

# Easements

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## A. What is an easement?

Easements are interests in land. Unlike fee simple ownership, they are nonpossessory. Rather, they allow the easement holder to use or control someone else's land. Suppose Anna owns Blackacre, and Brad owns Whiteacre, which borders Blackacre. Anna would like to cross Whiteacre to reach Blackacre. She could ask Brad for permission to cross, but even if he says yes, permission can be revoked. Brad might also convey Whiteacre to a less welcoming owner. Anna may therefore wish to acquire a property interest that gives her an *irrevocable* right to cross over Whiteacre. If Brad conveys her this interest (by sale or grant), Anna now owns an **easement of access**, which is a right to enter and cross through someone's land on the way to someplace else.

**Terminology.** Easements come in multiple flavors. The first distinction is between affirmative and negative easements. An **affirmative easement** lets the owner do something on (or affecting) the land of another, known as the **servient estate** (or **servient tenement**). The right is the **benefit** of the easement, and the obligation on the servient estate is its **burden**.

As noted above, a common affirmative easement is an **easement of access** (also known as an **easement of way**), which requires the owner of the servient estate to allow the easement holder to travel on the land to reach another location. In the example above, Anna has an affirmative easement to cross Whiteacre, the servient estate, to access Blackacre.<sup>1</sup> A **negative easement** prohibits the owner of the servient estate from engaging in some action on the land. For example, if Anna has a solar panel on her property, she might acquire a solar easement from Brad that would prohibit the construction of any structures on Whiteacre that might block the sun from Anna's panel on Blackacre.

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<sup>1</sup> If the easement holder is allowed to take something from the land (suppose Anna has the right to harvest wheat from Whiteacre while in transit to Blackacre), the right is called a **profit a prendre** or **profit**. Profits were traditionally classified as distinct from easements, though their legal treatment is typically similar. *See, e.g., Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong*, 516 N.W.2d 410, 414 (Wis. 1994) (“[W]e can find no distinction between easements and profits relevant to recording the property interest[.]”). The *Restatement* characterizes the profit as a kind of easement. § 1.2.

Another distinction is between **easements appurtenant** and **easements in gross**. An easement appurtenant benefits another piece of land, the **dominant estate**. The owner of the dominant estate exercises the rights of the easement. If ownership of the dominant estate changes, the new owner exercises the powers of the easement; the prior owner retains no interest. So if Anna's easement to cross Whiteacre to reach Blackacre is an easement appurtenant, Blackacre is the dominant estate. If she conveys Blackacre to Charlie, Charlie becomes the owner of the easement.

In an easement in gross, the easement benefits a specific person, who exercises the rights of the easement regardless of land ownership. If Anna's easement to cross Whiteacre to reach Blackacre is an easement in gross, she keeps her easement even if she conveys Blackacre. In general, the presumption is in favor of an easement appurtenant over an easement in gross. Why do you think that is?

Easements are part of the larger law of **servitudes**, which include real covenants and equitable servitudes. A servitude is a legal device that creates a right or obligation that **runs with the land**. A right runs with the land when it is enjoyed not only by its initial owner but also by all successors to that owner's benefited property interest. A burden runs with the land when it binds not only its initial obligor but also all successors to that obligor's burdened property interest. A servitude can be, among other things, an easement, profit, or covenant. These interests overlap, and the *Restatement (Third) of Property (Servitudes)* (2000) seeks to unify them.<sup>2</sup> As a matter of history, however, easement law developed as a distinct set of doctrines, and this chapter gives them separate treatment.<sup>3</sup>

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<sup>2</sup> A covenant is a servitude if either its benefit or its burden runs with the land; otherwise it is merely a contract enforceable only as between the original contracting parties (or perhaps a gratuitous promise enforceable by nobody at all). When a covenant is a servitude, it may equivalently be described as either a "servitude" or "a covenant running with the land." We will discuss covenants in a later chapter.

<sup>3</sup> Moreover, the Third Restatement is somewhat notorious for the extent to which it seeks not only to "restate" the common law, but to push it in a particular direction. While the Third Restatement does tend to provide the modern approach to most servitudes issues, it has a tendency to advocate against traditional, formalist rules that are often still good law in many American jurisdictions. We will not thoroughly explore these distinctions here; you should however be aware of the importance of thoroughly investigating the applicable law in your jurisdiction if you ever encounter servitudes in practice.

