> Because both the uses caused the conflict, both should share its costs. This notion is not based on a "fault" theory; . . . no discussion of "fault" is appropriate to concurrent cases. Rather, the notion is based on general principles of resource allocation . . . . An activity must be forced to "internalize" its external costs if we are to ensure that it makes its pricing decisions in a manner that will maximize the total value of goods and services in society.

Id. at 302. [p*889]

The rule proposed for "sequential" cases is that the second user be permitted to stay only on condition that he pay the full costs of relocating the first. *Id*. at 303–08.

Does the note's proposal seem a sound one? If you agree with it, how would you draw the line between the two types of cases? *See id*. at 308–09. How would you deal with external costs and benefits falling upon neighboring owners who are not parties to the suit? *See id*. at 301. *See also* Wittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance"*, 9 J.LEGAL STUD. 557 (1980).

7. In addition to the literature cited above, *see generally* Manson, *A Reexamination of Nuisance Law*, 8 HARV.J.L. & PUB.POL'Y 185 (1985); White, *Economics and Nuisance Law: Comment on Manson*, *id*. 213; Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J.LEGAL STUD. 49 (1979); Krier & Montgomery, *Resource Allocation, Information Cost and the Form of Government Intervention*, 13 NAT.RESOURCES J. 89 (1973); Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 U.C.L.A.L.REV. 429 (1971).

Section 3. PRIVATE ADJUSTMENTS OF THE USE RIGHTS ASSOCIATED WITH THE FEE

The land-use relationship between neighboring owners (*A* and *B*) produced by the common law tort doctrines discussed in the preceding section allows each owner a considerable range of land-based activity which can be enjoyed without threat of injunction or damages. Beyond that range lie uses which *A* and *B* can undertake without the consent of the other but only upon payment of damages. Finally, one comes to uses over which the neighbor has an effective veto, backed if need be by an injunction.

One point made quite forcefully in the *Coase* article, *supra*, p. S389, is that, however judges and juries draw the lines demarking these ranges, there will be situations in which *A* and *B* will see mutual advantage in modifying one or more of them. Since the precise location of those boundaries may be hard to plot in advance, there will also be occasions when *A* and *B* are prompted to seek an agreement simply to remove the uncertainty. In either case the agreement may be reached by *A* and *B* themselves or by a prior owner *O*. The latter occurs when an *O* believes his land will be more attractive to, and hence command a better price from, buyers like *A* and *B* if it is covered by different or more particularized land-use limits than those furnished by common law liability principles. In such a case, *A* and *B* are in the position of purchasing a ready-made land-use agreement.

This can be true with respect to any or all of the boundary lines described above. For example, *A* and *B* may agree or have it agreed for them that *A* will not engage in certain conduct under penalty of damage liability or an injunction (even though it is not a nuisance or at least arguably

not a nuisance at common law). *B* may, by contrast, grant *A* the right to engage in conduct that would otherwise be actionable. Certain adjustments of *A*'s use rights may dictate an adjustment of *B*'s so clearly that nothing need be said on the score. In other cases, an adjustment of one party's rights can be accomplished without any effect on the other's. It is quite common, however, especially when an *O* is doing the adjusting, for comparable or at least compatible adjustments to be made with respect to both lots as part of a single land-use arrangement or plan. [p*890]

Let us be clear that what *O* or *A* and *B* will seek to accomplish is more than a simple contract. *B* wants from *A* more than a personal undertaking not to build a motel or *A*'s agreement that *B* may continue to operate a piggery, for land changes hands. What is sought, normally, is a true adjustment of the composite rights, duties and so on associated with ownership of the respective lots, so that *A*'s sale to *C* or his death and consequent inheritance of the lot by *A Jr*. (or similar events on *B*'s side) do not force a renegotiation of the arrangement from scratch.

All of this may seem quite straightforward and so it might be were there but a single legal device available to achieve such adjustments. In fact, there are many, each useful for some though not all of the arrangements one might imagine. Picking the right slot and assessing the consequences of that choice is, as a result, a complicated business.

Consider as testimony these words of Judge Bell in Conaway v. Time Oil Co., 34 Wn.2d 884, 892, 210 P.2d 1012, 1017 (1949):

> Here I may say, I have been more confident many times than I am at this time as to whether or not the instrument is one of lease or one of license. But study of this . . . has left me of the . . . opinion, that this is an instrument of license notwithstanding that the parties who signed it have called it a lease.

This situation invites criticism. As we noted *supra*, p. S379, there are in many jurisdictions six separate categories into which such land-use arrangements can fall: easements, profits, licenses, covenants, and equitable servitudes. Indeed, there are more than that. We have already seen that defeasible fees can be used as land-use control devices (p. S209, Note 3 *supra*); leases may also be a device for land-use arrangements (pp. S422–424 *infra*). We will also see *infra*, pp. S417–421, that easements, profits, covenants, and equitable servitudes can be further divided into *appurtenant* or *in gross*, depending on whether the benefit of the agreement is or is not attached to another piece of (normally neighboring) land. Easements, covenants, and equitable servitudes may also be subdivided into *affirmative* and *negative*. That gives us nineteen possible categories, a number that virtually all commentators agree is far too many. *See, e.g.*, French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S.CAL.L.REV. 1261 (1982); Reichman, *Toward a Unified Concept of Servitudes*, 55 S.CAL.L.REV. 1179 (1982), and the accompanying comments.

To illustrate some of the difficulties let us assume that *O* executes a document labeled a "deed" which states that he:

> Has granted, bargained and sold, conveyed and confirmed, and by these presents does grant, bargain and sell, convey, and confirm, unto the said party of the second part [*A*], and to its successors and assigns forever, for reservoir purposes, all that certain lot, piece or parcel of land, situate, lying and being in the County of Glouchester, State of New Dorset, and particularly described as follows, to-wit: . . . .

O retains an adjacent parcel. What has he conveyed to *A*? What does *O* have left?

We must first decide whether *O* has parted with a fee simple estate or merely an easement in the tract. The latter construction, fastening on the "for reservoir purposes" language in the grant, involves the conclusion that *O* has transferred only "a limited right of use or enjoyment" in land which he continues to own. Is there any way to construe the deed as a grant of a fee simple and

still give some effect to "for reservoir purposes"? Yes. Conceivably, we might conclude that some sort of defeasible fee was created [p*891] so that should the grantee put the land to some other use title would either revert to *O* or his heirs or give *O* or his heirs the power to terminate *A*'s interest. An alternative is to read the phrase as language of promise appended to a fee simple absolute which might be enforced by injunction or damages in the event of breach.

Does it make any difference in which conceptual slot we file the respective interests of *O* and *A*? It may or may not depending on precisely what issue concerns us. For example, are we interested in:

(a) whether the language of purpose is to be given any effect at all;

(b) whether it is to be given any effect after circumstances in the surrounding area have changed drastically;

(c) whether *A* retains an interest after failing to make any use of the land over a long period of time;

(d) whether *O*'s interest can be conveyed to *B*, devised to *C* or inherited by *B Jr.*;

(e) whether *O*'s interest can be separated from his ownership of the adjacent lot;

(f) whether *O* or *A* or neither of them is entitled to remove oil discovered beneath the surface of the land in question;

(g) whether *O* is entitled to compensation under the constitution if his interest is extinguished by governmental action;

(h) what happens if *A* puts the land to some other use?

It is such matters that comprise the subject of this section—the major pigeonholes into which private land-use arrangements must be filed, their distinguishing marks, formal accoutrements, limitations, and consequences. You should be aware at the outset, however, that the same commentators who have argued that we have too many categories also argue that the questions posed above, which they concede are real questions, should not be resolved, as they traditionally have been, by determining first which category the arrangement falls into and then letting a pre-packaged set of rules determine the result. This "categorical analysis," which is characteristic of many areas of property law, has no place been carried to such an extent as it has in the area of private land-use restrictions. The *Restatement (Third) of Property—Servitudes*, of which Professor Susan F. French is the Reporter, would radically reduce the number of categories and would treat most of the issues listed above on a functional basis. *See* French, *Design Proposal for the New Restatement of the Law of Property—Servitudes*, 21 U.CAL.DAVIS L.REV. 1213 (1988); French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L.REV. 928 (1988).

While this development has caused considerable controversy (*see* pp. S447, S476 *infra*), the controversy has been mostly over how far the new *Restatement* should go in the direction of allowing private volition to determine how land-use patterns should be structured. Few, if any, commentators support the retention of the old categories. That fact has created considerable difficulties of organization for this section of this book. Since the authors of this book agree not only that simplification of the categories is desirable but also that it is inevitable, the temptation was to abandon the old categories and organize the section entirely along functional lines. Unfortunately, doing that would probably result in considerable confusion for the student. Statutes and cases still make use of the old categories, and while there is [p*892] considerable evidence that modern courts (and perhaps legislatures) are doing their best to overcome the rigidities of the old categories, it is difficult to understand many modern cases (and some legislation) unless one knows what it is about the old categories that the court or legislature is

trying to overcome. A further difficulty with organizing this section along the lines of the new *Restatement* is the fact that when DKM3 was written only parts of two of a proposed nine chapters of the new *Restatement* had appeared in tentative draft form.[1]

We have, therefore, preserved in the organization of this section, perhaps for the last time, the basic distinction between easements, on the one hand, and covenants and equitable servitudes, on the other. We will have occasion, of course, to cite the relevant provisions of the new *Restatement* where they are available, and we will certainly ask the question, particularly with regard to issues of scope and termination, whether it makes any sense to treat the two categories differently. We will also try to ask the still-unresolved question: Granted that limitations on private volition in this area should not depend on the category in which the land-use arrangement falls, what limitations should there be on private land-use arrangements?

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[1] RESTATEMENT (THIRD) OF PROPERTY—SERVITUDES §§ 2.1–2.15 (Tent.Draft 1989); *id*. §§ 3.1–3.7 (Tent.Draft 1991). (There is no *Restatement (Second) of Property* that deals with the issues under consideration here.) [Now that the new *Restatement* is available in its entirety, I will attempt to provide a complete set references before we get to this section. CD.]

A. EASEMENTS

1. Easements Expressly Granted

The *First Restatement*'s definition of an easement reads:

An easement is an interest in land in the possession of another which

(a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists;

(b) entitles him to protection as against third persons from interference in such use or enjoyment;

(c) is not subject to the will of the possessor of the land;

(d) is not a normal incident of the possession of any land possessed by the owner of the interest; and

(e) is capable of creation by conveyance.

RESTATEMENT OF PROPERTY § 450 (1944). As noted above, easements are sometimes hard to distinguish from a full-blown estate of comparable duration. The latter vests "possession" and not a mere "limited use" right in the holder. The stakes riding on the distinction can be considerable, as, for example, when valuable minerals lie underneath the land in question. *See* Welsh So. Oil Co. v. Scurlock Oil Co., 201 So.2d 376 (La.Ct.App.1967). Distinguishing easements from less substantial "use rights" can be equally difficult. *See* pp. S421–424.

The *Restatement* notes that easements are "capable of creation by conveyance." (Indeed, it seems to say they must be. What could that mean? *See* p. S408 *infra*.) They can also arise by prescription. In fact, they can arise in a variety of other ways soon to be explored. But at the start let us concentrate on parties who wish expressly to create an easement. What formalities must they follow? [p*893]

To the consternation of those on the trail of the difference between a fee estate or a lease and an easement it must be reported that all formal requisites that apply to the creation of estates of a certain duration must be complied with in the creation of a comparable easement. Most important of these is the Statute of Frauds' requirement of a writing. This does apply to easements, subject to the associated exceptions for interests of short duration. If a state's Statute of Frauds permits a

one year lease to be oral, *it* (the Statute of Frauds) will allow the same of a one year easement. Statutes requiring witnesses, attestation, and so on, also, typically treat easements and estates alike. *See generally* RESTATEMENT (THIRD) OF PROPERTY—SERVITUDES § 2.7 reporter's note, statutory note (Tent.Draft 1989); Conard, *Easements, Licenses and the Statutes of Frauds*, 15 TEMP.L.Q. 222 (1941).

