THE LAW OF PROPERTY

SUPPLEMENTAL READINGS

Class 22

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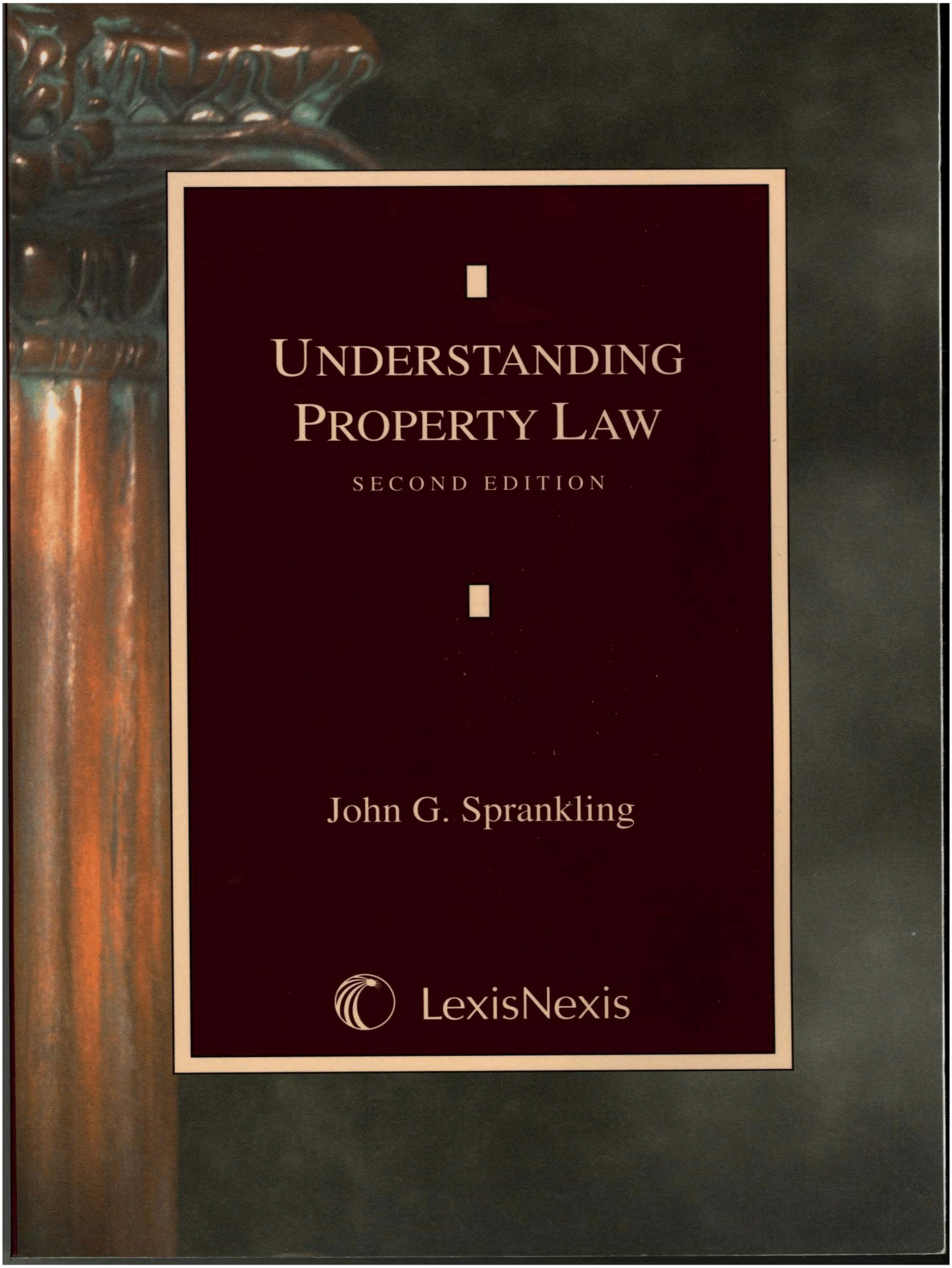

UNDERSTANDING PROPERTY LAW

SECOND EDITION

John G. Sprankling

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Chapter 30

TRESPASS

SYNOPSIS

§ 30.01 The Right to Exclude

The common law cherished an owner's virtually absolute right to exclude others from his land.[1] The law of trespass, which evolved to safeguard this right, was, as a result, extraordinarily broad.