## B. Creating Easements

### 1. Express easements

Because easements are interests in land, express easements are subject to the Statute of Frauds. Failures to comply with the statute may still be enforced in cases of reasonable detrimental reliance. *See, e.g., Restatement (Third) of Property (Servitudes) § 2.9.*

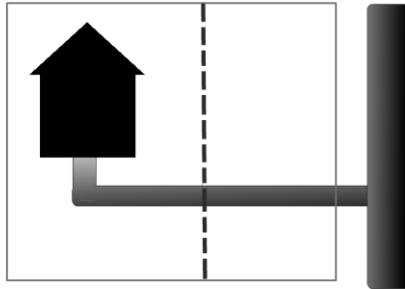
**Third parties.** Easements are often created as part of the transfer of land (e.g., selling a property, but retaining the right to use its parking lot). Traditionally, grantors could reserve an easement in the conveyed land for themselves, but could not create an easement for the benefit of a third party. This rule led to extra transactions. Where the traditional rule applied, if A wanted to convey to B while creating an easement for C, A could convey to C who would then convey to B, while reserving an easement. The modern trend discards this restriction.

### 2. Implied Easements

Easements may come into being without explicit agreements. They may arise from equitable enforcement of implied agreements or references to maps or boundary references in conveyances. *Restatement (Third) of Property (Servitudes) § 2.13.* In this section, we focus on two forms of implied easements: An **easement implied by existing use** and an **easement by necessity**. Both such easements commonly arise as a byproduct of land transactions.

#### a. Easement implied by existing use

An easement implied by existing use may arise when a parcel of land is divided and amenities once enjoyed by the whole parcel are now split up, such that in order to enjoy the amenity (a utility line, or a driveway, for example), one of the divided lots requires access to the other. Imagine, for example, a home connected to a city sewer line via a privately owned drainpipe, on a parcel that is later divided by carving out a portion of the lot between the original house and the sewer line connection:



In such a situation, courts will frequently find an easement implied by prior existing use, allowing the owner of the house to continue using the drainpipe even though it is now under someone else's land. *See, e.g., Van Sandt v. Royster*, 83 P.2d 698 (Kan. 1938). There are, however, some limits to the circumstances that will justify the implication of such an easement:

An implied easement from a preexisting use is established by proof of three elements: (1) common ownership of the claimed dominant and servient parcels and a subsequent conveyance or transfer separating that ownership; (2) before severance, the common owner used part of the united parcel for the benefit of another part, and this use was apparent and obvious, continuous, and permanent; and (3) the claimed easement is necessary and beneficial to the enjoyment of the parcel conveyed or retained by the grantor or transferrer.

*Dudley v. Neteler*, 924 N.E.2d 1023, 1027-28 (Ill. App. 2009) (internal citations and quotations omitted). The following notes consider each of these elements.

### Notes and Questions

1. **Common Ownership.** Are easements implied by prior existing use fair to owners of subdivided land? Why shouldn't we require purchasers of subdivided lots to "get it in writing"—that is, to bargain for easements to obvious and necessary amenities when accepting a parcel carved out from a larger plot of land? For that matter, why don't we require the original owner to bargain for the right to continue to use land that they are purporting to sell? Who do we think is in a better position to identify the need for such an easement, the prior owner of the undivided parcel, or the purchaser of the carved-out portion of

that parcel? Should the answer matter in determining whether to imply an easement or not?

The common law did draw distinctions between implied *reservation* of an easement (to the owner of the original undivided lot) and implied *grant* of an easement (to the first purchaser of the separated parcel). The latter required a lesser showing of necessity than the former, which would only be recognized upon a showing of *strict* necessity. The theory was that the deed that first severed the parcels from one another should be construed against its grantor, who was in a better position to know of the need for an easement to property she already owned, and to write such an easement into the deed she was delivering. Indeed, a minority of jurisdictions still follow this rule.

The modern Restatement, in contrast, makes no distinction as to whether the easement is sought by the grantor or the grantee, providing simply that the use will continue if the parties had reasonable grounds to so expect. Factors tending to show that expectation are that: “(1) the prior use was not merely temporary or casual, and (2) continuance of the prior use was reasonably necessary to enjoyment of the parcel, estate, or interest previously benefited by the use, and(3) existence of the prior use was apparent or known to the parties, or (4) the prior use was for underground utilities serving either parcel.” *Restatement (Third) of Property (Servitudes)* § 2.12 (2000). The commentary allows for the possibility that the balance of hardships and grantor knowledge might justify a court’s refusing to imply a servitude in favor of the grantor when it would have for the grantee. *Id.* cmt. a. But the general approach is to accept and accommodate the fact that grantors do not always protect themselves as well as they perhaps should. *Id.* (“Although grantors might be expected to know that they should expressly reserve any use rights they intend to retain after severance, experience has shown that too often they do not.”).

