 years. Nonetheless, D will succeed in his action because the statute of limitations began to run against him only two years previously — since D's future interest existed at the time AP began his possession, AP's possession began to count against D only when D's interest became possessory (at the termination of *B*'s 20-year interest, in 1995), so only two years had elapsed by the time D brought his ejectment suit.

  - **Successor in interest:** But don't confuse the above situation with a situation where there is a ***successor in interest*** to the property (i.e. where the owner conveys his interest to another after the adverse possession has already begun). In that case, ***tacking*** is ***allowed***. In other words, the time against the first owner gets added to the time against the subsequent owner.

EXAMPLES & EXPLANATIONS

Property

Sixth Edition

Barlow Burke and Joseph Snoe

Wolters Kluwer

CHAPTER 8

Adverse Possession

The preceding chapters dealt mainly with personal property. This chapter introduces adverse possession, a legal process to gain (or lose) title to either real or personal property.

INTRODUCTION

A landowner can have a person wrongfully on his land, such as a trespasser, removed from the property. The legal action to remove a trespasser is called ***ejectment***. On the other hand, a person who is not the legal owner of property, and who in fact may have entered as a trespasser, who uses the property for enough years becomes the owner of the property and defeats all rights of the true, record, or rightful owner, even if the latter had legal or record title, under a process known as ***adverse possession***.

Every jurisdiction has enacted an adverse possession statute. Each statute sets out the number of years the adverse possessor must use the property before its true owner will be prohibited from ejecting the adverse possessor. After that period of time, a trespasser becomes the owner and his subsequent

purchasers, heirs, and descendants succeed to his rights. The former true owner has no further rights to the property and cannot claim damages for his or her loss.

If the true owner of property fails to sue a trespasser within the period of time allotted for bringing an action in ejectment, the trespasser thereafter acquires its title. The adverse possessor obtains an original title to property. His title, in other words, is not derived from its former owner's.

The number of years an adverse possessor must use the property, also known as the ***statute of limitations period***, the limitations period, or the statutory period, varies widely among jurisdictions, and may vary within a jurisdiction, depending on whether the adverse possessor has a faulty deed (known as ***color of title***) or bought the property at a tax sale. In Iowa, for example, the statutory period is 40 years without color of title, but only ten years with color of title. Texas has shorter statute of limitations periods: ten years without color of title and three years under color of title. California and Idaho have five-year statutes of limitations for use both with color of title and without color of title. Most states fall between these extremes, requiring between seven and 30 years for the statute to run.

Although all authorities, courts, and legislatures embrace the idea of adverse possession, they do not agree on why we allow adverse possession and on the underlying rationale for it.

There are several traditional rationales. First, adverse possession *punishes* true owners who sit on their rights for too long. "You snooze, you lose." True owners are encouraged to monitor their property. This rationale deals with the abandoning owner; it was most useful in the nineteenth century, when pioneers traveled from region to region, never intending to return to their origins and abandoning land in the process. Our society is more comfortable if someone uses and lays claim to property. Rights must be asserted, or lost.

Second, adverse possession laws *reward* the person who uses, works on, or improves property for a long time, becoming in the process known in the community as its owner. In this vein, some adverse possession statutes require the adverse possessor to improve, cultivate, or enclose the claimed property for the statutory period.

Beyond these punishment or reward rationales, a third rationale views the elements of adverse possession as *evidentiary* tools. Evidence decays as time passes, and stale claims to property should be barred. Another evidentiary function is to confirm lost grants or otherwise correct conveyancing mistakes

and oversights. Landowners, for example, are not required by law to record deeds and other documents affecting real property. Thus long and visible possession and use becomes a substitute for documentary proof of a lost, misplaced or unrecorded deed. Some deeds, moreover, are invalid for technical reasons. The person signing a deed may not have authority to do so; its drafter may have described the property incorrectly; or the possessor may have received the property as an oral or parol gift, ineffective because real property transfers must be in writing under the Statute of Frauds. With the passage of time, adverse possession laws cure these problems.

Fourth, adverse possession laws serve a *structural* purpose, facilitating the efficient transfer of property. Land, in particular, does not wear out. A purchaser or other possessor of property should be free from potential ownership claims originating decades earlier when the putative legal owner has not indicated she even knows or cares that she owns the property. Adverse possession serves to quiet titles, reinforce the reliability of land records, and allow transferability of land at lower cost than would otherwise be possible: the integrity and reliability of the deed records alone justifies denying relief to long unenforced claims.

Finally, adverse possession preserves the *status quo*. As O.W. Holmes wrote, “Man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can’t be displaced without cutting at his life.” When ejecting the adverse possessor would result in more of a loss than the true owner would gain, there is no longer any point in denying the adverse possessor title.

Adverse possession cases concerning land fall into two broad categories. In one, the adverse possessor claims a parcel of land completely unrelated to any other land the adverse possessor owns or claims. The second category concerns boundary disputes, where neighboring landowners dispute who has the right to a strip of land used by one party but included within the legal description of another. Despite the potentially different concerns applicable in each of these two categories, courts resort to the same statutory and common law principles in resolving both categories of cases, but may interpret the elements of adverse possession differently.

ELEMENTS OF ADVERSE POSSESSION

While adverse possession statutes differ, a typical case may arise when the true or record owner brings an action in ejectment to oust the defendant, whom the true owner claims is a trespasser. The defendant counters, claiming to own the property by adverse possession. Alternatively, a person may bring a declaratory judgment action asking the court to rule that the person owns the property by adverse possession. In either scenario, the person claiming ownership by adverse possession bears the burden of proof to prove every element of adverse possession.

In evaluating an adverse possession claim, a court considers the elements contained in its adverse possession statute and several judicially developed elements to determine whether the adverse possessor "adversely possesses" the property. Thus, to assert a successful adverse possession claim, an adverse possessor must show that the adverse possession satisfies each of the following common law elements:

1. Actual
2. Open and notorious
3. Exclusive
4. Hostile or adverse
5. Continuous

In addition, some courts add other elements, by common law or by statute, including the following:

6. Claim of title or claim of right
7. Good faith or bad faith
8. Improvement, cultivation, or enclosure
9. Payment of property taxes

While some courts list claim of right or claim of title as separate elements and require either good faith or, conversely, bad faith as a separate element, commentators seem to agree these are subsets of the hostility element (hostile or adverse).

An adverse possessor must satisfy each required element to prevail. Courts apply a checklist approach. Failure to satisfy even one element defeats the action. In analyzing a case for the following elements, note that the same acts may satisfy several elements. In general, an adverse possessor who acts with respect to the property as would an owner of similar property in the

community for the period of limitations usually satisfies each element.

(a) Actual Possession

An adverse possessor must be in ***actual possession*** of the property. Actual possession serves several purposes. It gives notice to the true owner and others who come to the property that the adverse possessor is using the property. It also indicates that the adverse possessor may be claiming the property and has ousted all other persons. Finally, the date the adverse possessor entered onto the property triggers the true owner's cause of action in ejectment or trespass, and the adverse possession statute of limitations period starts to run.