Blackstone expressed this common law view by defining property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[2] Blackstone's eighteenth-century approach was quite influential in the young United States. As the Supreme Court ultimately explained, the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[3]

Why prohibit trespass? The main reason is utilitarian. As Richard Posner explains, the law protects a landowner's right to exclusive possession in order to maximize the efficient use of land.[4] Suppose farmer A plants

[1] *See generally* David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375 (1996); Curtis J. Berger, PruneYard *Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. Rev. 633 (1991); Kelvin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. Rev. 37 (1985); Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. Legal Stud. 13 (1985).

[2] Erlich's Blackstone 113 (J.W. Erlich, ed., Nourse 1959).

[3] Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

[4] *See generally* Richard A. Posner, Economic Analysis of Law 32–34 (6th ed. 2003).

wheat; he waters, weeds, and fertilizes his growing crop. When the wheat is ripe, T, a neighbor, enters the field, harvests the wheat, and sells it at market. In a world without trespass liability, A has no claim against T. Absent the protection afforded by the trespass doctrine, Posner argues, owners like A have no incentive to use their land productively. Why would A expend time and money in raising wheat if T or anyone else may appropriate the crop? By protecting owners like A, the trespass doctrine encourages an owner to undertake the investment necessary for optimum use of land. This results in maximum production of food and other goods that benefit society in general. Another important—but distinctly secondary theme—is that the trespass doctrine minimizes the risk of violence. If the law did not protect A's rights, he might be tempted to defend his wheat field through self-help (e.g., with a shotgun).[5]

In recent decades, the scope of the right to exclude—and consequently the trespass doctrine—has been curtailed for reasons of public policy. The productivity rationale underlying Posner's simple model has less force, for example, when applied to residential or commercial property. And other, countervailing policies have emerged. The absolutism of traditional trespass law is out of step with the needs of our increasingly crowded society. Thus, for example, the landlord's common law right to refuse to rent to a prospective tenant, or to evict an existing tenant, is no longer absolute (*see* §§ 16.02, 19.04). Similarly, a business open to the public cannot exclude potential customers based on discrimination.[6]

There is a clear movement toward crafting new exceptions to trespass liability in diverse areas, including beach access, migrant farmworker housing, and free speech activities in privately-owned shopping centers. As the New Jersey Supreme Court observed in *State v. Shack*, while overturning a criminal trespass conviction: "Property rights serve human values. They are recognized to that end, and are limited by it."[7] Courts are slowly building on this utilitarian sentiment by limiting the right to exclude in specialized situations.

§ 30.02 What Is a Trespass?

[A] Trespass Defined

At common law, any intentional and unprivileged entry onto land owned or occupied by another constituted a trespass. The scope of this doctrine was quite expansive, reflecting an absolutist view of property rights. The modern law of trespass—as reflected by the Restatement (Second) of Torts—largely follows the common law approach. Contemporary

[5] *See* Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997) (affirming $100,000 punitive damages award against company that delivered mobile home by trespassing across plaintiffs' field, based in part on the law's policy against self-help remedies).

[6] 42 U.S.C. §§ 2000a et seq.; *see also* U.S. Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981) (effort of Jaycees club to exclude women members violated state law).

[7] 277 A.2d 369, 372 (N.J. 1971).

developments in the law have focused on carving out special exceptions to liability, not on changing the basic liability standards.

The element of intent has a special meaning in trespass law. A trespasser is strictly liable; good faith, knowledge, and fault are irrelevant.[8] T commits a trespass, for example, if he merely walks across O's land, mistakenly believing it to be his own. The trespass doctrine requires only that T intend to enter onto the land as a matter of free choice, not that he had a subjective intent to trespass or even knew he was trespassing. T's mistaken belief that he actually owns the land is not a defense, although it will presumably bar punitive damages.