On top of these shared requirements, easements have their own peculiar necessity for a "written instrument under seal . . . subject [however] to statutory modification." RESTATEMENT OF PROPERTY § 467(b) (1944). With respect to the seal at least, the qualification is the important part of this second rule; statutes have eliminated the requirement of a seal in a substantial majority of the states. *See* Conard, *The Requirement of a Sealed Instrument for Conveying Easements*, 26 IOWA L.REV. 41 (1940). But most states have not done away explicitly with the requirement of a written instrument for conveyance of an easement. Of course, this fact is important only to the extent that the Statute of Frauds does not require a writing; but to that extent, easements, due to an historic quirk, may be held to a higher degree of formality than the corresponding estate. *See* RESTATEMENT OF PROPERTY § 467 comment g (1944). The new *Restatement* seeks to abolish the quirk: "The formal requirements for creation of a servitude are the same as those required for creation of an estate in land of like duration." RESTATEMENT (THIRD) OF PROPERTY—SERVITUDES § 2.7 (Tent.Draft 1989)

Since the formalities of conveyance may not serve to distinguish the conveyance of an easement from the conveyance of a fee estate or term of years, the matter often reduces to a question of the parties' intent. What is indicative of the intent to create an easement rather than an estate? Use of the word "easement" or "right of way" is apt to settle the question, unless the conveyance also contains language equally suggestive of a fee estate or lease. *See* Annot., 89 A.L.R.3d 767 (1979). Where language of purpose appears in a conveyance, at least when it appears in the *granting* clause itself (*see* Midkiff v. Castle & Cooke, Inc., 45 Hawaii 409, 368 P.2d 887 (1962) ("[F]or railroad purposes" language in *habendum* clause "does not operate . . . to reduce what would otherwise be an estate in fee simple to an easement.")), courts typically construe the instrument as creating but an easement. *See, e.g.*, Hawk v. Rice, 325 N.W.2d 97 (Iowa 1982) ("for the purpose of constructing a Railroad"); Kraemer v. Kraemer, 167 Cal.App.2d 291, 334 P.2d 675 (1959) ("for reservoir purposes"); *but see* Housing & Redev. Auth. v. United Stockyards Corp., 309 Minn. 331, 244 N.W.2d 275 (1976) (extrinsic evidence admitted to show that grant of fee estate was intended despite "for municipal purposes" and "for park purposes" in the deeds).

Other factors likely to push a court toward an easement construction are:

(a) a lack of particularity in the description of the land in question; *see, e.g.*, Northwest Realty v. Jacobs, 273 N.W.2d 141, 146 (S.D.1978) ("The deed contained no specific measurement of the property conveyed. The granting of an easement was consistent with the needs of Iowa Ditch . . . . Iowa Ditch never paid the property taxes on the strip of land. . . . [P]ublic policy [p*894] discourag[es] separate ownership of narrow strips of land . . . ."); Sohio Petroleum Co. v. Hebert, 146 So.2d 530, 533 (La.Ct.App.1962); or

(b) a large disparity between the price paid by the grantee and the value of a full estate; *see, e.g.*, Rogers v. Pitchford, 181 Ga. 845, 184 S.E. 623 (1936); *but see* Daniel v. Georgia Power Co., 146 Ga.App. 596, 247 S.E.2d 139 (1978) (large amount paid by grantee argues that acquisition of fee estate was intended); or

(c) the express retention by the grantor, of substantial rights in the affected land; *see, e.g.*, Baseball Publishing Co v. Bruton, 302 Mass. 54, 18 N.E.2d 362 (1938), *infra*, p. S423.

By an historical process of considerable complexity the word "reserve" came to be the standard one used by a grantor of land who sought to retain for himself an easement over the

granted land, while "except" came to be the word used in the situation in which the grantor wished to retain a fee estate in smaller part of a larger tract that he was granting. 2 A.L.P. §§ 8.24–8.29. Unfortunately, the distinction carried with it considerable ambiguity (not the least because in some circumstances an easement could be "excepted") and a baggage of rules that frequently led to anti-intentional results. *Id*. Whether any court today would place much weight on the use of the words "reserve" or "except" in determining whether the parties intended that the grantor reserve an easement or except a fee estate is doubtful. For a recent case that holds that a fee estate was retained despite the fact that the word "reserve" was used and despite the fact that the description of the excepted parcel was quite informal, see Sally-Mike Properties v. Yokum, 332 S.E.2d 597 (W.Va.1985). (The result in the case may be explained by the fact that interpreting the "reservation" as a fee estate allowed the descendants of people who were buried on the land to prevent the disinterment of their ancestors' remains.) In some jurisdictions it may still be necessary to make the distinction between reservations and exceptions because it is incorporated in a statute. *See, e.g.*, CAL.CIV.CODE § 1069 (West 1982) ("A grant is to be interpreted in favor of the grantee, except that a reservation in any grant . . . is to be interpreted in favor of the grantor."); *see* Coon v. Sonoma Magnesite Co., 182 Cal. 597, 189 P. 271 (1920).

Where the issue is not easement or fee estate but easement or lease, these factors become less reliable and the line becomes especially hard to draw, for in such cases it is quite consistent with the non-easement characterization that the grantor retain considerable control over and indeed some right to use the land described in the conveyance. *See, e.g.*, Town of Kearny v. Mun. Sanitary Landfill Auth., 143 N.J.Super. 449, 363 A.2d 390 (1976); Sproul v. Gilbert, 226 Or. 392, 359 P.2d 543 (1961).

In a few special situations extrinsic evidence concerning the parties' purpose can overwhelm absolute language in a deed leaving the grantee with an easement. Thus, one cannot, it seems, own a cemetery plot in fee:

> The purchase of a lot in a cemetery, although under a deed absolute in form and containing words of inheritance, is regarded as conveying only a privilege, easement, or license to make interments in the lot purchased, exclusively of others, so long as the lot remains a cemetery, the fee remaining in the grantor subject to the grantee's right to the exclusive use of the lot for burial purposes. [p*895]

First Trinity Evangelical Lutheran Church Appeal, 214 Pa.Super. 185, 192, 251 A.2d 685, 689 (1969).[1]

Some courts say, in effect, that a deed of a narrow strip of land to a railroad, no matter how it reads, will convey merely an easement. *See* Harvest Queen Mill & Elevator Co. v. Sanders, 189 Kan. 536, 370 P.2d 419 (1962). *But see* Sowers v. Ill. Cent. Gulf R.R. Co., 152 Ill.App.3d 163, 503 N.E.2d 1082 (1987).

Easements must not only be distinguished from the more substantial estates but from interests of lesser stature, most frequently licenses. Here formalities can be a help. If those required for

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[1] As one might suspect, the law of cemeteries and cadavers is a fascinating nook of property law. Unfortunately, limited space forces us simply to pose the central question and leave you with some references. When a cemetery plot is occupied by the remains of its "owner," who owns what? The issue is most often raised when the owner of the fee (who, the Pennsylvania court tells us, is someone other than the holder of the plot) seeks to put his land to some other use, or when it is being condemned for a state highway and the question is who gets what compensation. *See generally* Heiligman v. Chambers, 338 P.2d 155 (Okla.1959); *In re* Bd. of Transp., 140 Misc. 557, 251 N.Y.S. 409 (Sup.Ct.1931); P. JACKSON, THE LAW OF CADAVERS (1936); Note, *Cemetery Abandonment and Disinterment of Human Remains*, 35 ALB.L.REV. 320 (1971). The *Yokum* case, *supra*, is not an exception to the general rule because the issue in *Yokum* was the ownership of the entire cemetery rather than of an individual plot within the cemetery.

conveyance of an easement have not been complied with, normally something less will have been created. *See generally* pp. 421–422. But adherence to all the easement formalities may fail to produce an easement if the transaction shows the parties intended a lesser interest.

The traditional word appropriate for the creation of an easement was "grant." Over-cautious draftsmen are likely to throw in others. Most contemporary courts, however, are inclined to search for the parties' intent, without undue emphasis upon the use or failure to use certain key words. There are earlier cases, though, holding that words of promise, since they do not connote a present grant, cannot create an easement. *See*, *e.g.*, Nowlin Lumber Co. v. Wilson, 119 Mich. 406, 78 N.W. 338 (1899); East Jersey Iron Co. v. Wright, 32 N.J.Eq. 248 (1880). *See generally* Conard, *Words Which Will Create an Easement*, 6 MO.L.REV. 245 (1941). The new *Restatement* seeks to make the distinction between contract and conveyance irrelevant, at least for purposes of the creation of the "servitude." *See* RESTATEMENT (THIRD) OF PROPERTY—SERVITUDES § 2.1 (Tent.Draft 1989) ("A servitude may be created by contract or conveyance.") *Id.* § 2.2 ("A contract or conveyance creates a servitude if it is intended to do so, and if it is otherwise effective to create a servitude. The intent to create a servitude may be express or implied. No particular verbal formula is required.").

Unfortunately identifying an interest as an easement does not end the process of classification, for easements must be subdivided. There are, first of all, *appurtenant* easements—easements intended to enhance the usefulness or value of other land owned by the holder of the easement and to pass with it upon conveyance—and easements *in gross*—which have no such relationship to other land. Standard terminology is to speak of the land encumbered by an appurtenant easement as the *servient* tenement or estate and that benefited as the *dominant* tenement or estate. The importance of appurtenance will become apparent in *Cox v. Glenbrook Co.*, *infra*, p. S410, and in the Note, *infra*, pp. S417–421.

Easements are often also categorized as *affirmative* or *negative*. Affirmative easements permit the holder actively to use the grantor's property, generally with some related reduction of the grantor's scope of use. Active use is considered, in terms of this distinction, to include the casting of harmful effects on the grantor's estate which would, but for the easement, be [p*896] actionable as a nuisance or trespass. Negative easements are those which are passively enjoyed by the holder; he is not given a right to walk or drive upon or throw pollution onto the grantor's land, but empowered to prevent the grantor from doing things on his own land (short of nuisance) which would render property of the easement holder less pleasant or useful or valuable. We will see *infra*, pp. S408–409, that the types of negative easements that can be created are traditionally quite limited, and this limitation is one of the reasons that led to the rise of the equitable servitude, *infra*, pp. S434–437.

At least since the nineteenth century there is, in general, no way in which the holder of land burdened by easement may be compelled to do something. If such an arrangement is possible, it must normally be achieved by way of affirmative covenant or affirmative equitable servitude. *See* § 3B *infra*.

WALDROP v. TOWN OF BREVARD

Supreme Court of North Carolina
233 N.C. 26, 62 S.E.2d 512 (1950)

This is an action in which the plaintiffs seek to have abated as a private and public nuisance the presently maintained garbage dump of the Town of Brevard, and to recover special damages resulting from its operation since 1 October, 1946. In 1938 the Town of Brevard purchased from I.F. Shipman and wife a tract of land, consisting of five acres, for a garbage dump. The land purchased was near the middle of a 120–acre tract owned by the grantors. At the time the appellees purchased this land, only the grantors and one other family lived on the Shipman lands.