What constitutes actual possession is a function of the type of property involved, where the property is located, and what uses of the property would be expected in the community. A person is not required to live on the property, though in most cases the adverse possessor does live on or adjacent to the claimed property. In one early leading case, the adverse possessor lived across the street from the land he claimed, stepping onto it as needed to sell the right to dig sand and gravel to some, refusing it to others. These actions were confirmed by several witnesses at trial. His adverse possession claim was successful. See Ewing v. Burnet, 36 U.S. 41 (1837). Building a house, farming, fencing, even cutting timber or hunting and fishing in the right situations, may constitute actual possession. While paying taxes helps establish actual possession, unless applicable adverse possession statute requires payment of taxes as an essential element, an adverse possessor is not required to pay taxes and, in fact, may claim adverse possession even though the true owner pays the taxes. Selling the land, mortgaging it, or renting it to others could constitute actual possession.

The adverse possessor bears the burden of proving the boundaries to the land used adversely. Generally, an adverse possessor gains ownership of only so much of a tract of property as the adverse possessor actually occupies. The true owner continues to own any unoccupied land. Proving adverse possession can be extremely vexatious if the adverse possessor gradually expands the land being possessed. The statute of limitations period runs only from the time the particular part of the land being claimed is actually used, not from when any part of the parcel is being used.

Example 1: Teresa, a trespasser, occupied and used a 20-foot strip beginning in Year 1. She started using ten more feet in Year 5, and another 30 feet in Year 10. Teresa brought a declaratory judgment action in Year 11 that she owned the 60-foot-wide parcel of land by adverse possession. The applicable adverse possession statute provided for a seven-year statute of limitations period. Assuming she can prove the other elements, she may claim only the ten-foot strip she entered in Year 1. If she cannot identify the boundaries of this strip, a court may rule she cannot prove actual possession of any of the land for the requisite period.

A major exception to this rule occurs when the adverse possessor claims the land under ***color of title***. A person enters under color of title when he claims ownership pursuant to a written document, usually a deed, purporting to transfer the property to him, but the document is defective in some manner. Thus a faulty deed, or a deed from someone not owning the property, or owning a part or fractional share of the property, or a sheriff's tax sale deed that is defective because some part of the sale was improperly conducted does not convey legal title to the purchaser, but does clothe the purchaser with color of title.

Having color of title benefits the adverse possessor in two ways. First, as noted earlier, many state statutes reduce significantly the statute of limitations period for persons taking possession of property with color of title. In North Carolina, for example, the 20-year period is reduced to seven years if an adverse possessor has color of title. Second, the adverse possessor with color of title who successfully proves an adverse possession claim based on actual possession of a part of the tract described in the document constituting color of title is deemed to be in ***constructive possession*** of the whole tract.

Example 2: Wally owned Blackacre, a 500-acre parcel of heavily wooded land in Arkansas. Wally sold and deeded Blackacre to Edwin, who lived in St. Louis. Five years later, Wally died. Wally's daughter, Serena, believing she inherited Blackacre, sold and deeded Blackacre to Judy. The deed to Judy did not convey good title to Judy since Serena did not own Blackacre. The faulty deed to Judy, however, was color of title. Judy cleared five of the 500 acres and used the five acres as her residence. Judy lived there for the statutory period. Because Judy has color of title, she has adversely possessed the entire 500 acres described in her deed, not just the five acres

she actually possessed.

An exception to the constructive ownership by color of title rule is that the true owner's actual possession of a part of the described land negates the constructive possession, and thus the adverse possession is limited to the land actually possessed. As explained by the U.S. Supreme Court in Deputron v. Young, 134 U.S. 241, 255 (1890) (applying Nebraska law), "Where the rightful owner is in the actual occupancy of a part of his tract, he is in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession; and where the possession is mixed, the legal seisin is according to the legal title, so that … there could be no constructive possession on the part of the defendant or his grantors, even if that might exist if he had had actual possession of a part, and no one had been in possession of the remainder."

Example 3: Assume the facts in Example 2 above except that shortly after buying Blackacre Edwin moved to Arkansas, cleared five acres of Blackacre, and lived there. Edwin remained unaware that Judy was residing on another five acres of Blackacre. After the limitations period has passed, Judy may claim only the five acres she actually possessed.

Constructive possession benefits the adverse possessor in a variety of transfer situations. An adverse possessor occupying one lot has constructive possession of several lots conveyed separately if all lots are enclosed as a unit. Likewise, constructive possession reaches several lots conveyed in one document even if the lots are separately described in the deed. If the deed describes multiple lots—some occupied, others not—constructive possession even extends to lots that do not adjoin the occupied land.

(b) Open and Notorious Possession

Open and notorious possession means the adverse possessor's use of the property is so visible and apparent that it gives notice to the true owner if he checked his land that someone may be asserting an adverse claim to the land. The adverse possessor's use must be of such character under the circumstances as would indicate to a reasonably attentive owner that someone

else claims the property. Buildings, fences, crops, or animals might constitute an open and notorious presence. Fences or crops—enclosure or cultivation—are sometimes statutory requirements as well. If the true owner has actual knowledge of the adverse possessor's claim, however, the open and notorious element is met even though no one else has reason to know of the adverse claim.

Normally, the adverse possessor is not required to give actual notice to the true owner that the adverse possessor is on the land or that he is claiming the land as his own. However, the adverse possessor must give actual notice when the adverse possessor is claiming adversely against a co-owner. A co-owner is someone who owns land concurrently with the adverse possessor, as when two or three people buy property together, or when they inherit it together. For more on co-tenants and concurrent ownership, see Chapter 13.

(c) Exclusive Possession

Exclusive possession means that the adverse possessor holds the land to the exclusion of the true owner. Possession cannot be exclusive, moreover, when two or more possessors use the property adversely *vis á vis* each other. If, however, one adverse possessor has a superior legal right—by holding under color of title or having entered the property first, for example—the adverse possessor with the superior right may oust the other adverse possessor and continue possession, the statutory period running from the time the first adverse possessor initially occupied the property. Generally, the first adverse possessor may eject or oust subsequent adverse possessors even though the first adverse possessor has not occupied the property for the statutory period. Some jurisdictions, to the contrary, hold that exclusive possession means exactly what it implies—that only one person can claim adverse possession.

Exclusive possession does not mean only one person can ever gain title by adverse possession. Most states permit persons acting in concert to adversely possess property. They become co-owners or co-tenants.

(d) Hostile or Adverse Possession

There are three rules as to what constitutes hostile or adverse possession.

(1) The Majority or Objective View

Hostile or ***adverse possession*** in most jurisdictions means that the adverse possessor uses the occupied property without the true owner's permission, and inconsistent with the true owner's legal rights. A person entering property with the true owner's permission cannot claim adverse possession. A tenant leasing the property for more than the statutory period, for example, cannot claim ownership, since her possession was never hostile. The fact that the true owner gave permission to an adverse possessor already on the premises might not destroy the hostility element, however, if the possessor clearly intends to remain on the property with or without the true owner's permission.

