# THE LAW OF PROPERTY

*SUPPLEMENTAL READINGS*

**Class 17**

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barbri

Review

# New York State Bar Review - 2007

Outlines:

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

**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 remove 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).

## IV. 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* I.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.