

I. EASEMENTS

1. *Waldrop* cleanup

<https://www.google.com/maps/dir/500+Howell+Rd,+Brevard,+NC+28712/@35.1159941,-82.8403239,17z/data=!4m8!4m7!1m0!1m5!1m1!1s0x8859bb34ae3fd693:0xe7f7e18f37628d17!2m2!1d-82.843784!2d35.118059>

2. *Petersen* cleanup

- a. what kind of easement is it?
- b. why is there an issue?

We said last time that at the doctrinal level the issue is whether there is going to be a limitation on the types of negative easements that you can have. Nineteenth-century doctrine, at least in some jurisdictions, suggested that negative easements were limited to four: (a) light, (b) air, (c) support, and (d) certain water rights. It is unlikely that any court would so hold today, but knowing that helps to explain why, as we will see shortly, the negative covenant came to be the preferred method of creating other sorts of negative interests.

The drafter of the easement in this case took a chance. S/he worded the interest as a negative easement, and described it with considerable precision. The light and air part of it was already authorized by the California statute and the traditional doctrine. View does not seem to be much of a stretch, and the court has no difficulty (notice that this is not even a Supreme Court case) holding that it is valid. The fact that it was described with considerable precision probably helped. The court had confidence that the parties knew what they were doing.

- c. what diff. would it have made if it had been (1) a fee estate? (2) a covenant?
 - i. building
 - ii. damages
 - iii. injunction
 - iv. eminent domain
 - v. changed conditions
- d. who's the plaintiff?
- e. solar and conservation easements

3. *Cox*

- a. changed conditions—1945 \$8600; 1960 \$250 K; c. 3000%
- b. the scope consequences of appurtenance
- c. why presume appurtenance
- d. why width of road controlling but not use?
- e. why not tell the parties what they really want to know?
- f. It worked for a while, but ultimately something happened:

<https://www.google.com/maps/place/Glenbrook,+NV/@39.084821,-119.9406482,16.98z/data=!4m2!3m1!1s0x80999b81e54a934b:0xc142dc11b9122afc>

Move the map up to see the area marked in the sketch in the case.

<https://www.chaseinternational.com/homes-for-sale-in-reno-sparks-tahoe-carson/?perRow=4&limit=48&layout=card&area=city%7Cglenbrook&order=price%7Cdesc&page=1>

4. Categorization rules used to achieve perceived desirable results. If we assume that the court’s instinct in *Waldrop* was that the town had done what it could, then, the use of the rules makes sense:

- a. successors & assigns without notice — *Waldrop*
- b. changed conditions — *Waldrop*

Similarly, if we assume the the desired result in *Cox* was to get the parties to negotiate, then the use of the rules makes sense:

- c. full use but limited by the width of the existing road— *Cox*
- d. surcharge difficult to prove, and we won’t anticipate it — *Cox*

Finally, if we assume that the desired result in *Petersen* was to let people do what they wanted to do, then the expansion of the rules in *Petersen* makes sense:

- e. why should there be categorical limits on what you can do with negative easements? — *Petersen*

5. All cases so far as scope cases

- a. *Petersen* — contract-type approach
- b. *Waldrop* — the changed conditions
- c. *Cox* — uses appurtenance, but it doesn’t help in this case. The language says “full right of use,” but we can limit scope by limiting the scope to the width of the existing road.

6. Among other reasons, because easements are so difficult to get rid of, the courts have a tendency to use the categories to move things out of the easement category into some other category. A favorite category is “license.” A license is like an estate at will, only with a non-possessory interest. It’s a personal, revocable permission given by a landowner to someone else. The person who has a license may not convey it. Indeed, in most jurisdictions an attempt to convey the license will extinguish it. Like an estate at will a license is what you get if you attempt to create a non-possessory interest that violates the statute of frauds. There is some material in the book on licenses. The law is something of a mess. I don’t think that you need to get into it very deeply. If you are interested in why you can have an easement in a billboard in New York but not to put washing machines in the basement of an apartment you might want to puzzle over the *Todd* case. If you come to the conclusion that the reason is that billboards are not washing machines, you’re in good company.