Although trespass always involves a physical invasion, a trespass may occur without any personal entry by the trespasser. T will be liable in trespass, for example, if he causes a thing or a third person to enter O's land.[9] Further, although most trespass cases involve entry onto the surface of land, the doctrine also applies to entries below the land surface (e.g., through tunnels or caves)[10] and—at least partially—to entries in the air space over the land.[11]

A trespasser is liable even if the entry causes no actual damage.[12] A court will hold a trespasser like T liable to O for nominal damages and, upon O's request, will routinely enjoin any further trespass. The recent decision of *Jacque v. Steenberg Homes, Inc.*[13] illustrates the potential severity of this rule. The defendant, attempting to deliver a mobile home, discovered that the only road to the delivery site was nearly impassible. The road was covered with seven feet of snow, and contained a sharp curve that could be negotiated only with extensive labor. Defendant accordingly delivered the mobile home by crossing plaintiffs' snow-covered field, over their strong objection. Although the crossing caused no harm at all to the land, plaintiffs received $1 in nominal damages and $100,000 in punitive damages, a result affirmed by the Wisconsin Supreme Court.

[B] Distinguishing Trespass from Nuisance

The boundary between trespass and nuisance—once quite clear—is quite murky today. Traditionally, the distinction turned on the nature of the intrusion. Trespass protected the owner's right to exclusive *possession*. Any physical entry onto another's land was deemed to interfere with possession, and was thus a trespass. For example, T could commit an actionable entry if (a) he crossed O's land, (b) he tossed rocks onto O's land, or (c) debris from his factory fell onto O's land.

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[8] Restatement (Second) of Torts §§ 158, 164.

[9] Restatement (Second) of Torts § 158.

[10] *Cf.* Edwards v. Sims, 24 S.W.2d 619 (Ky. Ct. App. 1929) (suggesting entry into cave beneath owner's property constituted a trespass).

[11] *But see* Geller v. Brownstone Condominium Ass'n, 402 N.E.2d 807 (Ill. App. Ct. 1980) (temporary construction scaffolding intruding into air space from adjacent land was not a trespass).

[12] Restatement (Second) of Torts § 163.

[13] 563 N.W.2d 154 (Wis. 1997).

Nuisance, on the other hand, protected the owner's *use and enjoyment* of land (*see* § 29.02). Any conduct—other than physical entry—that interfered with the use and enjoyment of land was accordingly governed by nuisance law. Thus, for example, if T emitted smoke, odors, noise, vibration, light, or gases onto O's property, this was a nuisance, not a trespass.

Today, many courts reject this simplistic distinction. In a very real sense—reflecting the limited scientific knowledge of the era—the common law distinction ultimately turned on *visibility*: were the invading particles large enough to be visible (usually a trespass), or so small as to be invisible (a nuisance)? Courts are now increasingly willing to stretch the boundary of trespass (e.g., in air pollution or toxic contamination cases) to encompass microscopic particles, usually by focusing on the nature of the harm caused, not the size of the particle.[14] Thus, in borderline cases, a plaintiff may choose to sue in either trespass or nuisance.

[C] General Exceptions to Trespass Liability

An entry under a legally-recognized privilege does not constitute a trespass. The classic example of a privileged entry is one made with the landowner's *consent*. If owner O invites plumber P onto O's land to fix a leaky pipe, for example, P's entry is privileged.[15] The other main privilege may be broadly described as *necessity*. For example, a firefighter may enter private property to save an adjacent house from fire, just as a police officer may enter to arrest a suspect. Similarly, private persons are privileged to enter another's land in an emergency situation (e.g., while fleeing from an attacking bear).[16]

§ 30.03 Trespass and Rights of Migrant Farmworkers

O, a farmer, employs and houses migrant farmworkers on his property. P, a social worker, wishes to visit one of the farmworkers. Does the trespass doctrine permit O to exclude P from the farm?

This question was posed in the celebrated case of *State v. Shack*.[17] Two employees of government-funded organizations entered upon a privately-owned New Jersey farm in order to aid migrant farmworkers housed on the land. One, a health care provider, needed to remove sutures from a farmworker; the other, an attorney, wanted to discuss a legal problem with another worker. The farm owner, one Tedesco, confronted them with his shotgun and demanded that they leave the land. When they refused,

[14] *But see* Adams v. Cleveland-Cliffs Iron Co., 602 N.W.2d 215 (Mich. Ct. App. 1999) (entry of dust particles was not a trespass).

[15] *See, e.g.*, Desnick v. American Broadcasting Companies, Inc., 44 F.3d 1345 (7th Cir. 1995) (even though owner's consent to entry was obtained by fraud, entry was not trespass).