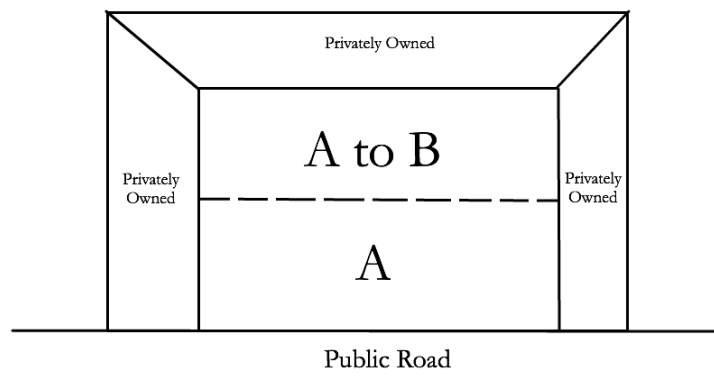
2. **Reasonable necessity.** Reasonable necessity is something less than absolute necessity. *See, e.g., Rinderer v. Keeven*, 412 N.E.2d 1015, 1026 (Ill. App. 1980) (“It is well established that one who claims an easement by implication need not show absolute necessity in order to prevail; it is sufficient that such an easement be reasonable, highly convenient and beneficial to the dominant estate.”)

(internal quotation and citation omitted)). Does this leave courts with too much discretion to impose easements? A minority of jurisdictions make a formal distinction between implied easements in favor of grantees and grantors, requiring strict necessity in the case of the latter. *Restatement* § 2.12. *But see* *Tortoise Island Communities, Inc. v. Moorings Ass’n, Inc.*, 489 So. 2d 22, 22 (Fla. 1986) (concluding that an absolute necessity is required in all cases).

3. **What is apparent?** Should home purchasers be expected to investigate the state of utility lines upon making a purchase? The *Restatement (Third) of Property (Servitudes)* reports that most cases to consider the question imply the easement when underground utilities are at issue. § 2.12 (Reporter’s Note) (such easements “will be implied without regard to their visibility or the parties’ knowledge of their existence if the utilities serve either parcel”). Are such uses plausibly apparent? Or is this simply a case of the law implying terms that the parties likely would have bargained for had they thought to consider the matter?

#### **b. Easements by necessity**

An **easement by necessity** (or sometimes **way by necessity**) arises when land becomes landlocked or incapable of reasonable use absent an easement. For example, if A owns a rectangular parcel bordered on the north, east, and west by privately owned land and on the south by a public street, and conveys to B a strip of her land on the northern boundary, B will acquire an easement by necessity across the southern portion of the parcel retained by A:



### **Thomas v. Primus**

84 A.3d 916 (Conn. App. 2014)

MIHALAKOS, J.

The plaintiffs, William Thomas, Craig B. Thomas and Andrea Thomas Jabs, appeal from the trial court’s declaratory judgment granting an easement by necessity and implication in favor of the defendant, Bruno Primus. On appeal, the plaintiffs claim that the court erred in finding an easement by necessity.<sup>1</sup> The plaintiffs also claim that the defendant’s claim for an easement should have been barred by the defense of laches. We affirm the judgment of the trial court.

The following facts, as found by the court, are relevant to this appeal. The plaintiffs own property located at 460 Camp Street in Plainville. The defendant owns one and one-quarter acres of undeveloped land abutting the eastern boundary of the plaintiffs’ property. The dispute at issue here concerns the northernmost portion of the plaintiffs’ property, a twenty-five feet wide by three hundred feet long strip of land known as the “passway,” which stretches from the public road on the western boundary of the plaintiffs’ property to the defendant’s property to the east.

Both the plaintiffs’ and the defendant’s properties originally were part of a single lot owned by Martha Thomas, the grandmother of the plaintiffs. In 1959, Martha Thomas

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<sup>1</sup> The plaintiffs also claim that the court erred in finding an easement by implication. Because we conclude that the court properly found an easement by necessity, we need not consider this claim.

conveyed the one and one-quarter acres of landlocked property, currently owned by the defendant, to Arthur Primus, the defendant's brother. At the conveyance, which the defendant attended, Martha Thomas and Arthur Primus agreed that access to the landlocked property would be through the passway, which until that time had been used by Martha Thomas to access the eastern portions of her property. In 1969, the defendant took possession of the land. In 2002, the plaintiffs took possession of the western portion of Martha Thomas' property, including the passway.