The duly recorded deed from Shipman and wife to the Town of Brevard, in addition to conveying the five-acre tract of land, contains the following provisions:

> "Together with a right of way across the lands of the parties of the first part 16 feet in width, extending from the road from Rocky Hill to Camp Illahee along the present road leading from said road to the property herein described. With the right to construct, reconstruct, repair or maintain said road in any manner which the party of the second part may see fit.
>
> "It is understood and agreed that the party of the second part is purchasing the property hereinabove described for use as a dumping ground for garbage, waste, trash, refuse, and other materials and products which the party of the second part desires to dispose of. And as a part of this conveyance the parties of the first part do hereby grant and convey unto the said party of the second part, its successors and assigns, the right, without limit as to time and quantity, to use the lands hereinabove described as a dumping ground for the Town of Brevard for garbage, waste, trash, refuse and other materials and products of any and every kind which the said party of the second part desires to dispose of by dumping on said lands and burning or leaving thereon, and the said parties of the first part do hereby release, discharge, waive and convey unto the said party of the second part, its successors or assigns, any or all rights of action, either legal or equitable which they have or ever might or may have by reason of any action of the party of the second part in using the lands hereinabove described as a dumping ground for the Town of Brevard, or by reason of any fumes, odors, vapors, smoke or other discharges into the atmosphere by reason of such location and use of a dumping ground on the lands hereinabove described. [p*897]
>
> "The agreements and waiver hereinabove set out shall be covenants running with the remainder of the lands owned by the parties of the first part, and binding on said parties as the owners of said lands, and their heirs and assigns, and anyone claiming under them, or any of them, as owners or occupants thereof."

After the Town of Brevard began using the land referred to herein as a garbage dump, I.F. Shipman and wife began selling other portions of the original 120–acre tract. Now some 35 or 40 families live in the neighborhood.

In 1939 Van R. Tinsley and wife purchased a lot from I.F. Shipman and wife, the lot being a portion of the original 120–acre tract and situate approximately 300 yards or more from the land used by the defendant as a garbage dump. The Tinsleys constructed a house on the lot and conveyed the property to the plaintiffs in 1940. They have owned and resided on the premises since that time.

The defendant . . . alleges that the plaintiffs are estopped from maintaining this action by reason of the covenants contained in its deed from I.F. Shipman and wife, and plead such estoppel in bar of plaintiffs' right to maintain the action.

At the close of plaintiffs' evidence, the defendant moved for judgment as of nonsuit. The motion was denied, but upon renewal thereof at the close of all the evidence, the motion was allowed. Plaintiffs except, appeal and assign error.

DENNY, J. If it be conceded that the normal operation of the defendant's garbage dump in a reasonably careful and prudent manner constitutes a nuisance, in our opinion these plaintiffs are estopped from asserting any claim for damages or for other relief by reason thereof, in view of the grant and covenants contained in the conveyance from I.F. Shipman and wife to the Town of Brevard.

It was stated in the conveyance to the Town of Brevard, that the property was to be used as a garbage dump, and I.F. Shipman and wife expressly granted to it the right, without limit as to

time and quantity, to use the premises conveyed as a dumping ground for the Town of Brevard, for garbage, waste, etc., and for themselves, their heirs and assigns, they released, discharged and waived, any or all rights of action, either legal or equitable which they have or might have by reason of any action of the Town of Brevard in using the lands conveyed to it as a dumping ground for said town, or by reason of any fumes, odors, vapors, smoke or other discharges into the atmosphere by reason of the use of the premises as a garbage dumping ground. The parties further stipulated that the agreements and waiver set forth in the deed shall be covenants running with the remainder of the lands owned by the grantors and binding on them "as the owners of said lands, and their heirs and assigns, and anyone claiming under them, as owners or occupants thereof."

"A covenant or agreement may operate as a grant of an easement if it is necessary to give it that effect in order to carry out the manifest intention of the parties." 17 Am.Jur., Sec. 27, p. 940.

The grant and release or waiver contained in the deed from I.F. Shipman and wife to the Town of Brevard, in our opinion, created a right in the nature of an easement in favor of the Town of Brevard, upon the remainder of the lands owned by the grantors. And the waiver or release of any right to make a future claim for damages or other relief, resulting from the use of the premises conveyed to the defendant as a garbage dump, [p*898] constitutes a covenant not to sue and is binding on the grantors, their heirs and assigns. [Citations omitted.]

The appellants contend they are not bound by the covenants in the deed from I.F. Shipman and wife to the Town of Brevard, because (1) the Town of Brevard is not plaintiffs' predecessor in title; (2) no deed in plaintiffs' chain of title contains or refers to the covenants contained in the defendant's deed; and (3) there has been such a change in the neighborhood it would be unconscionable and inequitable, and against public policy to enforce the covenants in the defendant's deed.

The plaintiffs are relying on the case of Turner v. Glenn, 220 N.C. 620, 18 S.E.2d 197, as authority for their position that since no deed in their chain of title contains or refers to the covenants set forth in the Shipman deed to the defendant, they are not bound thereby. This position might be well taken if we were dealing with restrictive covenants instead of an easement and a waiver and release of any and all claims for damages incident to the exercise of the easement granted. Grantees take title to lands subject to duly recorded easements which have been granted by their predecessors in title. G.S. 47–27; [further citations omitted]. . . .

The plaintiffs' contention that conditions have changed to such an extent, in the neighborhood adjacent to the defendant's garbage dump, that the covenants in the defendant's deed should not be enforced, is without merit. Changed conditions may, under certain circumstances, justify the non-enforcement of restrictive covenants, but a change, such as that suggested by the plaintiffs here, will not in any manner affect a duly recorded easement previously granted.

We do not construe the plaintiffs' complaint to allege that the nuisance complained of was the result of negligent conduct on the part of the defendant, its agents or employees. Therefore, in view of the interpretation we have given to the provisions contained in the defendant's conveyance from I.F. Shipman and wife, plaintiffs' predecessors in title, the judgment as of nonsuit entered below should be upheld.

Affirmed.

Notes and Questions

1. What kind of easement was this? Affirmative? Negative? Appurtenant? In gross? Could the quoted portion of the conveyance in question have been construed as creating an estate rather than an easement?

2. The court suggests that its analysis might have been different on two points if it were dealing with a "restrictive covenant" instead of an easement. What leads it to conclude that it is confronted with an easement?

3. How could plaintiffs have discovered defendant's right to maintain a nuisance before buying their lots? Was it recorded? Was it in the plaintiffs' chain of title? Why might matters have been different if the defendant's interest were a mere covenant? Could it be said that the plaintiffs had actual notice, whatever the state of the record?

4. Of what relevance is it that North Carolina is one of the few states that has a pure race recording statute? *See* p. S188 *supra*. In a state that had the more usual notice or race-notice form of recording statute could the court have made the same distinction between notice for purposes of a "restrictive covenant" and notice of an easement that the court makes in the principal case? [p*899]

5. If the categories of easement and covenant are collapsed for many purposes into one, as the new *Restatement* would do, what difference would there be in the way that the court treated the problem in the principal case? French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L.REV. 928, 941 (1988); French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S.CAL.L.REV. 1261, 1300–02 (1982). Don't make up your mind completely about this question until you have had an opportunity to examine the material on "changed conditions," *infra*, pp. S466–476.

6. Suppose, as is possible, that there are a few homeowners living just outside the original 120–acre Shipman tract who are significantly affected by the dump's operations. If they sue for an injunction or damages, how, if at all, are their rights influenced by the terms of the Shipman grant to the town?

PETERSEN v. FRIEDMAN
District Court of Appeal of California
162 Cal.App.2d 245, 328 P.2d 264 (1958)

KAUFMAN, J. The parties are owners of adjacent parcels of improved real estate situated on Franklin Street in San Francisco. Plaintiff's complaint sought to perpetually enjoin the defendants from violating an express easement of light, air and unobstructed view created in favor of plaintiff's property and to compel the defendants to remove certain television aerials and antennae. The trial court found all of the allegations of the complaint to be true, rendered judgment for the plaintiff, and issued both injunctions requested. Defendants appeal.

The nature and creation of the easement appurtenant to plaintiff's property is not in dispute. On November 6, 1942, Mary Petersen, now deceased, also known as Mrs. Chris Petersen, by a grant deed duly recorded conveyed a part of her property on Franklin Street to C. A. Petersen. The deed contained the followed [sic] reservation of an easement:

"RESERVING, however, unto the first party, her successors and assigns, as and for an appurtenance to the real property hereinafter particularly described and designated as 'Parcel A' and any part thereof, a *perpetual easement of light to receive light, air, and unobstructed view over that portion of the real property hereinabove described*, to the extent that said light, air and view will be received and enjoyed by limiting any structure, fence, trees or shrubs upon said property hereinabove described or any part thereof, to a height *not* extending above a horizontal plane 28 feet above the level of the sidewalk of Franklin Street as the sidewalk level now exists at the junction of the southern and western boundary lines of the property hereinabove described. Any obstruction of such view above said horizontal plane except by a peaked gable roof extending the entire width of the front of the building referred to herein and extending 9 feet in an easterly direction from a point 1 foot 6 inches east of Franklin Street, the height of said peaked

roof being 3 feet 2 inches together with spindles 3 feet in height on the peak of said roof, and except the necessary number of flues or vents constructed of galvanized iron and/or terra cotta not over 4 feet in height, shall be considered an unauthorized interference with such right or easement and shall be removed upon demand at the expense of second party, and his successors and assigns in the ownership of that real property described or any part thereof."

Thereafter, the defendants, by mesne conveyances from C. A. Petersen acquired all of the property conveyed by the deed of November 6, 1942, [p*900] subject to the reservation. Plaintiff is the duly appointed and qualified executor of the estate of Mary Petersen, which is the owner of the dominant tenement.

Defendants' contentions on appeal are limited to the following: (1) that it could not have been the intent of the parties to preclude the erection of television aerials and antennae on the defendants' roof as the easement was created before such devices were known; (2) that the evidence does not support the judgment.

The language of the easement is clear and leaves no room for construction or determination of the intent of the parties, as contended by the defendant. Its purpose is to avoid any type of obstruction of the light, air and view without regard to the nature thereof. The reservation was not limited to the use then being made of the servient estate, but extended to all uses to which the servient estate might thereafter be devoted. Easements of light and air may be created in this state. (Civ.Code, § 801; [further citation omitted].) Although we have not been able to find a California precedent on an easement of view, the weight of authority is that such an easement may be created by express grant. [Citation omitted.] It has been held in this state however, that interference with an easement of light, air or view by a structure in the street is ground for an injunction. [Citation omitted.]

As to defendant's second contention, the issue of whether or not the aerials and antennae obstructed plaintiff's view and otherwise interfered with the easement to the detriment of the plaintiff, were questions of fact for the lower court. The plaintiff offered evidence as to the size and nature of the obstructions and testified that because of the presence of the aerials and antennae, he received a lesser rental for the apartments on his property. The question of granting or refusing an injunction is addressed to the sound discretion of the lower court and its action will not be reversed on appeal unless there appears to be an abuse of discretion. [Citation omitted.] The record here supports the judgment.

Judgment affirmed. . . .

Notes and Questions

1. The court does not cite CAL.CIV.CODE § 1069 (West 1982), *supra* p. S401. Does it have any bearing in this case?

2. The instrument creating this interest labeled it an easement. Suppose instead the 1942 deed had purported to retain a fee simple interest in the "air rights" "above a horizontal plane 28 feet above the level of the sidewalk of Franklin Street." Would that have left the parties in any different relationship? If language of covenant had been used, *e.g.*, "the party of the second part does hereby covenant not to build above a horizontal plane [etc.], said covenant to bind his successors and assigns and to be enforceable by the party of the first part, her successors and assigns," would it have resulted in an easement or a mere "restrictive covenant"? *See* Cadwalader v. Bailey, 17 R.I. 495, 23 A. 20 (1891) (covenant not to build on portion of lot construed as a negative easement of view). Does it make any difference?

If the categories of easement and covenant are collapsed for many purposes into one, as the new *Restatement* would do, then presumably whatever could be achieved by way of easement could be achieved by way of covenant. Whether this is wise depends on how "changed

conditions" doctrine would operate. *See* pp. S466–476 *infra*. Can you see a "changed conditions" argument in the principal case? The new *Restatement* would not, however, eliminate the [p*901] substantial distinction between servitudes, on the one hand, and fee estates, on the other. Thus, the first question proposed in the preceding paragraph remains.