[16] *See generally* Powell on Real Property § 64A.02[2] (Michael Allan Wolf ed., Matthew Bender).

[17] 277 A.2d 369 (N.J. 1971). *See also* Michele Cortese, Note, *Property Rights and Human Values: A Right of Access to Private Property for Tenant Organizers*, 17 Colum. Hum. Rts. L. Rev. 257 (1986).

Tedesco then summoned a state trooper to eject them and initiated a successful criminal prosecution for trespass. The New Jersey Supreme Court overturned the convictions, finding that defendants' entry was privileged. Refusing to reach defendants' constitutional claims, the court grounded its ruling in New Jersey law; "under our State law the ownership of real property does not include the right to bar access to governmental services available to migrant workers."[18]

The rationale for this decision, however, is far from clear. The court seemed to suggest that the traditional privileges of consent and necessity contributed to its ruling. Having opened up his property to house farmworkers, perhaps Tedesco impliedly consented to entries by at least some visitors. Similarly, the visits of the health care worker and the attorney were arguably prompted by considerations of necessity. Medical care, for instance, is a basic human necessity. On the other hand, why couldn't such services have been provided off Tedesco's land? Another view of the case relies on a federal preemption argument; the federal statutes creating the publicly-funded programs at issue implicitly established a right of access across private land in order to implement the program goals, which impliedly preempted the state law of trespass.

At bottom, however, *Shack* appears to rest on a more abstract utilitarian analysis. The court observed that rights are not absolute, but rather are relative. Thus, the law requires an accommodation between the right of a property owner and the "right of individuals who are parties with him in consensual transactions relating to the use of the property."[19] Trying to strike a fair adjustment of the competing needs of the parties, the court concluded that Tedesco could not isolate a farmworker "in any respect significant for the worker's well-being."[20] He was thus obligated to allow access by employees of government agencies and charitable organizations providing services to migrant workers.[21]

§ 30.04 Trespass and Freedom of Speech

[A] Rights Under Federal Constitution

Suppose P wishes to distribute Communist party literature to customers at a shopping center owned by O. Can O enjoin this conduct as a trespass? Or may P exercise her right of free speech on O's property?

The First Amendment protects the right of freedom of speech from state action, not private action. Accordingly, while P has a right to distribute her literature on public property, this right does not necessarily extend to private property as well. One might argue, of course, that O's shopping

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[18] State v. Shack, 277 A.2d 369, 371–72 (N.J. 1971).

[19] *Id.* at 374.

[20] *Id.*

[21] *See also* Uston v. Resorts Int'l Hotel, Inc., 445 A.2d 370 (N.J. 1982) (partially relying on *State v. Shack* in holding Atlantic City casino could not exclude "card counter" from blackjack tables).

center should be subject to the First Amendment because it is the functional equivalent of a small town.[22] Like the business district of a small town, the typical shopping center has its own sidewalks, parking spaces, traffic controls, security force, fire protection, and so forth. Further, the shopping center serves both commercial and social functions. More than a mere collection of stores, it increasingly serves as a social meeting place. However, the Supreme Court rejected this argument in *Lloyd Corp. v. Tanner*,[23] reasoning that property does not lose its private character merely because the public is invited to use it for specific purposes. Thus, the First Amendment will probably not shelter P from trespass liability.

[B] Rights Under State Constitutions

The right to free speech contained in state constitutions, however, is sometimes broader than the First Amendment protection. A number of high-profile decisions have examined whether state constitutions allow citizens to exercise a right of freedom of speech at privately-owned shopping centers, with mixed results.[24] Although varying widely in other respects, these decisions typically focus on one issue: is today's shopping center the functional equivalent of yesterday's downtown business district? Answering "yes," courts in California, New Jersey, and a few other states interpret their state constitutions to protect such speech by P and other citizens. However, most jurisdictions find no state constitutional right under these circumstances.[25]

The leading decision exploring such a state constitutional right is *Prune-Yard Shopping Center v. Robins*.[26] The case arose when a group of high school students sought to enlist public support to oppose a pending United Nations resolution condemning "Zionism" by distributing literature and soliciting petition signatures in a privately-owned California shopping mall. Politely ejected from the mall by a security guard, they sued to obtain access. The California Supreme Court held that the state constitution protected the reasonably-exercised right of free speech even in private shopping centers. The mall owners subsequently attacked this decision before the United States Supreme Court, claiming, inter alia, that it constituted an illegal taking and violated their own federal right to freedom of speech. The Court found that no taking had occurred, reasoning that the

[22] *See* Marsh v. Alabama, 326 U.S. 501 (1946) (First Amendment's guarantee of free speech applied to privately-owned "company town").