In 2008, the plaintiffs decided to sell their property. When the defendant learned of their intention, he sent a letter to the plaintiffs asserting his right to use the passway to access his land. In 2009, the plaintiffs signed a contract to sell their property, but the prospective purchasers cancelled the contract when they learned of the defendant's claimed right to use the passway. The plaintiffs then brought the action to quiet title that is the subject of this appeal, seeking, among other things, a declaratory judgment that the defendant had no legal interest in the property. The defendant brought a counterclaim asking the court to establish his right to use the passway uninterrupted by the plaintiffs.... In response to the defendant's counterclaim, the plaintiffs asserted the special defense of laches.

A trial was held on June 5 and 6, 2012. On August 31, 2012, the court issued its decision, finding in favor of the defendant on the plaintiffs' complaint and on his counterclaim, and concluding that the defendant had an easement by necessity and an easement by implication over the passway. Specifically, the court found an easement by necessity was created when Martha Thomas conveyed a landlocked parcel to Arthur Primus, as it was absolutely necessary in order to access the property....

## I

On appeal, the plaintiffs claim that the court erred in finding an easement by necessity because (1) the defendant's predecessor in title had the right to buy reasonable alternative access to the street, (2) the defendant failed to present full title searches of all adjoining properties, and (3) Martha Thomas and Arthur Primus did not intend for an easement to exist. . . .

Originating in the common law, easements by necessity are premised on the conception that "the law will not presume, that it was the intention of the parties, that one should



convey land to the other, in such manner that the grantee could derive no benefit from the conveyance....” *Collins v. Prentice*, 15 Conn. 39, 44 (1842). An easement by necessity is “imposed where a conveyance by the grantor leaves the grantee with a parcel inaccessible save over the lands of the grantor....” *Hollymyle Assn., Inc. v. Hollister*, 164 Conn. 389, 398, 324 A.2d 247 (1973). The party seeking an easement by necessity has the burden of showing that the easement is reasonably necessary for the use and enjoyment of the party’s property.

A

First, the plaintiffs claim that an easement by necessity does not exist because the defendant’s predecessor in title had the right to buy reasonable alternative access to the street. We disagree.

In considering whether an easement by necessity exists, “the law may be satisfied with less than the absolute need of the party claiming the right of way. The necessity need only be a reasonable one.” *Hollymyle Assn., Inc. v. Hollister*, supra, 164 Conn. at 399, 324 A.2d 247.

In this case, the plaintiffs presented evidence at trial that, at the time he purchased the property from Martha Thomas in 1959, Arthur Primus maintained bonds for deed that allowed him to purchase access to Camp Street through a different piece of property for \$900. Although he did not exercise this right, the plaintiffs contend that the fact that Arthur Primus held this option establishes that the defendant’s use of the passway is not reasonably necessary.

The plaintiffs correctly note that the ability of a party to create alternative access through his or her own property at a reasonable cost can preclude the finding of reasonable necessity required to establish an easement by necessity. Nonetheless, we are aware of nothing in our case law that suggests that a party is required to purchase *additional* property in order to create alternative access, even at a reasonable price.<sup>2</sup>

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<sup>2</sup> The plaintiffs’ sole authority in support of their position; *Griffeth v. Eid*, 573 N.W.2d 829 (N.D.1998); is distinguishable from the case before us. In that case, the North Dakota Supreme Court upheld a trial court’s ruling that a party seeking an easement by necessity had not met his burden of establishing reasonable necessity because potential alternate access existed, including the possibility of purchasing an easement over another abutting property, and the party had not provided evidence that he had pursued these options and found them

Furthermore, easements by necessity need not be created at the time of conveyance. See *D'Addario v. Truskoski*, 57 Conn.App. 236, 247, 749 A.2d 38 (2000) (recognizing easement by necessity created by state taking and natural disaster). Even if we were to assume, arguendo, that Arthur Primus' bonds for deed made use of the passway unnecessary at the time he owned the property, those bonds for deed expired in 1962, several years before the defendant owned the property, and provide no reasonable alternative access today. Thus, we see no reason to disturb the court's finding that use of the passway is currently necessary for the use and enjoyment of the defendant's property....

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Finally, the plaintiffs argue that an easement by necessity does not exist because Martha Thomas and Arthur Primus did not intend for the easement to exist. We disagree.