3. CAL.CIV.CODE § 801 (West 1954), cited by the court, then read:

The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements:

1. The right of pasture;
2. The right of fishing;
3. The right of taking game;
4. The right of way;
5. The right of taking water, wood, minerals, and other things;
6. The right of transacting business upon land;
7. The right of conducting lawful sports upon land;
8. The right of receiving air, light, or heat from or over, or discharging the same upon or over land;
9. The right of receiving water from or discharging the same upon land;
10. The right of flooding land;
11. The right of having water flow without diminution or disturbance of any kind;
12. The right of using a wall as a party wall;
13. The right of receiving more than natural support from adjacent land or things affixed thereto;
14. The right of having the whole of a division fence maintained by a coterminous owner;
15. The right of having public conveyances stopped, or of stopping the same on land;
16. The right of a seat in church;
17. The right of burial.

A 1978 amendment added an eighteenth item to the list: "The right of receiving sunlight upon or over land as specified in Section 801.5." Section 801.5 defines this permissible "solar easement" as "the right of receiving sunlight across real property of another for any solar energy system." CAL.CIV.CODE §§ 801, 801.5 (1982). *See* DKM3, pp. 941–50.

At the time of *Petersen*, as today, section 802 set forth a short list of easements which "may be granted and held, though not attached to land:"

One—The right to pasture, and of fishing and taking game.
Two—The right of a seat in church.
Three—The right of burial.
Four—The right of taking rents and tolls.
Five—The right of way.
Six—The right of taking water, wood, minerals, or other things.

Why should this type of easement be more restricted than the types of easements listed in section 801? For a summary of the traditional doctrines that indicate hostility to easements in gross, see pp. S417–421 *infra*.

4. Neither section 801 nor section 802 lists easements of view. Does *Petersen* hold that they can, nevertheless, be created in California? Do you [p*902] gather that it would enforce "a perpetual easement of right to view that portion of the real property hereinabove described in its natural state or developed with a single-family residence of colonial style and no more than two stories"?

Some background is necessary before this last question can be tackled. While there is some evidence that earlier law was considerably freer recognizing easements, English law in the nineteenth century took a restrictive view of easements, a view greatly influenced by a treatise writer, Charles J. Gale, who derived much of his learning from Roman and Continental sources. *See* A. SIMPSON, HISTORY OF THE LAND LAW 262–63 (2d ed.1986). In 1924, one English writer maintained that the list of permissible subjects for easements contained a mere six headings: air, light, ways or roads, support, water, and fences. J. BEHAN, COVENANTS AFFECTING LAND 45 (1924). Viewed from this perspective section 801 and similar statutes in other states have to be seen as authorizing varieties of easements not otherwise possible. *See* Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196, 206 (Tex.1962).

Most American jurisdictions, however, at least when considering attempted affirmative easements, have shown a much more flexible attitude. The New York Court of Appeals, for example, said in 1910:

> The owner of land may impose upon it any burden, however injurious or destructive, not inconsistent with his general right of ownership, if such burden is not in violation of public policy, and does not injuriously affect the property rights of others.

Allerton v. N.Y.L. & W.Ry.Co., 199 N.Y. 489, 495–96, 93 N.E. 270, 272 (1910). Some courts while hesitating to go quite so far, readily enforce novel easements but continue to hold on to the possibility that some kinds of burdens may be inappropriate for an easement even though not violating public policy. This appears to be the position of the *First Restatement* which in its requirement that easements be "capable of creation by conveyance" has been read as saying something limiting about their subject matter. *See generally* Conard, *Easement Novelties*, 30 CALIF.L.REV. 125 (1942).

Viewed from this perspective California's section 801 threatens undesirable rigidity. It has not had that effect. In 1912 the California Supreme Court was confronted with a purported easement to maintain a pumping station, a use not enumerated in section 801. It confirmed the validity of the grant.

> The ingenuity and foresight of the legislature would be taxed in vain to name and classify all the burdens which might be imposed upon land. . . . [I]t is of no consequence whether that particular burden will fall into or can be forced into any of the seventeen subdivisions of section 801.

Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 415–16, 129 P. 593, 594 (1912).

Despite such judicial willingness to recognize new affirmative easements, there are indications that negative easements may remain confined to the original short list.

> The fact of the matter is that (putting aside the case of light and perhaps also support) all rights which have ever been held by English courts to constitute easements are intelligible objects of a grant, that is, they always relate to something which without absurdity we can imagine one man granting to another.

G. CHESHIRE, MODERN LAW OF REAL PROPERTY 255 (3d ed.1933). Notice the similarity between the last phrase and the Restatement's puzzling insistence that easements be "capable of creation by conveyance." Justice Holmes put the [p*903] matter somewhat differently in the course of denying recognition to an attempted easement not to open a quarry on certain land:

> It if be asked what is the difference in principle between an easement to have land unbuilt on, such as was recognized in *Brooks v. Reynolds*, 106 Mass. 31 [an easement of light case], and an easement to have a quarry left unopened, the answer is: that, whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct

> physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in [an] indirect way. . . .

Norcross v. James, 140 Mass. 188, 192, 2 N.E. 946, 949 (1885). Writing in 1942, one American commentator concluded:

> [I]n the development of types of affirmative easements courts have not been disposed to restrict the power of the owner of land to subject it to an easement in favor of another, as is shown by the novel kinds of affirmative easements that have been recognized in recent years. But in the development of negative easements, this policy [against novelty] has prevented the recognition of new types of restrictive easements, so that there are only four types which have gained acceptance to date easements for light, for air, for support of a building laterally or subjacently, and for the flow of an artificial stream.

Reno, *The Enforcement of Equitable Servitudes in Land: Part I*, 28 VA.L.REV. 951, 959 (1942).

There are few recent decisions (for recent legislation, see p. S419 *infra*; DKM3, p. 950) on the permissible subject matter of negative easements and little pressure for expanding the traditional list because in most questionable cases equitable enforcement of a restrictive covenant works every bit as well. From a fairly early date it became settled in English law that a variety of promises concerning land would be enforced in equity against subsequent owners with notice—even though the subject matter or lack of proper formalities prevented creation of an easement and the rigid common law rules limiting legal enforcement of promises against subsequent holders were not met. Backed by such enforcement, a restrictive covenant looks very much like a negative easement. Indeed, in many jurisdictions such covenants are termed "equitable easements" or "equitable servitudes." Their existence permits a court in many cases to avoid the question of whether a true negative easement of some new type can be or is being recognized. *See, e.g.*, Rube Bros. v. Dumont Coal & Ice Co., 200 App.Div. 135, 192 N.Y.Supp. 705 (1922) (granting enforcement of covenant not to compete without reaching the question of whether it could create an easement).

Does it make any difference? Does it matter whether California recognizes easements of view so long as it will enforce a restrictive covenant limiting the height and location of all construction on a lot? A full answer requires greater familiarity with equitable enforcement of covenants, a matter taken up in § 3B2. But *Waldrop v. Town of Brevard*, *supra*, p. S402, tells us that it may. *See also* First National Trust & Savings Bank v. Raphael, 201 Va. 718, 113 S.E.2d 683 (1960), DKM3, p. 951.

One setting in which the difference can have major impact is eminent domain. Suppose a city school board condemns a lot burdened by an easement of light, air, and view which prohibits the building of any structure above one story. The city intends to build a two story school. Need it pay compensation to the holder of the negative easement it will have to extinguish? Of course. *See* 2 P. NICHOLS, EMINENT DOMAIN § 5.14 [1] (Rev.3d ed. 1990). It is taking an interest in property—an easement. Suppose instead what is at issue is a restrictive covenant [p*904] limiting the lot's use to single-family residence; need compensation be paid to those benefiting from the restriction? In a significant number of jurisdictions, the answer is "no." *See*, *e.g*. Board of Public Instruction v. Town of Bay Harbor Islands, 81 So.2d 637, 640–42 (Fla.1955). *But see* United States v. 53¬ Acres of Land, 139 F.2d 244, 247 (2d Cir.1943):

> We see no reason to grope about in the mysterious world of "estates" and "interests not estates". The law of New York has put the matter on a very practical basis: a right with respect to property taken in condemnation may be so remote or incapable of valuation that it will be disregarded in awarding compensation; otherwise it will not be disregarded.

The court's reference is to Section 29, subd. 2 of the Highway Law which defines "property" as used therein to include all interests less than full title "such as easements permanent or temporary,

rights of way, uses, leases, licenses and all other incorporeal hereditaments and every estate, interest or right legal or equitable." *See also* Southern California Edison Co. v. Bourgerie, 9 Cal.3d 169, 507 P.2d 964, 107 Cal.Rptr. 76 (1973).

COX v. GLENBROOK CO.

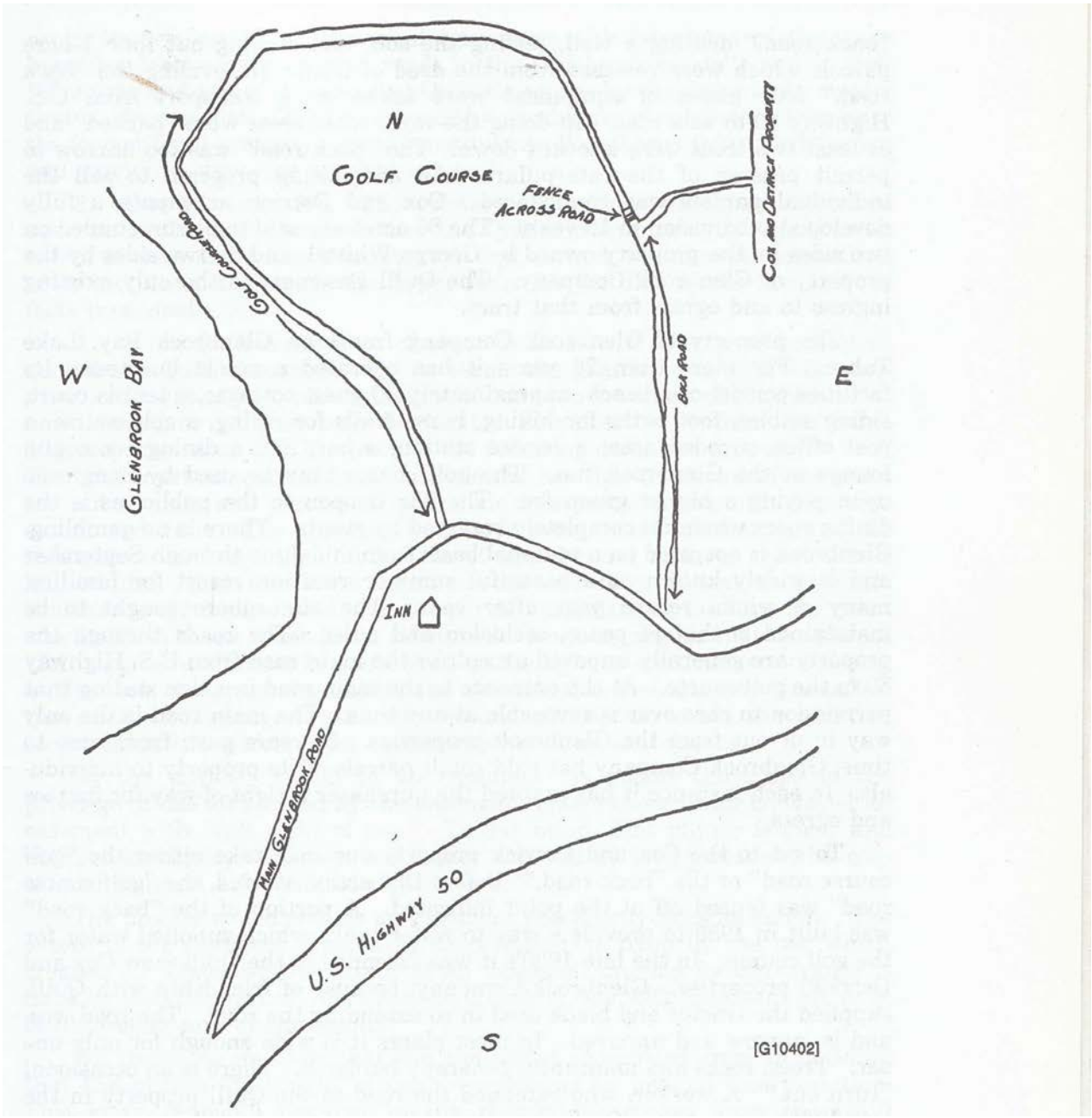
Supreme Court of Nevada

78 Nev. 254, 371 P.2d 647, 10 A.L.R.3d 947 (1962)

THOMPSON, J. In this case, Glenbrook Company, a family corporation, by complaint, and Cox and Detrick, copartners, by answer and counterclaim, each request a declaratory judgment as to the scope and extent of a certain right-of-way herein referred to as the "Quill Easement," granted Henry Quill by the Glenbrook Company in 1938. The conveying instrument reads:

"That said grantor, in consideration of the sum of ten dollars ($10.00), lawful money of the United States of America, to it in hand paid by the grantee, receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey to the said grantee an easement and right-of-way, with full right of use over the roads of the grantor as now located or as they may be located hereafter (but such relocation to be entirely at the expense of the grantor) from the State Highway known as U. S. Route 50 to the following described property: [description of Quill property]

"To have and to hold said right-of-way and easement unto the said grantee, his heirs and assigns forever." [p*905]



1. *The facts*. The relevant facts are not disputed. The Quill property contains 80 acres. Henry Quill died in 1943. In 1945 the administratrix of his estate sold the property, with appurtenances, to Kenneth F. Johnson for $8,600. In 1960 Johnson sold the property to Cox and Detrick for $250,000, $50,000 down, with the balance secured by trust deed and payable over an extended period.

Cox and Derrick propose to subdivide their property into parcels of one acre or more, resulting in a minimum of 40 or a maximum of 60 separate parcels. The building on each parcel is to be limited to a residence and a guesthouse. Permanent, as distinguished from seasonal, homes are planned. A commercial development of the property is not contemplated. Zoning will permit the proposed development. Cox and Derrick have incurred expenses of about $17,000 in preliminary development work, including leveling of the [p*906] “back road,” drilling a well, testing the soil,

and staking out four 1–acre parcels which were released from the deed of trust. In leveling the "back road," four pieces of equipment were taken on a transport from U. S. Highway 50 to said road. In doing the work some trees were "barked" and at least two trees were knocked down. The "back road" was too narrow to permit passage of the caterpillars. An advertising program to sell the individual parcels was commenced. Cox and Detrick anticipate a fully developed subdivision in 10 years. The 80 acres are said to be surrounded on two sides by the property owned by George Whittel, and on two sides by the property of Glenbrook Company. The Quill Easement is the only existing ingress to and egress from that tract.

The property of Glenbrook Company fronts on Glenbrook Bay, Lake Tahoe. For more than 25 years it has operated a resort business. Its facilities consist of a beach, approximately 30 guest cottages, a tennis court, riding stables, foot paths for hiking, horse trails for riding, a golf course, a post office, a rodeo area, a service station, a bar, and a dining room and lounge at the Glenbrook Inn. The golf course may be used by nonguests upon paying a higher green fee. The bar is open to the public, as is the dining room when not completely reserved by guests. There is no gambling. Glenbrook is operated on a seasonal basis from mid-June through September and is widely known as a beautiful summer vacation resort for families, many of whom return year after year. The atmosphere sought to be maintained is that of peace, seclusion and quiet. The roads through the property are generally unpaved except for the main road from U. S. Highway 50 to the golf course. At the entrance to the main road is a sign stating that permission to pass over is revocable at any time. The main road is the only way in or out from the Glenbrook properties. In years past, from time to time, Glenbrook Company has sold small parcels of its property to individuals. In each instance it has granted the purchaser a right-of-way for ingress and egress.

To get to the Cox and Detrick property one may take either the "golf course road" or the "back road." Before this action started, the "golf course road" was fenced off at the point indicated. A portion of the "back road" was built in 1936 to provide a way to water tanks which supplied water for the golf course. In the late 1930's it was extended to the Quill (now Cox and Derrick) properties. Glenbrook Company, because of friendship with Quill, supplied the tractor and blade used in so extending the road. The road was, and is, narrow and unpaved. In most places it is wide enough for only one car. Trees, rocks and manzanita generally border it. There is an occasional "turn out." A worker, who extended the road to the Quill property in the late 1930's, stated that Quill just wanted "a rough road, so that he could go on up with a car." Cox frankly stated that he would like to use the "back road" if it "were passable," and that he definitely wanted to widen the road. That road has seldom been used by anyone except the four or five families having homes along its course, and their guests.

2. *The lower court's judgment*. After trial before the court without a jury, judgment was entered declaring that the Quill Easement is limited in three respects: (a) "to such uses as are and will be reasonably consistent with the use to which the servient property is employed, that is, a conservative, family, mountain resort operation, and is further limited, as to reasonable use, to the use contemplated in the original grant to Quill, that is, access to and egress from the entire dominant parcel by a single family in occupancy, and their guests"; (b) "to use of the Glenbrook roads as those roads are presently constructed and maintained, or as the Glenbrook Company [p*907] by its own action or by mutual agreement with interested parties, may hereafter locate and construct roads in the Glenbrook estate"; and (c) that "The proposed use of the so-called Quill Easement by the defendants herein, that is, the use of the Glenbrook roads by purchasers of subdivided parcels of the former Quill property, would constitute an illegal and unjustified burden and surcharge upon the servient estate."

3. *Area of contention*. The primary contentions which we are called upon to resolve are: first, whether the Quill conveyance with regard to its extent is clear and without ambiguity; and,

second, whether the limitations of its use placed thereon by the lower court are justified by the law and the facts presented. . . .

4. *Is the Quill conveyance clear as to its extent?* We have heretofore quoted the Quill Easement. By its terms the grantor conveyed "an easement and right-of-way, with full right of use over the roads of the grantor as now located or as they may be located hereafter * * * from the State Highway known as U. S. Route 50 to the following described property * * * ." The trial court announced in a conclusion of law that the terms of the grant are not so clear and precise as to exclude interpretation regarding its true extent and limit. The appellant subdividers urge that the meaning of the conveyance is clear; that "full right of use" cannot mean a restricted or limited use; that the lower court should not have looked to extrinsic evidence to aid it in ascertaining the parties' intention at the time the grant was made. On the other hand, Glenbrook Company argues that the phrase "full right of use" must be considered in the light of circumstances existing at the time the grant was made, and the actual use of the way thereafter; that such circumstances are relevant and admissible to aid the court in ascertaining the extent of an easement created by conveyance. . . .

By the phrase "extent of an easement" is meant the scope of the privilege of use authorized by the easement. Here the grantor conveyed an easement with "full right of use." To our mind, that phrase is clear and without ambiguity. It may not, under the veil of interpretation, be considered to mean a "restricted right of use." . . .

The process which creates an easement necessarily fixes its extent. The extent of an easement created by prescription, is fixed by the use which created it. Likewise, the extent of an easement created by conveyance is fixed by the conveyance, Restatement, Property, sec. 482, comment (a), at p. 3010, if clear and unambiguous.[1]

We therefore conclude that the trial court committed error in deciding that the phrase "full right of use" was subject to judicial interpretation. This error probably resulted in the restrictions placed upon the Quill Easement by the judgment entered. However, we cannot be certain that this is so. In any event, it is our view that the judgment is too restrictive in certain respects, incomplete in others, and premature as to a third aspect of the litigation. . . .

5. *The unwarranted restrictions*. (A) We shall first discuss that portion of the judgment restricting the use to ingress to and egress from the entire dominant parcel "by a single family in occupancy and their guests." Such a restriction, in our view, destroys the appurtenant character of the easement. Yet, there can be no question but that the Quill Easement was appurtenant [p*908] to the 80–acre tract then owned by him. The terms of the conveyance, "to have and to hold said right-of-way and easement unto the said grantee, his heirs and assigns forever," make it clear that one who succeeds to the possession of the dominant tenement, succeeds as well to the privileges of use of the servient tenement authorized by the conveyance. Furthermore, those who succeed to the possession of each of the parts into which the dominant tenement may be subdivided, also succeed to such privileges of use, unless otherwise provided by the terms of the conveyance. [Citations omitted.] The Quill conveyance does not contain a restriction that the easement granted is to be appurtenant to the dominant estate only while such estate remains in single possession, and none may be imposed by judicial declaration.

(B) The judgment further restricts the use of the easement to "use of the Glenbrook roads as those roads are presently constructed and maintained." We are uncertain as to the precise

[1] Glenbrook Company urges that the trial court, by virtue of the "rule of practical construction" could properly consider evidence of the actual use of the way by predecessors of Cox and Detrick, to fix the extent of the use created by the conveying instrument. That rule does not apply where the instrument is clear. [Citation omitted.]

meaning of this restriction. If such language prohibits the owner of the dominant estate from making any improvements or repairs of the way, it is too restrictive. As a general rule, the owner of an easement may prepare, maintain, improve and repair the way in a manner and to an extent reasonably calculated to promote the purposes for which it was created. The owner may not, however, by such action, cause an undue burden upon the servient estate, nor an unwarranted interference with the independent rights of others who have a similar right of use.[2] [Citation omitted.] The action of Cox and Detrick in leveling or "rough grading" the "back road," to the extent that it was confined to the area within the exterior borders of the road as they existed when the easement was originally granted, was an improvement reasonably calculated to promote the purposes for which the easement was created. Such leveling or rough grading as so confined, would not, in itself, cause an undue burden upon the servient estate, nor constitute an unwarranted interference with the easement rights of other private property owners.

However, their conduct in attempting to widen the way is another matter. A careful study of the record makes it clear that the ultimate intention of the subdividers is to widen the "back road" in order that two cars going in opposite directions may pass comfortably at all points along its course. The conveying instrument does not specify the width of the way expressly; it does, however, refer to the "roads as now located." The "back road" as it existed at the time of the grant of easement, was described as a "small road," and wide enough for just one car. The record does not disclose that the predecessors of Cox and Detrick ever sought or attempted to widen the "back road." There is no evidence tending to indicate that either Glenbrook Company or Henry Quill contemplated or intended a wider road than existed when the grant was made. When the width is not specified, the conveying instrument must be construed in the light of the facts and circumstances existing at its date and affecting the property, the intention of the parties being the object of inquiry. [Citations omitted.] Indeed, it is sometimes held, as a matter of law, that where the width of a right-of-way is not specified in the grant, it is limited to the width as it existed at the time of the grant. [Citation omitted.] We need not go that far. We believe that the intention of the parties at the time of the grant, when there is evidence to indicate such intention, controls as to width.[3] [p*909]

As already stated, the only evidence in the record with reference to the "back road" indicates that Henry Quill desired a way wide enough for one car; that such was the character of the "back road" at that time, with occasional "turn outs." We must conclude, therefore, that such was the parties' intention in 1938 when the grant was made. If the *width* of the way is what the lower court had in mind when it restricted the easement to "use of the Glenbrook roads as those roads are presently constructed and maintained" (the record revealing no substantial change from 1938 to time of trial, except for the work of Cox and Detrick before mentioned), then we find ourselves in accord.

6. *Area wherein judgment is silent.* Glenbrook Company erected a fence or barrier across the "golf course road" at or near the point indicated on the sketch. Cox and Derrick desire permission to use that road. They removed the barrier, but it was again erected by Glenbrook Company. The predecessors of Cox and Detrick used the "back road" for ingress and egress; the "golf course road" was, however, used occasionally. The judgment below does not touch on this aspect of the case.