7. Easements in gross and profits

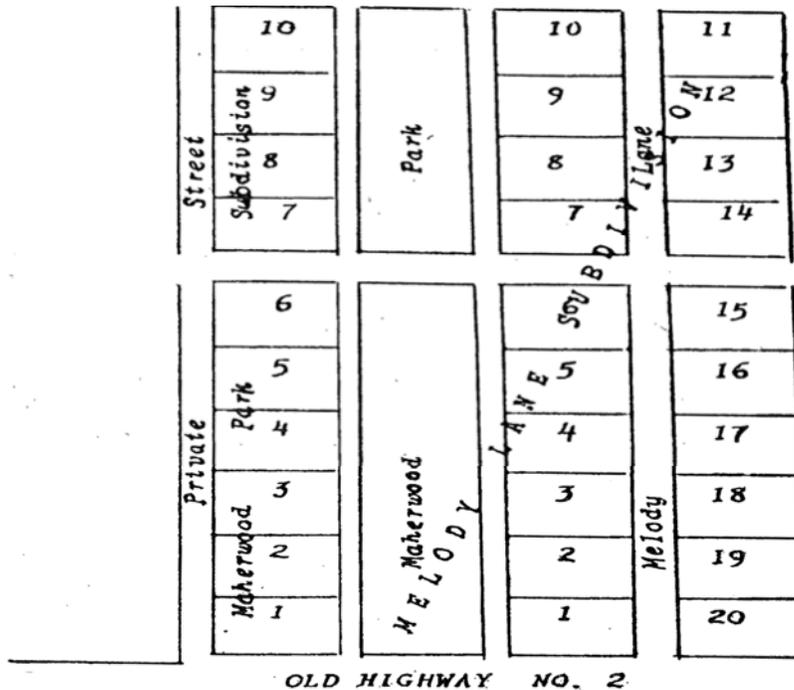
- a. Easements in gross do not exist (English rule) or, if they exist, they cannot be assigned or devised (still, at least nominally, the rule in a number of U.S. jurisdictions).
- b. If that’s the rule, then we need something to accommodate a whole bunch of quite normal interests: e.g., the right to hunt, the right to take timber, the right to take water or minerals. These are profits.
- c. If easements in gross become assignable then maybe we should get rid of the category of profits. First Restatement of Property.
- d. Or maybe we shouldn’t. Third Restatement of Property.

e. The implications of all of this for conservation and preservation easements.

II. FUNNY EASEMENTS

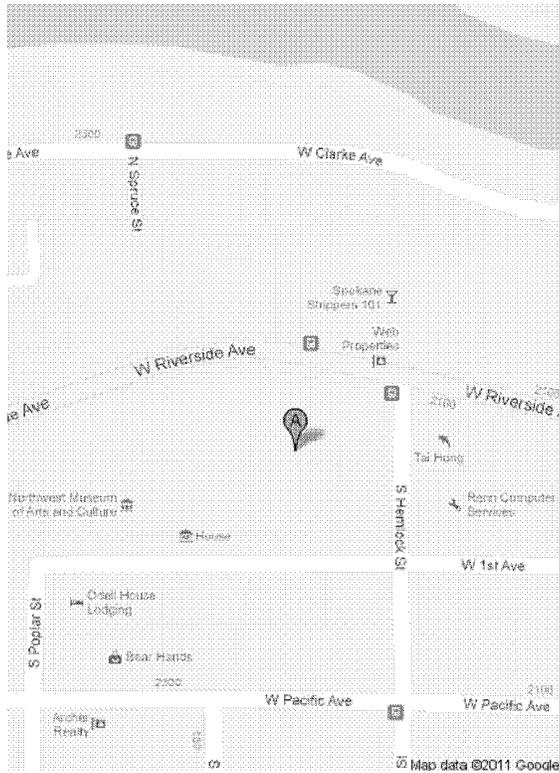
a.k.a. easements arising out of malpractice or, to be slightly less tendentious, easements arising by means other than express grants