The seminal case in this state on easements by necessity recognized that “the law will not presume, that it was the intention of the parties, that one should convey land to the other, in such manner that the grantee could derive no benefit from the conveyance.... The law, under such circumstances, will give effect to the grant according to the presumed intent of the parties.” *Collins v. Prentice*, supra, 15 Conn. at 44, 15 Conn. 39. This rationale does not, as the plaintiffs suggest, establish intent as an element of an easement by necessity. Instead, “[t]he presumption as to the intent of the parties is a fiction of law ... and merely disguises the public policy that no land should be left inaccessible or incapable of being put to profitable use.” (Citation omitted.) *Hollymyle Assn., Inc. v. Hollister*, supra, 164 Conn. at 400, 324 A.2d 247. Thus, absent an explicit agreement by the grantor and grantee that an easement does *not* exist, a court need not consider intent in establishing an easement by necessity. See *O'Brien v. Coburn*, 46 Conn.App. 620, 633, 700 A.2d 81 (holding that “the intention of the parties [was] irrelevant” in case establishing easement by necessity), cert. denied, 243 Conn. 938, 702 A.2d 644 (1997).

In this case, the court found that the defendant's property was landlocked and that access over the pass-way was reasonably necessary for the use and enjoyment of the

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unavailing. In this case, there is no evidence in the record that the defendant had the opportunity to purchase alternate access.

defendant's property. Therefore, the court found an easement by necessity to exist over the pass-way. This conclusion was supported by the record and there is no legal deficiency in the court's analysis. . . .

### Notes

1. As *Thomas* indicates, there are two traditional rationales for easements by necessity. The first considers it an implied term of a conveyance, assuming that the parties would not intend for land to be conveyed without a means for access. The second simply treats the issue as one of public policy favoring land use. *See* Restatement (Third) of Property (Servitudes) § 2.15 cmt. a (2000).
2. *Thomas's* implication to the contrary aside, the traditional view is that the necessity giving rise to an easement by necessity must exist at the time the property is severed. Restatement (Third) of Property (Servitudes) § 2.15 (2000) (“Servitudes by necessity arise only on severance of rights held in a unity of ownership.”); *Roy v. Euro-Holland Vastgoed, B. V.*, 404 So. 2d 410, 412 (Fla. Dist. Ct. App. 1981) (“[I]n order for the owner of a dominant tenement to be entitled to a way of necessity over the servient tenement both properties must at one time have been owned by the same party . . . . In addition, the common source of title must have created the situation causing the dominant tenement to become landlocked. A further requirement is that at the time the common source of title created the problem the servient tenement must have had access to a public road.”).
3. Easements by necessity are typically about access, but other kinds of uses may be necessary to the reasonable enjoyment of property. For example, suppose O conveys mineral rights to Blackacre to A. A would have both an easement of access to Blackacre and the right to engage in the mining necessary to reach the minerals. Likewise, an express easement of way may require rights to maintain and improve the easement. Access for utilities may also give rise to an easement by necessity, creating litigation over which utilities are “necessary”:

When questioned by defendants as to why he could not use a cellular phone on his property, plaintiff testified he ran a home business and a cellular phone was not adequate to handle his business needs; for

example, a computer cannot access the Internet over a cellular phone. Plaintiff also testified solar power and gas generators were unable to produce enough electricity to make his home habitable.

*Smith v. Heissinger*, 745 N.E.2d 666, 672 (Ill. App. 2001) (affirming finding of necessity of easement for underground utilities).

Courts often describe the degree of necessity required to find an easement by necessity as being “strict.” *See, e.g.*, *Ashby v. Maechling*, 229 P.3d 1210, 1214 (Mont. 2010) (“Two essential elements of an easement by necessity are unity of ownership and strict necessity.”). It is certainly higher than that needed for an easement implied by existing use. That said, considerable precedent indicates that the necessity need not be absolute. *See, e.g.*, *Cale v. Wanamaker*, 121 N.J. Super. 142, 148, 296 A.2d 329, 333 (Ch. Div. 1972) (“Although some courts have held that access to a piece of property by navigable waters negates the ‘necessity’ required for a way of necessity, the trend since the 1920’s has been toward a more liberal attitude in allowing easements despite access by water, reflecting a recognition that most people today think in terms of ‘driving’ rather than ‘rowing’ to work or home.”).