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[2] The factual background related mentions other property owners to whom Glenbrook Company has given similar rights of ingress and egress. To the extent mentioned by the general rule of law, this litigation is of significance to them.

[3] The "full right of use" phrase, previously discussed, does not embrace the problem of width. There can be a "full right to use" a narrow as well as a wide road.

The conveyance gave full right of use over "the roads." Both roads existed at that time. However, the conveyance also permitted relocation of the roads by Glenbrook Company at its own expense.

The evident purpose of the conveyance is to assure ingress to and egress from the dominant parcel, over the servient estate, to U.S. Highway 50. It is admitted by Cox and Detrick that Glenbrook Company could discontinue the use of, or barricade the existing roads, and relocate them without infringing upon the Quill Easement so long as ingress and egress was given to the dominant parcel over the roads as relocated. The action by Glenbrook Company in barricading the "golf course road" is, to a degree, a "relocation" of that portion of the right-of-way, and authorized by the terms of the conveyance. [Citations omitted.] The purpose of the conveyance is not frustrated by such conduct.

7. *Area wherein judgment is premature*. The judgment entered also declared that the *proposed use* of the Quill Easement *would* constitute an illegal burden and surcharge upon the servient estate. This declaration, we believe, deals with the subject with which the parties are most deeply concerned. They earnestly desire a specific declaration of their legal rights arising out of the Quill conveyance in order that their *future* courses of action may be planned. Though this be so, every judgment following a trial upon the merits must be based upon the evidence presented; it cannot be based upon an assumption made *before* the facts are known or have come into existence. The announced intention by the owners of the dominant estate as to their proposed future use of the easement does not, of itself, constitute an unreasonable burden upon the servient estate. When the facts concerning that use become known, an unreasonable burden upon the servient estate may, or may not result. That determination must await the presentation of evidence then in existence. . . .

. . . [F]actual circumstances which may arise in the future cannot be fairly determined now. As to this phase of the case we are asked to make a hypothetical adjudication, where there is presently no justiciable controversy, and where the existence of a controversy is dependent upon the happening of future events. [Citation omitted.] A declaratory judgment should deal with a present, ascertained or ascertainable state of facts. [Citation omitted.] Indeed, Glenbrook Company has stated that its purpose in initiating [p*910] this suit is not to enjoin the proposed subdivision. It is vitally interested, however, in maintaining the atmosphere of peace, seclusion and quiet for which it is widely known. Whether a subdivision, on the one hand, can coexist with the maintenance of such an atmosphere, on the other, cannot now be determined because of the lack of sufficient evidence. Consequently, a judgment cannot now be announced which will supply all of the answers desired by the parties. For example: Suppose we were to assume a completed subdivision, 40 or 60 homes with guesthouses, within 10 years, and declared, at this time, that the use of the Quill Easement by the possessors of the subdivided parcels, would unreasonably burden the servient estate. Such a declaration by us would not determine whether such use by a lesser number would likewise surcharge the servient estate. Nor can we forecast whether the character of Glenbrook will remain the same or change within the next 10 years. There is no feasible method, at this time, by which we can declare *in advance* the point at which the burden upon the servient estate becomes unreasonable. Such court declaration must await the knowledge and presentation of proper evidence. In our judgment the lower court erred in declaring that the *proposed* use of the Quill Easement would constitute an unreasonable burden upon the servient estate, in the absence of existing evidence. It should have done no more than to announce, in general terms, the applicable legal principle within which a subsequent factual determination could be made if occasion therefor arises.

Modified and remanded for judgment in accordance with this opinion.

BADT, C.J., concurring. I concur in the conclusions reached by Mr. Justice Thompson, but fear that some of the expressions used in the opinion might in some future case be taken to limit unduly the power of the court in actions under the Declaratory Judgments Act. While it is

undoubtedly true that "factual circumstances which may arise in the future cannot be fairly determined now," it is likewise true that an expressed purpose and intention to perform acts that will, under satisfactory proof, surcharge the servient tenement with an unreasonable burden is a present threat of invasion of plaintiff's rights and subject to declaratory determination. It need not await the event. [Citations omitted.]

Notes and Questions

1. This case gives you a taste of how courts go about finding limits to the use rights which constitute an easement created by grant. How would you expect the following disputes between easement holder *E* and servient estate owner *O* to be resolved?

(a) The written instrument conveying *E* a right of way describes a particular 20 foot strip across *O*'s land in terms that unambiguously define its location. Years later *O* seeks to erect an office building directly across the strip substituting an equally convenient 20 foot right of way. Has he the right to do so over *E*'s protest? *See, e.g.*, Davis v. Bruk, 411 A.2d 660 (Me.1980); Hollosy v. Gershkowitz, 88 Ohio App. 198, 98 N.E.2d 314 (1950); Sakansky v. Wein, 86 N.H. 337, 169 A. 1 (1933).

(b) The same situation as (a) except that the original instrument does not specifically locate the 20 foot right of way; however, since the grant a particular strip has been used by *E*. *See, e.g.*, Florida Power Corp. v. Hicks, 156 So. 2d 408 (Fla.Dist.Ct.App.1963); Holden v. Pilini, 124 Vt. 166, 200 A.2d 272 (1964).

(c) The same situation as (a) except that *O* plans to leave an opening 20 feet wide in his building and the parties are at odds over how high the opening must [p*911] be. The instrument of grant says nothing on this score. *See* Sakansky v. Wein, 86 N.H. 337, 169 A. 1 (1933).

(d) The instrument conveys a 20 foot right of way without locating it. As soon as *E* indicates the route he plans to use *O* protests that another would cause him much less inconvenience. *See, e.g.*, Arkansas Valley Elec. Coop. v. Brinks, 240 Ark. 381, 400 S.W.2d 278 (1966); *cf.* Smith v. King, 27 Wash.App. 869, 620 P.2d 542 (1980).

(e) At the time *E* is conveyed his right of way, the dominant estate bears *E*'s residence. Some years later *E* converts the house to a restaurant; traffic increases considerably. *O* contends that *E* has exceeded the scope of his easement. *Compare* Beeman v. Pawelek, 96 N.Y.S.2d 204 (Sup.Ct.1949), *aff'd*, 276 A.D. 1057, 96 N.Y.S.2d 312 (1950) *with* Wall v. Rudolf, 198 Cal.App.2d 684, 18 Cal.Rptr 123 (1961).

(f) *E* is granted "the exclusive right to fish and boat" in a lake owned by *O*. *E* proceeds to set up commercial camping areas on property he owns next to the lake allowing his campers to boat, bathe, and fish. *O* demands that this stop. *See* Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 200 A. 646 (1938); *cf.* Alexander Dawson, Inc. v. Fling, 155 Colo. 599, 396 P.2d 599 (1964); Hewitt v. Perry, 309 Mass. 100, 34 N.E.2d 489 (1941).

(g) *E* wishes to pave a portion of *E*'s right of way over *O*'s protest. *See* Davis v. Bruk, 411 A.2d 660 (Me.1980).

(h) *E*, who has the right to cut and remove trees, overhanging branches and other obstructions on its right-of-way, employs a new method of doing this: aerial spraying with herbicides. *O* protests. Kell v. Appalachian Power Co., 289 S.E.2d 450 (W.Va.1982).

(i) *E* acquired a lot on Ferry Lane and with it the right to use the lane for "vehicular and pedestrian traffic." Later, *E* acquired a second parcel adjacent to the Ferry Lane lot and constructed a dormitory on the entire property. The dormitory's service entrance can be reached by garbage trucks and suppliers only by use of Ferry Lane. *O* (or another easement holder) blocks *E*'s access. *See* College Inns of America, Inc. v. Cully, 254 Or. 375, 460 P.2d 360 (1969).

This last situation deals with a special scope of use limit that derives from appurtenance: "[T]he owner of the dominant tenement may not subject the servient tenement to use . . . in connection with other premises to which the easement is not appurtenant." Penn Bowling Recreation Center, Inc. v. Hot Shoppes, 179 F.2d 64, 66 (D.C.Cir.1949). For a suggestion that this rule should be modified, see Kratovil, *Easement Law and Service of Non-Dominant Tenements: Time for a Change*, 24 SANTA CLARA L.REV. 649 (1984).

In any of these cases, would the result likely be altered if the easement arose by reservation rather than by grant?

2. Affirmative easements not only create "scope of use" questions for the holder but also for the owner of the servient estate, for he must avoid uses incompatible with the rights he has conveyed. *See*, *e.g.*, Central Ky. Natural Gas Co. v. Huls, 241 S.W.2d 986 (Ky.1951), permitting the holder of an easement of way for a subsurface gas pipe line an injunction against the servient owner's proposed restaurant directly overhead because it would have interfered with inspection of and repairs to the pipe.

3. There are numerous A.L.R. annotations on easement scope of use and location problems: *see*, *e.g.*, Annot., *Location of Easement of Way Created by* [p*912] *Grant Which Does Not Specify Location*, 24 A.L.R.4th 1053 (1983); Annot., *Right to Maintain Gate or Fence Across Right of Way*, 52 A.L.R.3d 9 (1973); Annot., *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 (1966); Annot., *Extent and Reasonableness of Use of Private Way in Exercise of Easement Granted in General Terms*, 3 A.L.R.3d 1256 (1965); Annot., *Relocation of Easements (Other Than Those Originally Arising by Necessity*), 80 A.L.R.2d 743 (1961). *See also* 3 R. POWELL, REAL PROPERTY ¶ 415 (P. Rohan ed.1979).

Note on Distinguishing Among Different Types of Easements and Other Related Interests

a. Is It an Appurtenant Easement, an Easement in Gross or a Profit?

1. In 1943, Frances C. Perkins conveyed to Raymond D. and Ruth W. Kittinger a piece of land bordering on a small lake. Ms. Perkins retained the ownership of the bed of the lake and other land bordering the lake. She also conveyed to the Kittingers "the right to use the waters of the lake . . . solely and only to the said parties of the second part, and their heirs ["assigns" not being mentioned] . . .." Later, Ms. Perkins sold the remainder of her lakefront property, and ultimately a small development of lakefront houses was built on the lake. In 1964, development on a road near the lake led to drainage problems, which Anne Arundel County sought to correct by purchasing from the Kittingers a easement to construct and maintain a storm sewer through the Kittinger property to a ravine that led into the lake. When this did not solve the drainage problem, the County purchased an additional easement from the Kittingers to put the pipe into the lake. This resulted in a sand bar appearing in the middle of the lake and in a suit by the owners of the lakefront houses. Anne Arundel Cnty. v. Litz, 45 Md.App. 186, 412 A.2d 1256 (Ct. Spec. App.1980).

On the key issue of what kind of interest the Kittingers had in the lake, the lower court, affirmed by the appellate court, held: (1) The Kittingers had no power to convey that interest to anyone other than their heirs; (2) the Kittingers' easement to use the lake was appurtenant to their lakefront property and hence could not be used to benefit property not appurtenant to the lake, and (3) the use of the easement by the County was excessive. [p*913]

2. We have already seen in the *Cox* case, *supra*, p. S410, how appurtenance can be used to define the scope of easements. The *Cox* case also suggests that the court's holding in *Litz* that the county's use of the easement was excessive was well within the bounds of normal doctrine. What is different about the *Litz* case is the fact that the court seems to want to bolster its quite

traditional holdings with an additional one, that the easement was limited to the Kittingers and their family. Behind this holding lies a large amount both of doctrine and controversy, doctrine that is still not completely clear and controversy that is still not fully resolved. In order to clarify the issue, let us assume for a moment that the Kittingers had simply bought from Ms. Perkins a right to use the lake, i.e., that there was no lakefront property to which the easement could be made appurtenant. The Kittingers' interest would then, as we suggested *supra*, p. S402, be "in gross." Would such an arrangement have been valid? If so, could the Kittingers have then conveyed their interest in the lake to Anne Arundel County?