1. Prescription of affirmative easements—There are a number of references to it in the material on adverse possession. By and large, today, prescription operates like adverse possession with the same period of limitations. Prescriptive negative easements do not exist in this country.
2. Necessity and/or Implication
 - a. Plat easements (the plat in Putnam v. Dickinson, S414–415:)



<https://www.google.com/maps/place/Devils+Lake,+ND+58301/@48.1088256,-98.8435392,359m/data=!3m1!1e3!4m2!3m1!1s0x52db49613a81519f:0x2980d8b04ecf3ec5>

- b. Quasi easements
- c. Strict necessity



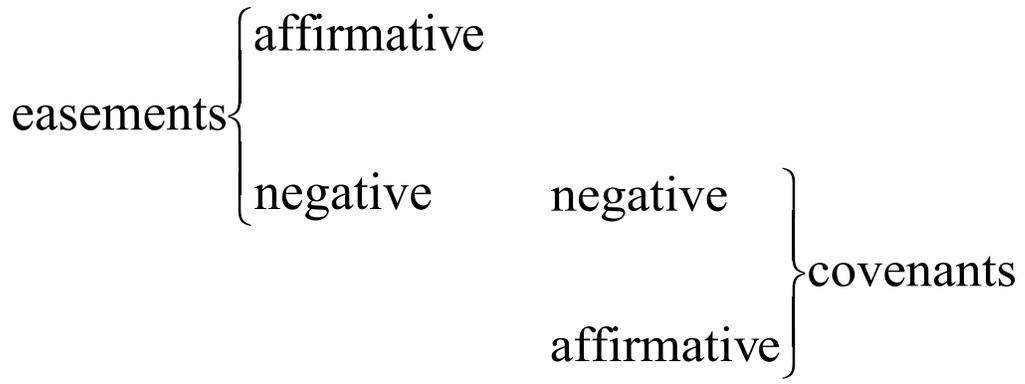
<http://maps.google.com/maps?q=2216+W+1st+Avenue,+Spokane,+WA>

(The current map of the property in *Adams v. Cullen*, S415. If you look up the Google map and look at the aerial view, you'll see why they needed to get out via First Avenue rather than Riverside Avenue: the property drops off precipitously in the back. [The buildings described in the case are no longer there.]

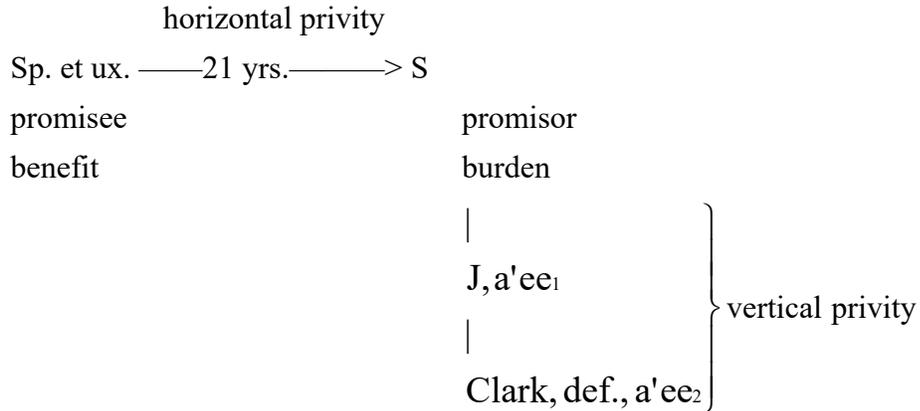
- d. The initial requirement of unity of title.
- 3. Estoppel and/or Part Performance, as we noted in the *Hayes* case
- 4. *Cooke* — what doctrine involved (Where two parts of the course come together)
<http://www.vineyard360.com/cooke-vineyard.html>
 - a. prescription—against the state?
 - b. implication—no unity of title?
 - c. part performance—was there an oral grant? Contrast *Stoner v. Zucker*
 - d. estoppel—only one left; hence much like *Hayes*. As in *Hayes* the detrimental reliance is very strong. The Cookes have no other way to get to their house on which they have spent a considerable amount of money. As in *Hayes* there is not much evidence, if any, that there was an oral grant. Hence, we need the estoppel both to create an oral grant and to overcome the statute of Frauds. You are not supposed to be able to estop the state, but one can argue that what Foster and Ramponi did was not enough to raise an estoppel.