4. Several states provide owners of landlocked property a statutory right to obtain access through neighboring land by means of a **private condemnation** action. Some courts have held that the availability of private condemnation actions negate the necessity prong of a common law easement by necessity claim. *See, e.g.*, *Ferguson Ranch, Inc. v. Murray*, 811 P.2d 287, 290 (Wyo. 1991) (“[A] civil action for a common law way of necessity is not available because of the existence of W.S. 24–9–101.”). Private condemnation actions may also extend to contexts beyond those covered by the common law easement by necessity. *See, e.g.*, Cal. Civ. Code § 1001 (utilities).

### 3. Prescriptive Easements

Easements may also arise from prescription. An easement by prescription is acquired in a manner similar to adverse possession, as it is a non-permissive use that ultimately ripens into a property interest. Recall the five elements of adverse possession: Entry and possession that is (1) actual, (2) exclusive, (3) hostile or under claim of right, (4)

open and notorious, and (5) continuous for the statutory limitations period. Which (if any) of these elements might have to be modified where the right being acquired is not a right of possession, but a right of use?

**Felgenhauer v. Soni**

17 Cal.Rptr.3d 135 (Cal. App. 2004).

GILBERT, P.J.

Here we hold that to establish a claim of right to a prescriptive easement, the claimant need not believe he or she is legally entitled to use of the easement. Jerry and Kim Felgenhauer brought this action to quiet title to prescriptive easements over neighboring property owned by Ken and Jennifer Soni. A jury made special findings that established a prescriptive easement for deliveries. We affirm.

FACTS

In November of 1971, the Felgenhauers purchased a parcel of property consisting of the front portion of two contiguous lots on Spring Street in Paso Robles. The parcel is improved with a restaurant that faces Spring Street. The back portion of the lots is a parking lot that was owned by a bank. The parking lot is between a public alley and the back of the Felgenhauers' restaurant.

From the time the Felgenhauers opened their restaurant in 1974, deliveries were made through the alley by crossing over the parking lot to the restaurant's back door. The Felgenhauers never asked permission of the bank to have deliveries made over its parking lot. The Felgenhauers operated the restaurant until the spring of 1978. Thereafter, until 1982, the Felgenhauers leased their property to various businesses.

The Felgenhauers reopened their restaurant in June of 1982. Deliveries resumed over the bank's parking lot to the restaurant's back door. In November of 1984, the Felgenhauers sold their restaurant business, but not the real property, to James and Ann Enloe. The Enloes leased the property from the Felgenhauers. Deliveries continued over the bank's parking lot.

James Enloe testified he did not believe he had the right to use the bank's property and never claimed the right. Enloe said that during his tenancy, he saw the bank manager in the parking lot. The manager told him the bank planned to construct a fence to

define the boundary between the bank's property and the Felgenhauers' property. Enloe asked the manager to put in a gate so that he could continue to receive deliveries and have access to a trash dumpster. The manager agreed. Enloe "guess[ed]" the fence and gate were constructed about three years into his term. He said, "[Three years] could be right, but it's a guess." In argument to the jury, the Sonis' counsel said the fence and gate were constructed in January of 1988.

The Enloes sold the restaurant to Brett Butterfield in 1993. Butterfield sold it to William DaCossee in March of 1998. DaCossee was still operating the restaurant at the time of trial. During all this time, deliveries continued across the bank's parking lot.

The Sonis purchased the bank property, including the parking lot in dispute in 1998. In 1999, the Sonis told the Felgenhauers' tenant, DaCossee, that they were planning to cut off access to the restaurant from their parking lot.

The jury found the prescriptive period was from June of 1982 to January of 1988.

## DISCUSSION

### I

The Sonis contend there is no substantial evidence to support a prescriptive easement for deliveries across their property. They claim the uncontroverted evidence is that the use of their property was not under "a claim of right."...

At common law, a prescriptive easement was based on the fiction that a person who openly and continuously used the land of another without the owner's consent, had a lost grant. California courts have rejected the fiction of the lost grant. Instead, the courts have adopted language from adverse possession in stating the elements of a prescriptive easement. The two are like twins, but not identical. Those elements are open and notorious use that is hostile and adverse, continuous and uninterrupted for the five-year statutory period under a claim of right. Unfortunately, the language used to state the elements of a prescriptive easement or adverse possession invites misinterpretation. This is a case in point.

The Sonis argue the uncontroverted evidence is that the use of their property was not under a claim of right. They rely on the testimony of James Enloe that he never claimed he had a right to use the bank property for any purpose.