If a person enters onto the property with permission, or his occupation is consistent with the true owner's title, the possessor's continued stay could become hostile, but the hostility claim must be unequivocal. In most cases, a tenant or co-owner must give actual notice to the true owner or engage in some act that clearly brings home the fact that the possessor is claiming full ownership as against the landlord or co-owner. Arguably, a tenant refusing to vacate property after a lease ends and denying any continuing obligation to pay rent may exhibit the hostility element. In some jurisdictions, however, the tenant must vacate the property and then reenter to begin the running of the statute of limitations.

(2) The Minority, Bad-Faith, or Intentional Trespass View

Courts adopting the objective view just discussed agree that a possessor using land on his neighbor's property under the mistaken belief as to the exact location of the boundary line can adversely possess the land as long as he claims the strip used as his own. Some courts, however, deem important the adverse possessor's subjective intent and examine the possessor's state of mind. The issue, often arising in boundary disputes, is whether the possessor's subjective intent is relevant.

A small minority of jurisdictions hold that mistaken possession does not constitute hostility. These courts find no hostility if the adverse possessor intended to claim only the property described in his deed and was on

neighboring land under the mistaken belief that the land was described in his deed. The subtle difference between the possessor's intending to claim the property whether or not described in the possessor's deed and not intending to claim unless the disputed strip was contained in the possessor's deed, to be determined after the statutory period has run, tempts the possessor who may never have thought about it, to lie. Because of the tendency to tempt otherwise honest people to lie, and because a rule that disfavors mistaken possession rewards bad-faith adverse possessors and penalizes good-faith possessors, most but not all courts conclude that the possessor's intent is irrelevant.

(3) Good-Faith View

A few courts go the other direction and require the adverse possessor in a boundary dispute to be on his neighbor's land in good faith, actually believing it to be included in his deed description. Only when the adverse possessor is on the neighboring land mistakenly thinking that land is included in his deed will the adverse possessor be able to satisfy the hostile and adverse possession element. As with the bad-faith discussion above, most courts hold the possessor's good faith irrelevant.

(e) Continuous Possession

To satisfy the statute of limitations for adverse possession, a claimant must be in ***continuous possession*** for the entire limitations period. Continuous does not mean uninterrupted. It does not mean the person must be on the property 24 hours a day, or even every day. It simply means the possessor must use the property as would a true owner under the circumstances. Intermittent use usually does not constitute continuous possession, but seasonal use may be continuous, as in the use of a hunting cabin during hunting seasons, or the cutting of timber when appropriate. In one interesting case, a court held that two prison sentences of four and nine months each did not interrupt the possessor's continuity of possession. See Helton v. Cook, 219 S.E.2d 505 (N.C. App. 1975).

The continuity element focuses on the adverse possessor's time on the

property, rather than on how long the true owner has been dispossessed. If an adverse possessor abandons the property, and a second adverse possessor independently enters into possession, the statute of limitations starts anew. If an adverse possessor leaves the property with the intent to return and returns to find a new adverse possessor on the property, the returning possessor can eject the second adverse possessor and continue the running of the statute.

PRIVITY AND TACKING

The adverse possessor gains a limited interest in the property even though he has occupied the property for less than the time necessary to gain title and is subject to ejectment by the true owner. An adverse possessor may eject other trespassers and adverse possessors even before the statute of limitations runs, as long as the adverse possessor entered the property first.

The adverse possessor, moreover, may sell or give his interest to another person. The purchaser or donee succeeds to the adverse possessor's attributes, including the time the first adverse possessor occupied the property. This adding of time the first adverse possessor used the property to the time the second possessor used the property is called ***tacking***. The relationship necessary to allow tacking is called privity. ***Privity*** occurs by contract of sale, gift, will, or intestate succession.

DISABILITIES AND TOLLING THE RUNNING OF THE STATUTE OF LIMITATIONS

Many jurisdictions provide that the statute of limitations for an adverse possession claim will not run against a true owner who is under a legal ***disability*** when the adverse possession commences. Jurisdictions consider various conditions or situations to be disabilities. Infants (minors) and the mentally incompetent generally are deemed disabled. Other common groups include persons in prison and those in military service.

If a true owner of property is under a disability, the statute of limitations will not run against him or her until the disability is removed. Meanwhile the

statute is said to be ***tolled***. To illustrate, if a statute provides for a ten-year statute of limitations, the state law deems a minor to be under a disability until the minor reaches age 21, and the true owner is 15 years old when the adverse possession begins, the statute of limitations is tolled and does not begin to run until the true owner turns 21. In this Example, therefore, the statute is tolled for six years and the true owner has until he or she turns 31 to bring an ejectment action against the adverse possessor. Some statutes reduce the limitations period following a period of disability (but the person under a disability has at least the standard limitations period to bring suit).

Some guiding principles are common to most jurisdictions. First, the disability must exist on the date of the adverse possessor's entry onto the land. A disability that arises after the adverse possession begins will not toll the running of the statute. To illustrate, if an adverse possession begins in Year 1, and in Year 2 the true owner is sentenced to 20 years in the state penitentiary, the statute is not tolled. If the true owner had been sentenced in Year 1 and the possession began in Year 2, however, the statute would be tolled until the true owner was released from prison.

Second, there is no tacking of disabilities, although when the true owner is under more than one disability, the one of most benefit to him may be elected. If a true owner under a disability when the adverse possession begins falls under a second disability during the time of the adverse possession, the statute is tolled only during the continuance of the first disability. For example, if the true owner is 15 when the possession begins, and is sentenced to prison for ten years when he is 19, the statute is tolled until he reaches majority (say, age 21), and will run against him after that date even though he still is in prison.

Third, a person taking from or through the true owner under a disability generally can take advantage of the tolling statute to the same extent as the person with the disability, except that the disability is deemed to end on the day of the sale or gift. The logic behind this rule is as follows: Without the rule, if the statute ran against the new owner from the first day the adverse possessor entered onto the property, the person under a disability might not ever be able to sell the property because the property might immediately vest in the adverse possessor. Or, from the new owner's perspective, he could lose all rights in the property before having an opportunity to discover and eject an adverse possessor.

TEMPORAL AND PHYSICAL SEVERANCE AND ADVERSE POSSESSION

Adverse possession laws also protect persons who have a "future interest" in property. Land ownership can be divided temporally—i.e., by time. In a simple scenario, *O*, the true owner, may transfer property to *A* to use during *A*'s life, and give to *B* the right to possess the property after *A* dies. *A* is said to be the life tenant in this Example. *B* is called the remainderman. An adverse possession statute does not begin to run against a person having a future interest until the future interest becomes possessory. In the life tenant–remainderman scenario, the remainderman has no right to possess or use the property until *A* dies. If an adverse possessor enters the property *after* the ownership has been divided in time between the life tenant and the remainderman, he can divest only the life tenant and the statute does not begin to run against the remainderman until *A*, the life tenant, dies, and *B*, the remainderman, gains the right to possession. If the adverse possessor enters the property *before O*, the original owner, makes the transfer to *A* and *B*, however, the statute runs against both the life tenant and the remainderman.