3. The most restrictive view of easements in gross is that which developed in nineteenth-century England, where easements in gross were said not to exist. *See* A. SIMPSON, HISTORY OF THE LAND LAW 263 (2d ed.1986). This does not mean that the arrangement between the Ms. Perkins and the Kittingers hypothesized above would not be enforceable as between them, but as soon as Ms. Perkins sold the land the Kittingers' privilege to use the lake would cease. Few, if any, American courts are so restrictive. Most would go at least as far as to hold that the *burden* of an easement in gross will bind successive holders of the burdened land, even if the benefit is personal. This would mean that the benefit could not be assigned and would normally cease with the death of the holder of the benefit. *See, e.g.*, Shingleton v. State, 260 N.C. 451, 454, 133 S.E.2d 183, 185–86 (1963). The court in *Litz*, then, would seem to achieving by interpretation what the some courts would achieve as a matter of law.

Unfortunately, the problem is not simply whether easements in gross are assignable. Consider the following case:

> The rule in England is that an easement in gross, if it exists at all, may not be assigned. [Citations omitted.] The weight of authority in this country also follows the same rule, although there is authority to the [p*914] contrary, and the nonassignability of easements in gross has been severely criticized by some authors. [Citations omitted.] While the trial court found that the plaintiff had an easement [to hunt on the burdened land], we need not determine whether we will follow the rule that easements in gross are nonassignable, which seems to be an open question in this state, for the reason that we are already committed to the rule that the interest which the plaintiff has, if any, is a profit a prendre in gross, not an easement in gross, strictly speaking. [Citation omitted.]
>
> . . . [Such an interest] may be segregated from the fee of the land and conveyed in gross to one having no interest or ownership in the fee, and, when so conveyed, it is assignable and inheritable. [Citation omitted.]

Fergus Falls Nat'l Bank & Trust Co., 242 Minn. 498, 503, 507, 65 N.W.2d 857, 861, 863 (1954).

If profits in gross are assignable while other easements in gross are not, it becomes important to know a profit when you see one. Could the right to use the lake at issue in *Litz* qualify? *See* Beckwith v. Rossi, 157 Me. 532, 534, 175 A.2d 732, 734 (1961):

> The use of the words "reserving the gravel" . . . created . . . what is technically designated a "profit a prendre." A profit a prendre is the right to take from the land of another a part of the soil, or something which is a product of the soil. Examples of profits a prendre are the right to take soil, gravel, minerals and the like from another's land.

The *First Restatement* includes profits within its treatment of easements, making no distinction between the two:

> Interests of the sort here discussed under the title "Easements" have traditionally been discussed under the separate titles of "Easements" and "Profits." In phrasing the rules applicable to each of these interests it has been found, however, that in no case was there a rule applicable to one of these interests which was not also applicable to the other. This is not

> true with respect to English Law. Under that law the interest designated as an easement can exist only as an appurtenance of a dominant tenement, while a profit may exist independently of such a tenement, or, as it is commonly expressed, in gross. From this essential difference largely came the differentiating designations which we have inherited. This difference does not exist in this country. Here we have "easements in gross" as well as "profits in gross." Since we have both "easements in gross" and "profits in gross" and since the rules with respect to both "easements" and "profits" can be stated in identical terms, it is much more convenient to use a single term to designate both interests rather than to use to the extent of annoying repetition the cumbrous phrase "easements and profits." Accordingly this has been done and the term selected as that most nearly in accord with accustomed usage is the term "easements."

RESTATEMENT OF PROPERTY § 450 special note (1944).

This should give you a clue as to the *First Restatement*'s view on the assignability of easements in gross. It concludes that the American decisions allow assignment (and devise) of those of a "commercial character," and also noncommercial ones where indicated "by the manner or the terms of their creation." RESTATEMENT OF PROPERTY §§ 489, 491 (1944). The last-quoted phrase appears to mean only that the intent that the easement be assignable must be manifest: " . . . [Easements] are, if of a commercial character, assumed to be alienable. If not of a commercial character, . . . alienability becomes a question of construction in each particular case." RESTATEMENT OF PROPERTY § 489 comment b (1944). [p*915]

4. To what extent is the difficulty of limiting the scope of an easement in gross relevant to the question of alienability? (You see, of course, why it is more difficult to limit the scope of an easement in gross than of an appurtenant easement.) One commentator argues that easements in gross should be divided into two groups—those which because of their subject matter and terms permit reasonable limits on scope and those which do not. Only the former should, in his view, be alienable. Comment, *Assignability of Easements in Gross*, 32 YALE L.J. 813 (1923). Another, Professor Simes, argues for complete alienability but with careful control of scope. Simes, *The Assignability of Easements in Gross in America*, 22 MICH.L.REV. 521 (1924). *See generally* 3 R. POWELL, REAL PROPERTY Ê 419 (P. Rohan ed.1991); Clark, *The Assignability of Easements, Profits and Equitable Restrictions*, 38 YALE L.J. 139 (1928); Kloek, *Assignability and Divisibility of Easements in Gross*, 22 CHI.KENT.L.REV. 239 (1944); Welsh, *The Assignability of Easements in Gross*, 12 U.CHI.L.REV. 276 (1945). As Professor Kloek notes: "No question concerning rights in land has produced as many varied and inconsistent opinions, both by courts and by accepted authorities, than the problem of the assignability and divisibility of easements in gross." Kloek, *supra*, at 239.

5. The debate reflected in the previous paragraph seems to have died down. Little recent commentary can be found on the issue. The law, however, remains unsettled. A recent survey concluded that in twelve states easements in gross are not assignable, in four others dictum favors nonassignability, in five states cases clearly sustain assignability, in six others assignability is based on statute, and in nine states the holdings are in conflict. Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP.PROB. & TR.J. 540, 546–47 (1979).

The title of the *Netherton* article gives some indication why the matter has once again become a concern. Encouraged by the federal tax laws, which allow a charitable deduction for gifts of such easements, at least in certain circumstances (I.R.C. § 170(h) (1988)), and discouraged by the difficulty and cost of achieving their purposes by regulation or eminent domain, environmental and historic preservation groups are increasingly seeking to have holders of private interests in buildings and land commit their property to historic or scenic preservation. A common device to achieve this purpose is a scenic or historic preservation easement, the benefit of which is held by

a non-profit group or governmental entity, which does not necessarily own land in the area. Because of the uncertainty of the common law about easements in gross (and about negative easements generally, *see* p. S408 *supra*), statutes in a number of states expressly authorize "building preservation" easements or "land conservation" easements. *See, e.g.*, UNIFORM CONSERVATION EASEMENT ACT; FLA.STAT. § 704.06 (1989); R.I.GEN.LAWS §§ 34–39–1 to -5 (1984 & Supp.1990). *See generally* Comment, *Conservation Easements: Michigan's Land Preservation Tool of the 1990's*, 68 U.DET.L.J. 193 (1991); Comment, *Forever a Farm: The Agricultural Conservation Easement in Pennsylvania*, 94 DICK.L.REV. 527 (1990); Dana & Ramsey, *Conservation Easements and the Common Law*, 8 STAN.ENVTL.L.J. 2 (1989); Comment, *New York's Conservation Easement Statute: The Property Interest and its Real Property and Federal Tax Consequences*, ALB.L.REV. 430 (1985).

6. To return, however, to the problem of the *Litz* case, assuming that easements in gross are possible, the question remains how does one determine whether a given easement is in gross or appurtenant? It is commonly said that the purpose of a grant and surrounding circumstances, not merely its written terms, are relevant in determining whether the resulting easement [p*916] is appurtenant. *See, e.g.*, Kemery v. Mylroie, 8 Wash.App. 344, 506 P.2d 319 (1973); Mitchell v. Castellaw, 151 Tex. 56, 246 S.W.2d 163 (1952). Typically, it is also said that if possible an easement will be construed to be appurtenant. *See, e.g.*, *Kemery v. Mylroie*; Martin v. Music, 254 S.W.2d 701 (Ky.1953); Rusciolelli v. Smith, 195 Pa.Super. 562, 171 A.2d 802 (1961). Such a presumption is certainly desirable if easements in gross cannot be assigned and terminate upon the death of the grantee, regardless of intent. Is it justified in a jurisdiction in which the traditional rigidities have totally or partially disappeared?

7. What physical relationship between easement and benefited estate is required for appurtenance to be possible or construed or presumed, as the case may be? Need the two be immediately adjacent? Close-by? How close? *Compare* Anania v. Serenta, 275 Pa. 474, 119 A. 554 (1923) (right to water from another lot appurtenant to land holding a hotel even though not contiguous) *with* Shia v. Pendergrass, 222 S.C. 342, 72 S.E.2d 699 (1952) (right of way not appurtenant since it did not reach the owner's land). *See generally* 3 R. POWELL, REAL PROPERTY Ê 405, at 34–8 (P. Rohan ed.1991). Can railroad tracks or power lines on an abutting easement qualify as a dominant estate? In other words, is the typical easement of way granted a railroad or public utility appurtenant or in gross? If appurtenant, appurtenant to what? *See* Geffine v. Thompson, 76 Ohio App. 64, 62 N.E.2d 590 (1945). Does it make any difference if assignment of easements in gross is allowed? *See* Tide Water Pipe Co. v. Bell, 280 Pa. 104, 124 A. 351 (1924). Recall the scope of use point, note 4, *supra*.

8. The new *Restatement*, although it restores the distinction between easements and profits,[1] would, apparently, abolish all traces of the doctrine of non-assignability of easements in gross. RESTATEMENT (THIRD) OF PROPERTY § 2.6(b) (Tent.Draft 1989) ("The benefit of a servitude may be held personally, in gross, or as an appurtenance to an estate or other interest in land."):

> Under the rule stated in this section, benefits of affirmative and negative covenants, as well as of easements and profits, can be held in gross. Benefits in gross are useful in a variety of transactions in which burdens running with land are desired, and are permitted whether the servitude is a covenant, an easement or a profit. To the extent that benefits in gross cause

[1] The term profit has been resurrected from the oblivion into which it was consigned by the 1944 Restatement because it describes a device that is used for a purpose quite different from the other servitude devices, and occasionally calls for somewhat different considerations, if not different rules. Profits, for example, are difficult to acquire by prescription in jurisdictions requiring payment of taxes to establish titles by adverse possession, while easements are not.

RESTATEMENT (THIRD) OF PROPERTY introduction at xxvi (Tent.Draft 1989).

> greater problems than appurtenant benefits in locating the persons who are able to negotiate modification or termination of the servitudes, those problems are dealt with by doctrines governing modification and termination of servitudes, rather than by the ancient method of prohibiting their creation. See Chapters 7 and 8 for doctrines governing modification and termination. To the extent that the doctrine prohibiting benefits in gross has served a gatekeeper function in covenant enforcement litigation, it has been replaced by the requirement that the person seeking enforcement demonstrate a legitimate interest in enforcing the servitude. See Chapter 9, Enforcement of Servitudes.

Id. comment *d*. The new *Restatement* has not yet committed itself on the problem of whether there should be a constructional preference for appurtenance. [p*917]

b. Easement or License?

1. In 1950, George McCastle apparently entered into an oral arrangement with the Scanlons to cut wood on their land, for which he paid them $175.00. In the spring of 1951, apparently in consideration of another $75.00, they put the arrangement in writing:

> Dated this day of May 24th, 1951. Agreement by and between Carl Scanlon and wife, parties of the first part, and George McCastle, Jr., party of the second part. Parties of the first part agree to sell all trees suitable for lumber, either standing or lying on the ground, except some designated around buildings, on following description of land containing 35 acres, more or less, according to government survey, for the sum of 1 dollar and other valuable consideration, with permission to cut and haul same from said property for a period of 1 year from date.
>
> Description: East 20 acres of SW 1/4 of the SW 1/4 of section 27, of Township 11 North, Range 15 West; SW 1/4 of SW 1/4 except East 20 acres and except South half of West 10 acres, section 27, of Township 11 North, Range 15 West.