Claim of right does not require a belief or claim that the use is legally justified. It simply means that the property was used without permission of the owner of the land. As the American Law of Property states in the context of adverse possession: “In most of the cases asserting [the requirement of a claim of right], it means no more than that possession must be hostile, which in turn means only that the owner has not expressly consented to it by lease or license or has not been led into acquiescing in it by the denial of adverse claim on the part of the possessor.” (3 Casner, American Law of Property (1952) Title by Adverse Possession, § 5.4, p. 776.)... Enloe testified that he had no discussion with the bank about deliveries being made over its property. The jury could reasonably conclude the Enloes used the bank’s property without its permission. Thus they used it under a claim of right.

The Sonis attempt to make much of the fence the bank constructed between the properties and Enloe’s request to put in a gate. But Enloe was uncertain when the fence and gate were constructed. The Sonis’ attorney argued it was constructed in January of 1988. The jury could reasonably conclude that by then the prescriptive easement had been established.

The Sonis argue the gate shows the use of their property was not hostile. They cite *Myran v. Smith* (1931) 117 Cal.App. 355, 362, 4 P.2d 219, for the proposition that to effect a prescriptive easement the adverse user “... must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest.”

But *Myran* made the statement in the context of what is necessary to create a prescriptive easement. Here, as we have said, the jury could reasonably conclude the prescriptive easement was established prior to the erection of the fence and gate. The Sonis cite no authority for the proposition that even after the easement is created, the user must keep the flag of hostility flying. To the contrary, once the easement is created, the use continues as a matter of legal right, and it is irrelevant whether the owner of the servient estate purports to grant permission for its continuance....

### Notes

1. **Fiction of the lost grant.** *Felgenhauer* refers to the fiction of the lost grant. The principle traces back to English law. 4-34 POWELL ON REAL PROPERTY § 34.10

(“In early England the enjoyment had to have been ‘from time immemorial,’ and this date came to be fixed by statute as the year 1189. Towards the close of the medieval period, this theory was rephrased and an easement of this type was said to arise from a grant, presumably made in favor of the claimant before the time of legal memory, but since lost.”). The usual American approach is to ignore the fiction and simply apply rules of prescription that largely track those of adverse possession. *See id.*

2. How do the elements of a prescriptive easement differ from the elements of adverse possession? Why do you think they differ in this way? How do the resulting interests differ?
3. **Easements acquired by the public.** What happens if city pedestrians routinely cut across a private parking lot? May an easement by prescription be claimed by the public at large? Does it matter that the right asserted is not in the hands of any one person? Here, too, the fiction of the lost grant may play a role in the willingness of courts to entertain the possibility.

There is a split of authority as to whether a public highway may be created by prescription. A number of older cases hold that the public cannot acquire a road by prescription because the doctrine of prescription is based on the theory of a lost grant, and such a grant cannot be made to a large and indefinite body such as the public. See II American Law of Property § 9.50 (J. Casner ed.1952). The lost grant theory, however, has been discarded. W. Burby, Real Property § 31, at 77 (1965). In its place, courts have resorted to the justifications that underlie statutes of limitations: “[The] functional utility in helping to cause prompt termination of controversies before the possible loss of evidence and in stabilizing long continued property uses.” 3 R. Powell, *supra* note 5, ¶ 413, at 34–103–04; W. Burby, *supra*, § 31, at 77; Restatement of Property ch. 38, Introductory Note, at 2923 (1944). These reasons apply equally to the acquisition of prescriptive easements by public use. The majority view now is that a public easement may be acquired by prescription. 2 J. Grimes, Thompson on Real Property § 342, at 209 (1980).



Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 410, 416 (Alaska 1985).

What then should the owner of a publicly accessible location do? The owners of Rockefeller Center reportedly block off its streets one day per year in order to prevent the loss of any rights to exclude. David W. Dunlap, “Closing for a Spell, Just to Prove It’s Ours,” *New York Times* (Oct. 28, 2011), available at <http://www.nytimes.com/2011/10/30/nyregion/lever-house-closes-once-a-year-to-maintain-its-ownership-rights.html? r=0> (“But there is another significant hybrid: purely private space to which the public is customarily welcome, at the owners’ implicit discretion. These spaces include Lever House, Rockefeller Plaza and College Walk at Columbia University, which close for part of one day every year.”). Another option is to post a sign granting permission to enter (thus negating any element of adversity). Some states approve this approach by statute. Cal. Civ. Code § 1008 (“No use by any person or persons, no matter how long continued, of any land, shall ever ripen into an easement by prescription, if the owner of such property posts at each entrance to the property or at intervals of not more than 200 feet along the boundary a sign reading substantially as follows: ‘Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code.’”).