Likewise, land ownership can be divided vertically—into air rights, surface rights, and subsurface (typically mineral) rights. If minerals have been sold separately from the right to use the surface, and thereafter an adverse possessor enters the property, he can divest only the holder of the surface rights—unless he opens a mine, at which point he starts to run the statutory period against the person holding the mineral rights. If the adverse possessor enters the property before the surface and the mineral rights are severed, however, the statute runs against both the surface and the mineral owner.

In Marengo Cave Co. v. Ross, 10 N.E.2d 917 (Ind. 1937), the discoverer of a spectacular cave, owning the land where the cave's mouth was located, mistakenly believed that the whole cave was located under his land. It wasn't, and the owner of the land whose surface lay adjacent and partly above the cave sued the discoverer's successors in title, but only after the cave's users had, over a period of 50 years, improved its accessibility and made extensive efforts to turn it into a profitable tourist destination. Ross, the adjacent owner, sued Marengo, the current operator of the enterprise, to quiet title to that portion of the cave under Ross's land. A court-ordered survey disclosed that

the cave was indeed under Ross's land. The court held that Marengo's possession "tacked" onto that of prior operators of the cave. It also held that the use was actual, hostile, and continuous, but not exclusive and open and notorious, even though Ross had occasionally toured the cave, buying a ticket to do so.

As to the open and notorious element, you might argue that the development of the cave enterprise, exploiting the cave as its true owner would, is sufficient. On the other hand, the underground nature of the cave might not give Ross notice that his property was being used. Ross could not locate the cave without entering it, which he could not do without a court order. Just as when a miner exceeds the extent of his mineral rights when extending a mine under land he does not own, there is something secret and fraudulent about the trespass. Either argument is reasonable, but the *Marengo Cave* court concluded the possession of the cave was not open and notorious.

PERSONAL PROPERTY AND ADVERSE POSSESSION

Personal property can be acquired by adverse possession, but the mobility of personal property creates tricky issues. In early cases, domesticated animals could be acquired by adverse possession, but if the animals were taken out of their original locale to places where their true owners were very unlikely to find them, or if personal property such as paintings were fraudulently concealed, the statute of limitations was tolled.

Additionally, as to some of adverse possession's elements—actual possession, exclusivity, hostility, and continuity—the law worked reasonably well. But other elements such as open and notorious possession presented problems. A person can wear his or her wristwatch, but who will notice? Or an adverse possessor may keep the property in his home away from public view. Under such circumstances, is it sensible to let the limitations period run out in the usual fashion?

These questions are the more pressing because the statutes of limitations for personalty—for actions of trover, conversion, and replevin (see Chapter 3)—are shorter (typically between four and eight years) than similar ones for realty. These questions have been a source of debate, and two rules have

developed to answer them. The first, traditional rule is that the statute of limitations for actions for personalty does not start to run until the action "accrues"—that is a lawyer's way of saying that the last element of the cause of action is in place. So, for example, when a work of art disappears and then reappears on the wall of a purchaser, the cause of action to recover it does not accrue until its true owner discovers its whereabouts and makes a demand for its return. This gives the purchaser an opportunity to return it, but upon refusing to do so, the true owner's action is complete—the demand and refusal being the last element in it. This "demand and refusal" rule means that the statute runs only from the date of the refusal and that the statute was tolled beforehand. See Solomon R. Guggenheim Fdn. v. Lubell, 569 N.E. 426 (N.Y. 1991).

The second rule is the rule of due diligence. Here, after the personal property disappears, the true owner may toll the statute for the period of time that he or she searches diligently for it, but if the search is discontinued, the statute runs. The true owner bears the burden of proof on the issue of diligence. Meanwhile, the cause of action does not accrue until the true owner discovers, or by the exercise of reasonable diligence should discover, the facts which will permit the action to accrue. See O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980). Discovery of the facts is here the key; no demand is necessary.

Both the "demand and refusal" and the "due diligence" rule have advantages and disadvantages. They both, rather than modifying the elements of adverse possession, focus on when the statute of limitations starts and stops. Consider, for example, a cause of action in replevin. Its elements are (1) the loss of personal property, (2) the plaintiff's right to it up to the time of the action, and (3) a demand for and a refusal to return it. The due diligence rule's focus is on the second element; the demand and refusal's rule is (obviously) on the third element, and differs in the extent to which the court is willing to prefer the rights of the true owner over its present possessor. The demand and refusal rule is easier to apply and consistent with the traditional preference of the common law for a true owner's rights. The due diligence rule is more flexible, considers the disadvantage at which possessors find themselves showing adverse possession, and allows the true owner to show how much she valued the chattel. Yet both rules attempt to inhibit the fencing or thievery of personal property (if in different ways), and both are fact-based enough to take account of the many ways in which the true owner might be

"diligent" in searching for lost chattel.

Examples

Hunting Lodge

1. Arthur obtained a defective tax deed to a section of land on which he constructed a hunting cabin. When the cabin was destroyed by fire several years later, Arthur rebuilt it on a cement foundation, cleared the acreage around the cabin, planted grass, and posted a sign along a nearby road indicating an access road to the cabin. Arthur occupied the cabin during hunting seasons and occasional other weekends over the course of the limitations period, but never resided there or attempted to keep others off the land around the cabin. He never otherwise improved the land or posted it against other hunters, but he did pay the taxes, and sold the scrub timber on the land for pulpwood. Has Arthur acquired adverse possession?

Timing Is Everything

2. In a jurisdiction with a 20-year statute of limitations, Alie entered and began adversely possessing Blackacre. Nineteen years later, trespasser Tom destroyed Blackacre's crops. May the record owner of Blackacre (the true owner, or *TO*) sue Tom for damages to Blackacre on the day after the statutory period ends in favor of Alie?

Interim Transfer

3. Ten years ago Adam entered and began adversely possessing *TO*'s Whiteacre, located in a state with a 20-year statute of limitations for adverse possession. This year, Adam deeds Whiteacre to Xeno, a bona fide purchaser. What estate does Xeno obtain?

It's Yours? Really?

4. A quarter century ago Angie entered and immediately began adversely possessing *TO*'s Brownacre. *TO* now arrives and tells Angie it is *TO*'s land. A surprised Angie says she is sorry; she thought it was her land and didn't know it belonged to *TO*. In a jurisdiction with a 20-year statute of

limitations, does Angie own Brownacre?

With Your Kind Permission

5. *TO* told Andy, "Stay as long as you need a place." Andy did and, after the statutory period passed, sued *TO* in order to establish adverse possession. Will Andy's claim succeed?