[23] 407 U.S. 551 (1972).

[24] *See, e.g.*, New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994) (New Jersey constitution protects right to distribute leaflets at shopping center); Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331 (Pa. 1986) (Pennsylvania constitution does not protect right to collect signatures on nomination petition at shopping center).

[25] *See, e.g.*, United Food & Comm. Workers Union v. Crystal Mall Assocs., L.P., 852 A.2d 659 (Conn. 2004); Cross v. Texas, 2004 Tex. App. LEXIS 6098.

[26] 447 U.S. 74 (1980). *See also* Curtis J. Berger, PruneYard *Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. Rev. 633 (1991).

owners lacked any evidence suggesting that such activity would unreasonably impair the value of their land as a shopping center. Any potential adverse impact, the Court observed, could be mitigated by reasonable time, place, and manner regulations. Nor did the ruling interfere with the owners' own freedom of speech. It was unlikely that patrons would conclude the owners were endorsing the views in question and, in any event, the owners could avoid this danger by expressly disclaiming any sponsorship.

§ 30.05 Trespass and Beach Access

[A] Who Owns the Beach?

Roman law held that the ocean—and, by extension, ocean beaches as well—could not be privately owned, but rather was common property open to all. The *public trust doctrine* produces much the same result in the United States. It holds that state governments act as trustees over navigable waters and certain related lands in order to protect the public's right to use these areas for navigation, commerce, fishing, swimming, and other activities.

Under this doctrine, the public has a clear right to use wet-sand ocean beaches *below* the mean high tide line; these beaches are subject to the "ebb and flow" of the tide.[27] Suppose P, a member of the public, wishes to use the wet-sand beach. May P cross O's land—the dry-sand beach *above* the mean high tide line—to reach the wet-sand beach? Even better, may P use O's dry-sand beach? Or would such acts constitute trespasses?

[B] Extending the Public Trust Doctrine

One judicial approach to these issues relies on the public trust doctrine itself, as illustrated by the New Jersey Supreme Court's decision in *Matthews v. Bay Head Improvement Association*.[28] There, the defendant association effectively controlled public access to most of the beach in the Borough of Bay Head, New Jersey; it owned the dry-sand parcels that separated the wet-sand beach from the ends of seven public streets, and leased or owned much of the rest of the dry-sand beach. Except for association members, no one could travel from these street ends to reach the wet-sand beach without the association's consent. The court first concluded that the public had a right of access across the association's dry-sand beach parcels. To deny public access, it reasoned, would seriously threaten or perhaps even nullify the public trust doctrine.

Extending this line of analysis, the *Matthews* court held that the public was entitled to use and occupy the dry-sand beach itself where this use was essential or reasonably necessary for enjoyment of the ocean. For example,

[27] *See, e.g.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984); Opinion of the Justices (Public Use of Coastal Beaches), 649 A.2d 604 (N.H. 1994).

[28] 471 A.2d 355 (N.J. 1984).

it noted that swimming must be accompanied by periods of rest on land; during high tides, the effective exercise of this right required that a swimmer be allowed to rest on the dry-sand beach.

The result in *Matthews* rests heavily on the identity of the defendant, whose relationship with the Borough and virtual monopoly over the local beach gave it a quasi-public status. A city or other public entity—as a component of the state itself—is obviously restricted by the public trust doctrine. Just as a city would be obligated to provide general access to a city beach, the court ruled that the defendant association must provide beach access for members of the public, such as our hypothetical beach-lover P. *Matthews* offers little guidance, however, on whether the public trust doctrine imposes similar obligations on an ordinary private landowner.[29]

[C] Other Approaches

Two other approaches are utilized in access disputes where there is a long history of public use. Four states with extensive coastlines—Florida, Hawaii, Oregon, and Texas—rely on customary rights. In these states, lengthy and uninterrupted public use of the beach creates a perpetual right of access.[30]

Alternatively, a few states apply the prescriptive easement doctrine in these circumstances (*see* § 32.06). It is often difficult, however, to establish the elements of the doctrine in beach access cases. Continuous use by the public is hard to prove as a factual matter. And because many courts presume that the owner consented to prior public access, adverse use is rarely established.