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### C. Transferring Easements

**Easements appurtenant.** Transferring easements appurtenant is simple; when the dominant estate is conveyed, the rights of the easement come along. This is a natural consequence of the principle that servitudes (such as easements) run with the land. A more complicated problem concerns the division of the dominant estate into smaller parcels. The default approach is to allow each parcel to enjoy the benefit of the easement. Restatement (First) of Property § 488 (1944) (“Except as limited by the terms of its transfer, or by the manner or terms of the creation of the easement appurtenant, those who succeed to the possession of each of the parts into which a dominant tenement may be subdivided thereby succeed to the privileges of use of the servient tenement authorized by the easement.”). Here, however, foreseeability and the extent of the added burden matters. *See generally* R. W. Gascoyne, *Right of owners of parcels into which dominant tenement is or will be divided to use right of way*, 10 A.L.R.3d 960 (Originally published in 1966) (collecting cases).

**Easements in gross.** The modern view is that easements in gross are transferable, assuming no contrary intent in their creation (e.g., that the benefit was intended to be personal to the recipient). *Restatement (Third) of Property (Servitudes)* § 4.6 cmt. (2000) (“Although historically courts have often stated that benefits in gross are not transferable, American courts have long carved out an exception for profits and easements in gross that serve commercial purposes. Under the rule stated in this section, the exception has now become the rule.”); Restatement (First) of Property § 489 (1944) (commercial easements in gross, as distinct from easements for personal satisfaction, are transferable); § 491 (noncommercial easements in gross “determined by the manner or the terms of their creation”).

Another issue concerns the divisibility of an easement in gross. Here, too, the danger is that divisibility may lead to excessive burdens on the servient estate. Section 493 of the First Restatement of Property provides that whether divisibility is permitted depends on the circumstances surrounding the easement’s creation. The facts giving rise to a prescriptive easement, for example, may give a landowner fair notice that a single trespasser may acquire an easement, but not that the easement may then be shared by many others once the prescription period passes. In contrast, an exclusive easement might lead to a presumption of divisibility, for “the fact that [the owner of

the servient tenement] is excluded from making the use authorized by the easement, plus the fact that apportionability increases the value of the easement to its owner, tends to the inference in the usual case that the easement was intended in its creation to be apportionable.” *Id.* cmt. c. Where the grant is non-exclusive a clearer indication of intended divisibility may be required. *Id.* cmt. d. Section 5.9 of the modern Restatement goes further by making divisibility the default assumption unless contrary to the parties intent or where divisibility would place unreasonable burdens on the servient estate.

## D. Terminating Easements

Easements can be terminated in a variety of ways.

1. **Unity of ownership.** When the dominant and servient estates of an easement appurtenant unite under one owner, the easement ends. Likewise an easement in gross ends if the owner acquires an interest in the servient tenement that would have provided independent authority to exercise the rights of the easement.
2. **Release by the easement holder.** The First Restatement would require a written instrument under seal for an inter vivos release, while the modern Restatement simply requires compliance with the Statute of Frauds.
3. **Abandonment.** Abandonment resembles a release. The First Restatement treats them separately, however, and distinguishes the two by describing abandonment as intent by the easement holder to give up the easement, while a release is an act done on behalf of the owner of the burdened property. Abandonment may be inferred by actions. Restatement (First) of Property § 504 (1944).
4. **Estoppel.** Estoppel may terminate an easement when 1) the owner of the servient tenement acts in a manner that is inconsistent with the easement’s continuation; 2) the acts are in foreseeable reasonable reliance on conduct by the easement holder; and 3) allowing the easement to continue would work an unreasonable harm to the owner of the servient property. *Id.* § 505.

5. **Prescription.** Just as an easement may be gained by prescription, so too may it be lost by open and notorious adverse acts by the owner of the servient tenement that interrupt the exercise of the easement for the prescription period.
6. **Condemnation.** The exercise of the eminent domain power to take the servient estate creates the possibility of compensation for the easement owner.
7. **A tax deed.** Section 509 of the First Restatement provides that a tax deed will extinguish an easement in gross, but not an easement appurtenant.
8. **Expiration,** if the interest was for a particular time.
9. **Recording Acts.** Being property interests, easements are subject to the recording acts, and unrecorded interests may be defeated by transferees without notice. The modern restatement provides for exceptions for certain easements not subject to the Statute of Frauds and generally for servitudes that “would be discovered by reasonable inspection or inquiry.” Restatement (Third) of Property (Servitudes) § 7.14 (2000).