One Farm, Two Deeds

6. Amy gave Brad a deed to Amy's farm. Amy then gave Charlie a similar deed to the same farm (except, of course, for the name of the grantee—here, Charlie). Brad started to cut timber on the farm. Charlie moved into the farmhouse and farmed the fields. Both Brad and Charlie continued in this manner for the limitations period. Charlie then sued Amy and Brad for adverse possession of the land described in the deed from Amy. What result and why?

Dispossessing Future Estate Holders

7. (a) AP entered Blackacre adversely. *TO* held a life estate in Blackacre, remainder to Bobbie and her heirs. The prescriptive period in the jurisdiction is ten years. Eleven years later, *TO* died and Bobbie brought suit to oust AP. In this suit, what result and why?

   (b) AP entered Blackacre adversely. *TO*, the true owner of Blackacre, then died and left a will devising a life estate in Blackacre to Angelina, remainder to Bobbie and her heirs. The statute of limitations period in the jurisdiction is ten years. Eleven years later, Angelina died and Bobbie brought suit to oust AP. In this suit, what result and why?

Calculating Time in Possession

8. Owen owned Blackacre. In a state with a 20-year statute of limitations Ayn began adversely possessing Blackacre. After satisfying all the elements for adverse possession for ten years, she left Blackacre (and the state). Hearing Ayn has moved, Bessie moved onto Blackacre adversely and stayed for the next 15 years. Then Owen sued Bessie in ejectment, claiming he owned Blackacre and Bessie was a trespasser. What result and

why?

This Land Is My Land

9. Assume a 20-year statute of limitations in the following Examples:
   (a) In Year 1, Odie, the true owner, is ousted (forceful or wrongful exclusion) from Blackacre's possession by Arthur, who in Year 5 is ousted by Betty, who in Year 15 is ousted by Cory, who in Year 20 is ousted by Dan. Who has title to Blackacre in Year 31?
   (b) If, in Year 22, Cory had sued Dan in ejectment to regain possession, what result?
   (c) What result if Dan had sued Cory for damages in polluting the soil on Blackacre's wheat fields?
   (d) Ossie owned Blackacre. Addy entered upon Blackacre in Year 1. Addy stayed in possession until Year 25. In that year, Ossie sold to Ben and Ben then sued Addy in ejectment. In this suit, what result and why?
   (e) Same facts as in (d) except Ossie sold to Ben in Year 15, and Ben sued Addy in Year 15. What result?
   (f) Same facts as in (e) except Ben waited until Year 25 to bring his ejectment action. What result?

Disabled Advice

10. *O* was insane when ousted by *A* in Year 1. *A* was in adverse possession from Year 1 to Year 15 when *O*, in a lucid moment, conveyed the property to his insane son *S*. Assuming a 20-year statute of limitations, what would you advise *O* to do?

Bad Fences Make Bad Neighbors

11. A fence was mistakenly constructed between Arden's and Ben's lots 20 feet into Ben's property, and for ten years Arden used the extra 20 feet as his own. Ben then constructed an improvement on his land on his side of the fence and, during the construction, tore down the fence to get construction equipment onto the land and around his new improvements. After the construction, the fence was rebuilt, but in a different place, 12 feet onto Bob's property. Another ten years passed, with Arden and Ben

fully using the land on their respective sides of the new fence. In a state with a 20-year limitations period, Arden sued Ben for adverse possession of the 20 feet now in dispute. What result?

Intent on Ownership

12. Twenty-one years ago, the true owner, Owen, left Blackacre. Annie told two persons that she was the new owner, and was in adverse possession thereafter for 20 years. Annie's witnesses are dead and, upon Owen's return, Owen sues Annie for ejectment. Annie's defense is her adverse possession. Assuming a 20-year statute of limitations, what result and why?

Step Neighbors

13. This case is based on Mannillo v. Gorski, 255 A.2d 258 (N.J. 1969). The New Jersey adverse possession provision at the time of the dispute stated: "Every person having any right or title of entry into real estate shall make such entry within 20 years next after the accrual of such right or title of entry, or be barred therefrom thereafter." In the summer of 1946, Gorski made certain additions and changes to her house. Among the improvements were a concrete stoop with steps on the west side of the house for use in connection with a side door, and a concrete walk from the steps to the end of the house. The concrete walk was the same width as the steps. The steps and concrete walk encroached 15 inches upon her neighbors' (the Mannillos') land. The Mannillos brought an action in 1968 for an injunction to stop the continuing trespass. Gorski countered for a declaratory action that she owned the 15-inch strip by adverse possession. Gorski did not know that the steps and walk encroached on the Mannillos' property until shortly before trial.
    (a) Does the New Jersey adverse possession statute provide that an adverse possessor, such as Gorski, prevails by using the property for 20 years; or does it provide that the record or true owners, such as the Mannillos, lose all rights to eject anyone who has been in possession for 20 years?
    (b) Was Gorski's possession actual?
    (c) Was Gorski's possession open and notorious?
    (d) Was Gorski's possession hostile and adverse? Could the fact that

Gorski did not know the steps encroached on the Mannillos' property affect your answer?

(e) Was Gorski's possession exclusive?

(f) Was Gorski's possession continuous for 20 years?

(g) If the Mannillos prevail, should the court force them to sell the disputed land to Gorski? If Gorski prevails, should the court order her to pay the Mannillos for the disputed land?

(h) The platform, steps, and walk were in place and visible when the Mannillos bought their property. A survey at the time should have discovered the encroachment. Should either of these facts affect your analysis of this dispute?

Tack and Toll Time

14. A state has a ten-year statute of limitations period for adverse possession claims. The state also authorizes an extension of the statute of limitations period if the true owner is under a disability. It also allows possessors in privity to tack holding periods for purposes of the adverse possession statute. The jurisdiction's disability provision reads as follows:

Tolling for Disabilities:

(1) If a person entitled to bring an action is, at the time the cause of action accrues, either under the age of 20 years; or insane; or imprisoned on a criminal charge, the action may be commenced within two years after the disability ceases, except that where the disability is due to insanity or imprisonment, the limitations period prescribed in this chapter may not be extended for more than five years.

(2) Subsection (1) does not shorten a limitations period otherwise prescribed.

(3) A disability does not exist, for the purposes of this section, unless it existed when the cause of action accrues.

(4) When two or more disabilities coexist at the time the cause of action accrues, the two-year period specified in subsection (1) does not begin until they all are removed.

Assume for the following Examples that the adverse possessor has met the actual, open and notorious, hostile and adverse, exclusive, and continuous elements of adverse possession.

(a) Bryan, born December 1, 2000, inherited property on July 1, 2006, when he was five years old. Poe entered upon the property on

January 1, 2011, claiming it as her own. When does Poe gain title by adverse possession?

(b) Same as (a) except Bryan was convicted of robbery and sentenced to prison on July 1, 2019, when he was 18. He served four years, and was released on July 1, 2023. When does Poe gain title by adverse possession?