III. COVENANTS

- 1. Easements vs. Covenants



1. **Spencer's Case (1583)**



The issue is the running of the burden of an affirmative covenant at law. Now let me pause here and make a point that some people forget. There is no doubt that S. was contractually obliged to build the wall. But the first question that we have to ask in any case involving covenants that arguably run with the land is whether there was a valid contract between the original promisor and promisee. That's a proposition that some of your predecessors forgot on an exam a couple of years ago. Assuming that there was a valid contract between the original promisor and original promisee, contract doctrine won't get the burden of the contract to run. Why not? Because the successor in interest in the land didn't make the promise. The doctrine of covenants running with the land binds someone to perform a contract to which s/he did not agree. That makes courts uncomfortable, and I think rightly so.

2. The rules at law

- a. formalities — I doubt that any of the common-law formalities remain today, at least in most jurisdictions, other than those imposed by the S/Frauds with the usual equitable exceptions
- b. intent — Once more, there were some odd rules at common law that probably do not exist in most jurisdictions today, but the basic concept remains
- c. touch & concern
 - i. Restatement 1 test – the burden must burden the burdened land in the physical use and enjoyment of the land and the benefit must benefit the benefited land in the physical use and enjoyment of the land in order for the burden to run at law
 - physical
 - relation of burden & benefit
 - ii. Judge Clark's test – the enforcement of the covenant must affect the the legal relations of the landowners as landowners.
 - iii. Special problems
 - affirmative covenants a number of jurisdictions had problems with getting affirmative covenants to run, NY is a striking example. I doubt that there's any US jurisdiction that has a categorical rule any more, but I think the discomfort may still be there.

covenants not to compete – the public policy element in this is pretty obvious, such contracts look like 'contracts in restraint of trade' to use the words of the Sherman Act. Once, more I doubt that any jurisdiction has a categorical rule any more.

- iv. Restatement 3 test: a public policy determination about whether this type of covenant should be allowed to run
- d. privity of estate – There are a number of cases, still not overruled on this topic, though one rarely finds, for reasons that we will get to shortly, a covenant that is not allowed to run for lack of it. The common-law concept of privity of estate involves two elements:
 - i. vertical – it was required at common law for the burden to run at law and is required today. The distinction between assignments and subleases.
 - ii. horizontal – What constitutes horizontal privity was a matter of huge debate in the 20th century. It may be a matter of debate in the 21st, but I doubt it. Restatement 3 tries to get rid of it. I’m going to skip it.
- 3. **Spencer’s Case** (revisited)
 - a. privity?
 - b. touch & concern?
 - c. intent? There was certainly enough in most modern jd’s. There was not under the c.l. rules because the word “assigns” was not used.
- 4. Starting in the 19th century, the courts of equity developed what was, at least for the time, looser rules that would allow covenants to run in equity when they would not so run at law. The exact coincidence of the rules in equity and those in law remained unclear for some time, and, to a certain extent, remains unclear today. One thing, however, was clear, and remains clear today: for a covenant to run in equity, privity of estate is not required; what is required is that the person against whom enforcement of the covenant is sought must have notice of the existence of the covenant.
- 5. Today
 - a. Relevance of law/equity distinction today
 - i. As to remedy
 - ii. As to changed conditions
 - b. Drafting practice
 - i. Ensuring notice in case the court gets strict about privity
 - ii. Ensuring that something that can only be remedied at law can also be remedied in equity by means of enforcement of a lien