McCastle v. Scanlon, 337 Mich. 122, 126, 59 N.W.2d 114, 117 (1953). McCastle, for $250, authorized one Morse to cut the remaining timber. The Scanlons refused to allow it and also denied McCastle the right to resume cutting. The Michigan Supreme Court held that they were entitled to do so since McCastle had only a license to cut timber. Being a license, his interest was personal and revocable.

The court in *McCastle* seemed to think that the only possible interpretations of the instrument in question were license or conveyance of the timber. In the subsequent Michigan case involving a "bargain and sale" of sand and gravel, the court held that a profit had been granted. *McCastle* was distinguished as follows:

> Controlling factors [in *McCastle*] were stated to be the absence of language in the agreement ordinarily used in conveyances of real estate and the lack of formalities normally observed in such transactions. The sales agreement in the present case did not contain the type of granting clause found in a [p*918] deed and did not use terms such as "easement", "lease", or "*profit a prendre*". However, various provisions in the agreement support the lower court's determination that a conveyance of a property interest was intended. The agreement included a legal description of the property. Paragraph 2 . . . indicated a present sale of all sand, stone and gravel on the premises, utilizing the phrase "bargain and sale". This language does not support plaintiffs' argument that the actual transfer of ownership in the material was to take place after it had been removed and weighed. . . .

Evans v. Holloway Sand & Gravel, Inc., 106 Mich.App. 70, 80, 308 N.W.2d 440, 443–44 (1981). Is this a good distinction?

2. *McCastle* serves to introduce us to yet another category of land-use interests—licenses. A license may be described as an "easement at will." As Powell explains:

> It is . . . possible to differentiate between licenses as "revocable relationships" and easements as "irrevocable relationships." A substantial amount of rhetoric in the law is traceable to the use of such terms as "licenses coupled with an interest," "irrevocable licenses," "executed licenses" and similar expressions, often when a court is seeking a legal category to attach a desired result to. That which is important is the *existing* relationship between the parties. That relationship may have *begun* with a revocable permission, but if that permission has been followed by events which have eliminated its revocability, it seems clear that the *existing* irrevocable relationship should no longer be called a license, but rather an easement, as it truly is.

Id. ¶ 427, at 34–303 to 34–304.

By this analysis an interest that begins as a license but becomes irrevocable because of estoppel or part performance should be termed an easement rather than a license. *See Cooke v. Ramponi*, *infra*, p. S424.

The following events normally terminate a license (a revocable one, that is):

(a) express notice of revocation

(b) conduct by the licensor inconsistent with the license's continued existence

(c) the licensor's death

(d) his conveyance of the servient estate

(e) an attempt by the licensee to assign his interest.

See 3 R. POWELL, REAL PROPERTY ¶ 428, at 34–310 to 34–314 (P. Rohan ed.1991).

3. A license can be created despite the parties' intent to establish an easement. This occurs when the easement is defeated for failure to comply with some formal requirement, a seal or writing, for example. *See* RESTATEMENT OF PROPERTY §§ 514, 515 (1944). In most cases, though, it is the parties' intent which is said to determine whether the interest created is an easement or license, or, for that matter, an estate.

4. What factors led the court to conclude in *Evans*, *supra*, that more than a license was intended? What factors led the court in *McCastle*, *supra*, to conclude that only a license was intended? [p*921]

c. Easement or License or Lease?

1. In 1979, plaintiff entered into a written agreement with defendants' predecessor in title, giving plaintiff a sole and exclusive right to install and maintain laundry machines in the apartment complex presently owned by defendants. The contract was for a period of 10 years and purported to be binding "on the heirs, successors and assigns of the parties and the rights hereunder shall not be disturbed or affected by foreclosure, acquisition, merger or any change of ownership." In 1980, in lieu of foreclosure, defendants predecessor in title transferred the property by deed to Marine Midland Bank. In February, 1981, the bank conveyed the property to defendants. During negotiations for the purchase of the property, defendants inquired about the laundry machines on the property and were advised by Marine Midland Bank that there was no existing agreement concerning any laundry machines located on the subject premises. In response to several written requests from defendants to remove the machines, plaintiff commenced this action seeking a permanent injunction preventing the removal of the machines during the term of its contract with Monarch Associates and, by order to show cause, moved for a preliminary injunction. Defendants appealed from the trial court's granting of the motion. Over a vigorous dissent, the Appellate Division reversed, holding: (1) that there was no contractual relationship between the plaintiff and the defendants, and (2) that the agreement between the defendant's predecessor in title and the plaintiff created a license that was automatically revoked when the

title to the property was transferred. The court briefly considered, and rejected, the contention that the agreement be construed either as an easement or a lease, arguing that the absence of a precise description of the property in the agreement precluded either interpretation. In affirming the Appellate Division's holding the Court of Appeals added that the complaint was also deficient in that it failed to allege (because it was not the case) that the agreement had been recorded. Todd v. Krolick, 96 A.D.2d 695, 466 N.Y.S.2d 788 (1983) *aff'd mem.*, 62 N.Y.2d 836, 466 N.E.2d 149, 477 N.Y.S.2d 609 (1984).

2. Professor Powell reports:

> It is common practice to draw a line between the "licensee" and the "tenant for years" in terms of the absence or presence of a right of exclusive possession of a defined physical area. . . . [This] antithesis of "licenses" and "leases" [unfortunately] tends to cause a court to feel bound to label the transaction before it one or the other of the two, rather than realize it has three choices, namely, lease, license or easement. [p*922]

3 R. POWELL, REAL PROPERTY ¶ 430 (P. Rohan ed.1991). As the dissent in *Todd* points out, Bermann v. Windale Props., 4 A.D.2d 746, 164 N.Y.S.2d 817 (1957), is such a case, although the washing machine supplier in that case ultimately prevailed on the ground that the new owner had ratified the agreement with the prior owner (*id*., 10 Misc.2d 388, 169 N.Y.S.2d 975 (1957)), a route that was closed to the plaintiff in the principal case because, as a court points out in another section of its opinion, he failed to plead it in time. 96 A.D.2d at 696, 466 N.Y.S.2d at 790. Reliable Washer Serv. v. Delmar Assocs., 49 Misc.2d 348, 267 N.Y.S.2d 419 (Long Beach City Ct.1966), is a classic illustration of Powell's thesis, and it contains a good discussion of the New York authorities, all of which seem to hold that washing-machine agreements are licenses not leases, without considering the possiblity that they might be easements in gross. Is *Todd* case simply another illustration of this point?

3. In Baseball Publishing Co. v. Bruton, 302 Mass. 54, 18 N.E.2d 362 (1938), the court was confronted with an agreement denominated a "lease" which granted the right to maintain an advertising sign. This is how the court analyzed the resulting interest:

> A lease of a roof or a wall for advertising purposes is possible. . . . The writing in question, however, giving the plaintiff the "exclusive right and privilege to maintain advertising sign . . . on wall of building," but leaving the wall in the possession of the owner with the right to use it for all purposes not forbidden by the contract and with all the responsibilities of ownership and control, is not a lease . . .. The fact that in one corner of the writing are found the words, "Lease No.—," does not convert it into a lease. Those words are merely a misdescription of the writing. . . .
>
> If what the plaintiff bargained for and received was a license, and nothing more, then specific performance that might compel the defendant to renew the license, leaving it revocable at will, would be futile and for that reason should not be granted. . . .
>
> The writing in the present case, however, seems to us to go beyond a mere license. It purports to give "the exclusive right and privilege to maintain" a certain sign on the defendant's wall. So far as the law permits, it should be construed as to vest in the plaintiff the right which it purports to give . . .. That right is in the nature of an easement in gross, which, whatever may be the law elsewhere, is recognized in Massachusetts . . ..

Id. at 55–57, 18 N.E.2d at 363–64. *See* Whitmier & Ferris Co. v. State, 12 A.D.2d 165, 209 N.Y.S.2d 247 (1961), in which the court distinguishes between ground leases (true leases granting the right to maintain a sign upon a described plot) and a wall lease. ("While doubts have arisen as to whether the grant or 'lease' of the exclusive right to place signs on a wall or fence is a license or easement we conclude that it is now established in this jurisdiction that an easement in gross is thereby created.") *But see* Truly Nolen, Inc. v. Atlas Moving & Storage Warehouses,

Inc., 125 So.2d 903 (Fla.Dist.Ct.App.1961) (agreement for sign on wall held void because of indefiniteness).

Whitmier is illustrative of another line of New York authority, of which the prime example is Borough Bill Posting Co. v. Levy, 144 App.Div. 784, 129 N.Y.S. 740 (1911), cited and relied on by the dissenting judge in the principal case. This line of authority has recently been reaffirmed in *In re* XAR Corp. v. Di Donato, 76 A.D.2d 972, 429 N.Y.S.2d 59 (1980). In *XAR Corp.*, the court had this to say about the recording act issue that the Court of Appeals raises in its opinion in the principal case:

> The recording statutes protect only a subsequent purchaser in good faith and for a valid consideration. Actual "knowledge and notice of any facts which would put a prudent man upon inquiry, impeaches the good faith of [p*923] the subsequent purchaser". [Citation omitted.] Here, petitioner admits that it had knowledge of the existence of the sign, and made no inquiry of respondents concerning their rights or interests.

Id. at 973, 429 N.Y.S.2d at 60. Is there some reason why the presence of an advertising sign should put a purchaser on inquiry notice but the presence of someone else's washing machines should not? If the real concern in these cases is notice to the subsequent purchaser of the land, should that not be the focus of the court's inquiry rather than whether the appropriate label to apply to the agreement is "lease," "license," or "easement." Certainly the labeling process can lead courts to miss the notice point. In *Reliable Washer*, *supra*, note 2, the defendant subsequent purchaser of the land, Delmar Associates, had acquired its interest from Ramled Holding, Inc. "Ramled" is "Delmar" spelled backwards.

4. Where the agreement's terms tend to indicate the parties had in mind an interest both personal and revocable, this can be taken as evidence of intent to create a license. Where nothing of this sort appears, how is intent to be found? Is the subject matter of the agreement pertinent? *See Whitmier & Ferris Co. v. State*, *supra*, note 3. *See also* Drye v. Eagle Rock, 364 S.W.2d 196, 205 (Tex.1962), discussed in DKM3, p. 934. Finally, consider Justice Holmes addressing the question: Does a ticket of admission create in the holder an easement or license?

> The fact that the purchase of the ticket made a contract is not enough. A contract binds the person of the maker, but does not create an interest in the property that it may concern, unless it also operates as a conveyance. The ticket was not a conveyance of an interest in the race track, not only because it was not under seal but because by common understanding it did not purport to have that effect. There would be obvious inconveniences if it were construed otherwise. But if it did not create such an interest, that is to say, a right *in rem* valid against the landowner and third persons, the holder had no right to enforce specific performance by self-help. His only right was to sue upon the contract for the breach.

Marrone v. Washington Jockey Club, 227 U.S. 633, 636 (1913). *Cf*. Mosher v. Cook United, Inc., 62 Ohio St.2d 316, 405 N.E.2d 720 (1980). *See generally* 3 R. POWELL, REAL PROPERTY Ê 428, at 34–305 to 34–323 (P. Rohan ed.1991); Conard, *The Privilege of Forcibly Ejecting an Amusement Patron*, 90 U.PA.L.REV. 809 (1942).

5. The dissent in *Todd* also raised the possibility that the agreement might be sustained (and held to bind the defendants) as a covenant running with the land. *See infra*, § 3B.

2. Easements Arising By Other Means

COOKE v. RAMPONI

Supreme Court of California
38 Cal.2d 282, 239 P.2d 638 (1952)

SPENCE, J. Defendants appeal from a judgment decreeing plaintiffs' ownership of an easement over defendants' land and enjoining defendants from interfering in any manner with plaintiffs'