(c) Same as (a) except on January 1, 2016, when Bryan was 15, Bryan (by his trustee) sold the property to Michelle, who turned 18 on January 1, 2016. When does Poe gain title by adverse possession?

(d) Same as (c) except Bryan sold the property to Michelle on July 1, 2021. When does Poe gain title by adverse possession?

(e) Lance was 18 when he inherited property on January 1, 2010, while serving in the armed forces. Addie entered on the property on July 1, 2010, claiming it as her own. On January 1, 2011, Lance died in an automobile accident, leaving the property to his one-year-old son, Kevin (born July 1, 2009). When does Addie gain title by adverse possession?

(f) Same as (e) except Addie sold the property to Ed Verse on January 1, 2014, giving him a deed for the property. When does Ed Verse gain title by adverse possession?

Explanations

Hunting Lodge

1. Yes. Arthur used the property as would a true owner. A true owner using the property as a hunting lodge would not clear the land or necessarily fence in the land. The posting of the directions to the cabin, the road to the cabin, and the cabin itself are open enough possession to give notice to the true owner. Holding pursuant to the tax deed satisfies the adverse and hostile element. Even though Arthur does not reside on the land, his use as would a true owner of a hunting cabin, especially as reinforced by the presence of the road and the cabin itself, is enough to satisfy the continuing possession element. Arthur had exclusive possession. The faulty tax deed is a color of title, so any problems Arthur may have in establishing exactly how much of the property he used at all—much less continuously for the limitations period—are overcome since Arthur is

deemed to be in constructive possession of all the land described in the tax deed. Some jurisdictions require payment of property taxes to claim by adverse possession; most do not. Either way, Arthur is okay because he paid them. See Monroe v. Rawlings, 49 N.W.2d 55 (Mich. 1951).

Timing Is Everything

2. The record owner may sue in some jurisdictions. Once the title to Blackacre is transferred to Alie, *TO* no longer has any right to sue Alie in ejectment to recover possession and title. However, that does not necessarily mean that rights against trespassers such as Tom that arise before the limitations period runs also end. See 10 *Thompson on Real Property* §87.03, at 86 (David Thomas, ed., 1994). In some jurisdictions, *TO* still has the right to sue. In others, the title acquired by adverse possession relates back to the date of the adverse possessor's entry and, when this rule is prevails, the *TO* has no right to sue Tom.

Interim Transfer

3. Xeno acquires all of the right, title, and estate that Adam had. Thus Xeno can tack her own possessory right onto Adam's ten years of adverse possession, so that Xeno can acquire title by adverse possession in ten more years in a state with a 20-year statute of limitations.

It's Yours? Really?

4. Yes. The post-limitations period admission is irrelevant to the passage of title to Angie by adverse possession. The statute is a statute of repose. Once perfected, title by adverse possession is as good as any title, and nothing said by the claimant will divest it. Adverse possession creates a new title, not just a defense to the former owner's title. Land transfers are subject to the Statute of Frauds, which requires a writing to transfer title. For Angie to return Brownacre to *TO*, she must execute a deed. An oral statement is inadequate to transfer title. While Angie's possession was not consciously hostile to *TO*, she was on the property other than with *TO*'s permission, and that is all the hostility most states require.

With Your Kind Permission

5. No. *TO*'s permission immunizes his holdings from Andy's claim. Andy's possession must be hostile and adverse to *TO*'s ownership. *TO* can stop Andy's claim dead by showing that Andy had permission to take possession (as a tenant with a lease has permission to do so).

One Farm, Two Deeds

6. Judgment for Charlie as to the farmland. Charlie has color of title and constructive possession of the land described in the deed as to Amy. Judgment for Brad as to the timberland and to any land not used by either of them. A faulty deed constitutes color of title and the person holding the faulty deed, Charlie here, has constructive possession of the entire property described in the deed. But where the true owner, Brad in our case, actually possesses part of the disputed property, the person holding color of title can claim only the portion of the property actually possessed.

Dispossessing Future Estate Holders

7. (a) Judgment for Bobbie. You may want to return to this Example after studying future interests. *TO* holds a life estate, which means he owns Blackacre as long as he lives. Once he dies, Blackacre automatically passes to Bobbie. The adverse possessor used the property for the full limitations period, but only against *TO*, the holder of the life estate, not against Bobbie. AP owns Blackacre as long as *TO* lives. Once Bobbie's remainder vests in possession at *TO*'s death, however, AP must run the statute against Bobbie all over again. Even if the adverse possessor fully and efficiently used the land during the life tenant's tenure for the full limitations period, title is not transferred to the adverse user in this instance. No amount of honest labor will be rewarded by transferring Bobbie's title to AP, because Bobbie is not the sleeping owner the law means to penalize. Both theories of adverse possession cannot be satisfied in this instance.

   (b) This time, judgment for AP. The adverse possession began at a time when *TO* held Blackacre in fee simple absolute (*TO* owned it potentially forever), so the statute continued to run against all persons, including Bobbie, who had interests in Blackacre originating in *TO*'s ownership. When *TO* died and left Blackacre

partly to Angelina (life estate) and to Bobbie (remainder after Angelina's death), each took subject to AP's rights already established in the property. AP successfully acquired the fee simple absolute that *TO* held at the time of AP's entry.

Calculating Time in Possession

8. Judgment for Owen. Bessie is not in privity with Ayn and therefore cannot tack Ayn's time to Bessie's possession period. The statute of limitations for Bessie began running when she entered onto Blackacre. Owen, although a true owner sleeping on his rights for more than the statutory period, still prevails over the adverse user, who has not herself been in possession and satisfied the elements of adverse possession for the statutory period. This result shows that the "sleeping owner" statute of limitations rationale is not as important as the reward theory in these circumstances.

This Land Is My Land

9. (a) Odie still owns Blackacre because no one adverse possessor has run the statute for the required 20 years. Dan held it the longest, 11 years, but still fell short of the required 20 years. For the successive disseisers, one must be in possession for the statutory period to oust the true owner thereafter. None of the disseisers can tack preceding possessors' time on the land since they were not in privity. If Betty had sold or willed her rights to Cory, and Cory had deeded or willed his rights to Dan, Dan could tack both Betty's and Cory's times of possession and prevail, but that's not what happened.

   (b) Judgment for Cory. The prior possessor has a right to possession superior to the right of a later adverse possessor, even if the latter is satisfying all the elements required for adverse possession up to the time of the suit. Adverse possession is a method of transferring title after the statute has run, not an exception to the doctrine of relativity of title (first-in-time). The prior adverse user has a right superior to any successors, assuming she can prove that she did not abandon the property. Cory can eject Dan, but does not have the title yet. Does Cory get credit for Dan's possession? This is an open question.

(c) Judgment for Dan. Dan has a separate interest in the wheat crop, assuming that he planted it and intends to harvest it, no matter that Cory has a right of prior possession. Protecting the crop presents an issue separate from the prior right to possession of the soil. Here Dan seeks not possession, but damages.