§ 30.06 Encroachments

Suppose T mistakenly builds her new house in the wrong location: it extends two inches over her lot line onto the adjoining lot owned by O. What is O's remedy for this trespass?

A permanent or continuing trespass caused by the construction of a building or other improvement that *partially* extends onto another's land is known as an *encroachment*. The common law treated an encroachment just like any other type of trespass. Thus, under the traditional view, O had a choice. He could either (a) obtain an injunction forcing T to remove the encroachment or (b) recover damages from T.[31] This standard may produce harsh results. Suppose that removing the encroachment (by rebuilding part of the house) will cost T $10,000, while allowing the

[29] *Cf.* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (state's attempt to condition building permit for beachfront lot on owner's grant of beach access easement violated the Takings Clause of the Fifth Amendment).

[30] *See, e.g.*, State of Oregon *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969).

[31] *See, e.g.*, Peters v. Archambault, 278 N.E.2d 729 (Mass. 1972) (house encroached 15 feet); Geragosian v. Union Realty Co., 193 N.E. 726 (Mass. 1935) (fire escape encroached 11 inches over plaintiff's land, and drain extended under land); Pile v. Pedrick, 31 A. 646 (Pa. 1895) (foundation wall encroached 1 3/8 inches).

encroachment to remain will cause only minor damage to O, perhaps $500. Should the law permit O to inflict costs of $10,000 on T merely to save O $500?

Driven by concern for both equity and efficiency, most modern courts restrict the owner's remedy where the encroachment results from an innocent, good faith mistake. If the injury to the owner is minor compared to the cost of removing the innocent encroachment—as in the O-T example above—a court will deny the owner's requested injunction and award damages instead.[32] Under this standard, O will receive $500. The common law view, however, still governs intentional encroachments. Accordingly, O could obtain an injunction compelling removal of the encroachment regardless of equity or efficiency if T's conduct was intentional.

§ 30.07 Good Faith Improvers

What if an owner mistakenly builds a new house *entirely* on land owned by another? Suppose T intends to build on her own lot, but due to a survey error, inadvertently builds her house on an adjacent lot owned by O. Because the owner of land is also deemed to own buildings on the land, O now owns the house. Yet O has been unjustly enriched by T's good faith mistake. Does T have any recourse?

English common law accorded only meager protection to the improver of another's land. In general, the improver was considered a trespasser subject to punishment, not a laborer entitled to compensation. In the United States, this standard still governs the fate of the "bad faith" improver who purposely builds on another's land; he loses ownership of the improvements without compensation.

Yet, to prevent unjust enrichment, most states afford limited relief to the *good faith improver*—one who improves land under the mistaken but good faith belief[33] that he owns it.[34] Case law in some states entitles the good faith improver to either (a) remove the improvements or (b) receive compensation equal to the amount by which the improvements increase the market value of the owner's land.[35] Other states—usually by statute—require the owner to either compensate the improver for the enhanced value produced by the improvements or to simply sell the land to the improver for its fair market value before improvement.[36]

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[32] *See, e.g.*, Goulding v. Cook, 661 N.E.2d 1322 (Mass. 1996) (recognizing rule).

[33] *But see* Raab v. Casper, 124 Cal. Rptr. 590 (Ct. App. 1975) (remanding case to trial court for determination on improver's possible negligence).

[34] *See generally* Kelvin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. Rev. 37 (1985); John H. Merryman, *Improving the Lot of the Trespassing Improver*, 11 Stan. L. Rev. 456 (1959).

[35] *See, e.g.*, Madrid v. Spears, 250 F.2d 51 (10th Cir. 1957) (good faith improver can recover compensation measured by enhanced value of land); Hardy v. Burroughs, 232 N.W. 200 (Mich. 1930) (same); Somerville v. Jacobs, 170 S.E.2d 805 (W. Va. 1969) (good faith improver entitled to receive either enhanced value of land or conveyance of improved land in return for payment of land's value before improvement).

[36] *See* Powell on Real Property § 64A.05[5] (Michael Allan Wolf ed., Matthew Bender).