(d) Judgment for Addy, who has acquired (assuming that proper proof is presented in this suit) Ossie's title by adverse possession, so that, in Year 25, Ossie had no rights to transfer to Ben. Ben cannot acquire more than his vendor had to give and so acquires nothing. Ben is not without a remedy, as he likely has a suit against Ossie for failing to convey good title.

(e) Ben prevails. He acquired all of Ossie's rights as legal owner. The statute of limitations has not run on Addy's adverse possession, so Ben can eject her.

(f) Addy wins. Ben waited too long to sue. He has 20 years to bring suit. The statute of limitations is measured by the time the adverse possessor is in possession, not by the time a record title owner has title.

Disabled Advice

10. Absent some special statutory provision on this problem that adjusts the time a person can bring suit once a disability is removed, your advice to *O* should be to sue *A* in his son's name before Year 35, when the limitations period will run in *A*'s favor in a majority of states. The statute of limitations is tolled while *O* is insane since insanity is a disability. We do not tack disabilities, however. Only the disabilities in effect at the time the adverse possessor entered the land toll the statute. Though *O*'s son *S* was insane when taking his interest, the statute of limitations begins running in *A*'s favor as soon as the title is transferred to *S*: *S*'s disability does not stop or toll the statute's running.

Bad Fences Make Bad Neighbors

11. Ben's construction interrupted the prescriptive period. Judgment for Ben. See Mendonca v. Cities Service Oil Co., 237 N.E.2d 16 (Mass. 1968). The limitations period was certainly disrupted as to eight feet. An argument could be made that Arden used 12 feet continuously for the

entire 20-year period. A better argument can be made, however, that if Arden was truly claiming adversely he would have challenged Ben's taking down the fence and using the land in dispute. Having failed to assert his rights in a situation where the true owner would have challenged Ben's actions, Arden lost his adverse claim to the entire 20 feet and started the limitations period anew as to the remaining 12 feet after the fence was back up.

Intent on Ownership

12. Judgment for Annie in states adopting the objective view of hostility and for Owen in states requiring subjective good faith on the adverse possessor's part. Actually, this problem is really an argument for the majority rule. Annie's possession (if she can prove it), regardless of what she told people about it, should control. Adverse possession cases often turn as much on matters of proof as on questions of law. Annie, for example, may not be able to prove when she took possession, or that she took hostilely, because her main witnesses are not able to testify. In practice, adverse possessors entitled to have a title decreed theirs should actively pursue a judgment saying so. At a minimum, witnesses' affidavits at the beginning and at the end of the limitations period and a record of the possession over the required length of time should be made and kept.

Step Neighbors

13. (a) The New Jersey adverse possession statute provides that the record or true owners, such as the Mannillos, lose all rights to eject anyone who has been in possession for 20 years. The statute says anyone having a right to enter can bring suit, in this case for ejectment. The person with the right to enter is the legal owner, in our case the Mannillos. According to the statute the true owner can bring the action as soon as the action accrues, which is as soon as the Gorskis' stoop, steps, and walk encroach onto the Mannillos' land. The statute says if the person with the right to bring the action fails to bring the action within 20 years after the cause of action accrues, the true owner is barred from ever bringing the suit. Since the legal owner cannot bring a suit to oust or eject the trespasser

after the statute of limitations has run, the trespasser in effect and legally has the right to the property.

(b) Gorski's possession was actual. She claims only the land where her stoop, steps, and walk sit.

(c) A critical issue in the opinion in *Mannillo* was whether Gorski's possession was open and notorious. Although the stoop, steps, and walk were visible (and in all likelihood walked on by Mannillo at times), the New Jersey Supreme Court concluded the encroachment onto the Mannillo property was not open and notorious. Beginning with an assertion that the foundation of adverse possession is the failure of the true owner to commence an action for the recovery of the land involved, the court concluded the possessor's use must be of such character

> as to put an ordinarily prudent person on notice that the land is in actual possession of another. . . . Generally, where possession of the land is clear and unequivocal and to such an extent as to be immediately visible, the owner may be presumed to have knowledge of the adverse occupancy. . . . However, when the encroachment of an adjoining owner is of a small area and the fact of an intrusion is not clearly and self-evidently apparent to the naked eye but requires an on-site survey for certain disclosure as in urban sections where the division line is only infrequently delineated by any monuments, natural or artificial, such a presumption is fallacious and unjustified.… Accordingly, we hereby hold that no presumption of knowledge arises from a minor encroachment along a common boundary. In such a case, only where the true owner has actual knowledge thereof may it be said that the possession is open and notorious.

While the New Jersey court's approach is sensible in urban settings, it causes enough practical problems that most other states have not expressly adopted the "minor encroachment" rule. One troubling issue that arises, for example, is what constitutes a minor encroachment and what a major encroachment. In a later case, a New Jersey trial court and the supreme court disagreed over whether a strip of land one foot wide and 152 feet long was a minor or a major encroachment ("minor encroachment," ruled the supreme court). The rule also makes more difficult determining whether long-used property may be claimed by adverse possession when prior owners' knowledge is unknown. Another issue, as discussed in Explanation (h), below, is whether a survey taken when Mannillo purchased the property should have given Mannillo actual, inquiry, or constructive notice. Because Gorski's possession was not open and notorious under the New Jersey approach,

Gorski's adverse possession claim fails no matter how she fares under the other elements.

(d) A major issue in *Mannillo* was whether an entry and continuance under the mistaken belief that the possessor has legal title to the land in dispute exhibits the requisite hostile and adverse possession to sustain an adverse possession claim. Until this case, New Jersey held adverse possession could not be bottomed on mistake. In *Mannillo*, New Jersey held that the adverse possessor's intent is irrelevant.

New Jersey's former rule, called the "Maine Doctrine," required as an essential element of adverse possession that the adverse possessor intend to claim the property whether or not his deed describes the land, and whether or not it is eventually determined he had no right to enter upon the property. "If, on the other hand, a party through ignorance, inadvertence, or mistake occupies up to a given fence beyond his actual boundary, because he believes it to be the true line, but has no intention to claim title to that extent if it should be ascertained that the fence was on his neighbor's land, an indispensable element of adverse possession is wanting. In such a case the intent to claim title exists only upon the condition that the fence is on the true line. The intention is not absolute, but provisional, and the possession is not adverse." 255 A.2d at 261. Thus the Maine Doctrine favors a person with hostile ambitions and disfavors an honest but mistaken person. A minority of states adhere to the Maine Doctrine. If New Jersey had not disclaimed the Maine Doctrine in *Mannillo*, Gorski would not have satisfied the hostile and adverse element, and thus could not avail herself of the adverse possession statute.

In *Mannillo*, however, New Jersey aligned itself with the vast majority of states and commentators that adhere to the Connecticut Doctrine that the possessor's mental state is immaterial. Besides treating intentional wrongdoers better than honest possessors, the Maine Doctrine encourages dishonesty at trial. A person who knows she might prevail if she testifies that she intended to claim the disputed property but definitely loses if she says she used the property by mistake will be tempted to testify that she intended to claim the property as her own even though it was not described in

her deed. We disfavor laws that encourage dishonesty and lying. The Connecticut Doctrine, on the other hand, posits an objective rule that the very nature of the entry and possession of the property is an assertion of an adverse and hostile possession when that possession is without the consent of the true owner. Adopting the more objective Connecticut Doctrine, the New Jersey Supreme Court concluded that Gorski satisfied the hostile and adverse element. In the end, it was a short-lived victory, since the court held that Gorski's possession was not open and notorious. See Explanation (c), supra.

(e) Gorski's possession was exclusive. Even though guests and invitees used the stoop, steps, and walk (including, presumably, the Mannillos when they visited Gorski), Gorski was the only one to claim possession. You might have noticed that although Gorski used a small portion of the Mannillos' lot, the Mannillos resided on the biggest portion of the lot, used the lot daily, and used it more intensely than Gorski. Only by treating the one lot as two pieces of property can Gorski be deemed to be in exclusive possession. Courts in fact do treat a portion of the property as separate property for determining exclusivity.

(f) Gorski's possession was continuous for more than 20 years. The stoop, steps, and walk were in place from 1946 until 1968, which exceeds 20 years. It is the possessor's use and possession of the land that must exist during the limitations period. It also does not matter that the Mannillos had owned their house for only 15 years (since 1953). The time the possession was adverse to the Mannillos' predecessor in interest (their seller) is deemed to run against the Mannillos.

(g) The general rule is that the successful adverse possessor does not have to compensate the former owner and that the true owners are not required to sell to trespassers. Some commentators have criticized the all-or-nothing approach, arguing that adverse possessors—especially in boundary disputes—should have a right to purchase the land, but not to take the land without payment. Some states, through betterment statutes, force the true owner in some cases to elect to pay for improvements made in good faith by an innocent improver or to sell the property to the innocent

improver. It seems unfair to require Mannillo to compensate Gorski since Mannillo cannot benefit in the slightest from the stoop, steps, and walk. The New Jersey court held that since its holding could result in undue hardship in boundary disputes, "if the innocent trespasser of a small portion of land adjoining a boundary line cannot without great expense remove or eliminate the encroachment, or such removal or elimination is impractical or could be accomplished only with great hardship, the true owner may be forced to convey the land so occupied upon payment of the fair value thereof without regard to whether the true owner had notice of the encroachment at its inception" where "no serious damage would be done to the remaining land as, for instance, by rendering the balance of the parcel unusable or no longer capable of being built upon by reason of zoning or other restrictions." 255 A.2d at 264.

(h) Although it may be tempting to consider the pre-existing condition because the Mannillos got what they expected when they bought the home and the surprise discovery is more of a psychological windfall than a loss of expectations, adverse possession and trespass laws do not take into account the fact that the encroachment existed at the time the true owner bought the property. Nonetheless, under New Jersey's minor encroachment rule, a survey may have given the Mannillos actual notice of the encumbrance, thus making Gorski's possession open and notorious. Even if the survey did not give the Mannillos actual notice because, hypothetically, they did not look at the survey and no one told them of the problem, a court might conclude a reasonable person should have known what the survey shows and treat the Mannillos as having ***constructive notice*** or that they should have asked about the survey results (known as ***inquiry notice***). Unfortunately for Gorski, treating the survey as giving the Mannillos notice of any type would not have helped her since the Mannillos purchased (and thus would have received notice) in 1953. The case was filed in 1968, so only 14 or 15 years had elapsed, preventing Gorski's adverse possession from meeting the 20-year requirement.

Tack and Toll Time

14. (a) Poe would gain title by adverse possession on December 1, 2022. Under the statute, the earliest Poe could gain title by adverse possession would be January 1, 2021. Bryan, a minor or infant under the statute until he turns 20, cannot be dispossessed until two years after his disability ceases. Bryan turns 20 on December 1, 2020. Two years later is December 1, 2022. Poe gains title on the later of the normal adverse possession period or the special disability period, in this case on December 1, 2022.

(b) Poe would gain title by adverse possession on December 1, 2022, the same time she would have possessed had Bryan not gone to prison. Provision (3) of the state statute, as do all or virtually all state statutes, provides that a disability does not exist for purposes of adverse possession unless it existed when the cause of action accrued. Bryan's only disability when the action accrued—when Poe entered onto the land—was his age. Bryan's going to prison does not toll the running of the limitations period.

(c) Poe gains title by adverse possession on January 1, 2021. Under the statute the earliest Poe could gain title would be January 1, 2021. The statute provides that a person is entitled to an additional two years after the disability ends to bring an action. The "action" that may be brought is an ejectment action against Poe, the trespasser (adverse possessor). The "person entitled to bring an action" includes Bryan and any person taking through Bryan, including his estate should he die, his successors, devisees, or heirs, including in our Example the purchaser, Michelle. Bryan's disability ceased on January 1, 2016, the date he sold to Michelle. Two years later is January 1, 2018, which is earlier than if Bryan had no disability. The statute sensibly provides that the two-year extension rule cannot shorten a limitations period otherwise prescribed. The prescribed period ends on January 1, 2021. Poe gains title then. The limitations period does not begin anew when ownership changes hands. Michelle has only five years to bring an action to eject Poe, not 20 years.

(d) If Bryan sold to Michelle on July 1, 2021, Poe gains title on December 1, 2022. Again, the earliest Poe could claim title by

adverse possession is January 1, 2021. Since Bryan's disability ended on December 1, 2020, when he turned 20, however, he and any person claiming through him, including Michelle, have until November 30, 2022, to bring an action to eject Poe. Michelle bought on July 1, 2021, while Bryan (and, through Bryan, Michelle) had almost a year and a half to bring an action. Michelle must bring an action before December 1, 2022. The statute continues to run against Michelle, however. The limitations period does not begin anew when Michelle purchases the land from Bryan.

(e) Addie gains title by adverse possession on July 1, 2020, the earliest day possible under the statute. Lance had one disability when he acquired the land: being under age 20. Note that the statute does not include being in the military as a qualifying disability. Lance died in 2011. His disability ended on that date. The two-year extension would not benefit Lance or Kevin. The main issue is whether Kevin can toll the statute because he was a minor or an infant both when Lance acquired the land and when Lance devised the land to him. Unfortunately for Kevin, he was not a "person entitled to bring an action at the time the action accrued." Kevin could not bring suit, and in fact had no right to the land at all, until the land passed to him under Lance's will. Despite his age, therefore, Kevin may lose all rights to eject Addie on July 1, 2020, when Kevin just turns 11. Let's hope Kevin's mother, legal guardian, or trustee looks out for his interest!

(f) Ed Verse gains title by adverse possession on July 1, 2020. Ed Verse is able to "tack" the time Addie was on the land. Addie sold the land to Ed Verse, and thus was in "privity" with Ed Verse, so he succeeds to her attributes, including time she adversely possessed the property.