Chapter 1

Easements

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

1.1 Terminology

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

As noted above, a common affirmative easement is an **easement of access** (also known as an **easement of way**), which requires the owner of the servient estate to allow the easement holder to travel on the land to reach another location. In the example above, Anna has an affirmative easement to cross Whiteacre, the servient es-

tate, to access Blackacre.[1] A **negative easement** prohibits the owner of the servient estate from engaging in some action on the land. For example, if Anna has a solar panel on her property, she might acquire a solar easement from Brad that would prohibit the construction of any structures on Whiteacre that might block the sun from Anna's panel on Blackacre.

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

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

Easements are part of the larger law of **servitudes**, which include real covenants and equitable servitudes. A servitude is a legal device that creates a right or obligation that **runs with the land**. A right runs with the land when it is enjoyed not only by its initial owner but also by all successors to that owner's benefited property interest. A burden runs with the land when it binds not only its initial obligor but also all successors to that obligor's burdened property interest. A servitude can be, among other things, an easement, profit, or covenant. These interests overlap, and the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) (2000) seeks to unify them.[2] As

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

[2] A covenant is a servitude if either its benefit or its burden runs with the land; otherwise it is merely a contract enforceable only as between the original contracting parties (or perhaps a gratuitous promise enforceable by nobody at all). When a covenant is a servitude, it may equivalently be described as either a "servitude" or "a covenant running with the land."

a matter of history, however, easement law developed as a distinct set of doctrines, and this chapter gives them separate treatment.[3]

Notes and Questions

1.1. Characterize the following easements using the terms above. Is it affirmative or negative? Appurtenant or in gross? An easement of access, a profit, or something else? What is the dominant estate and the servient estate? Who has the benefit, and who has the burden?

1. Anna owns Blackacre. Brad has the right to walk across Blackacre to reach his own property, Whiteacre.
2. Anna owns Blackacre, which has several blackberry bushes. Connie, a chef, has the right to come onto Blackacre and harvest blackberries.
3. Anna owns Blackacre, which is at the bottom of a hill. Durant owns Whiteacre, at the top of the hill, with a house on the hill. There is a retaining wall on Blackacre, preventing the soil from the hill from falling down (and bringing Durant's house down with it). A court prohibits Anna from tearing down the retaining wall. (This is called an **easement of support**.)

To be sure, there are a lot of terms here, and it is not necessary to fully memorize them all. But the exercise of categorizing easements and the relevant parties will help you keep track of the relevant rights and duties, especially when ownership starts changing hands.

1.2. The terminology suggests a sharp distinction between affirmative easements, that give the benefit holder a right to do something, and negative easements, which impose a duty on the burdened estate not to do something. Is the distinction really so sharp? In the examples above, doesn't Anna have a duty not to build a fence to keep Brad out? Doesn't Durant have a right to keep the retaining wall in place?

1.3. The notion of easements appurtenant "running with the land" should tell you what happens when a dominant estate holder conveys land. If Brad sells

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

Whiteacre to Ennis, then Ennis can of course use the easement to walk over Anna's Blackacre. Similarly, the general rule is that the benefit holder may transfer an easement in gross, absent contrary intent at the time the easement was created. The burden of an easement obviously transfers with any conveyance the servient estate. (Why?)

Things can get much more complicated, though, if the benefit holder seeks to aggregate or divide up rights. The original *Open Source Property* module on Easements offers much more detail, but test your intuitions on a few possibilities (still using the hypotheticals from above):

- What if Brad also buys Greenacre, and starts using the easement to reach both Whiteacre and Greenacre? *See Brown v. Voss*, 715 P.2d 514 (Wash. 1986).
- What if Brad builds a 100-unit condominium on Whiteacre? Should all the unit owners get to use the easement?
- What if Connie hires three assistants to help her harvest blackberries? What if Connie's restaurant is bought out by a multinational food chain that now intends to send out heavy harvesting machinery to Blackacre?

1.4. *United States v. Turoff*, 701 F. Supp. 981 (E.D.N.Y. 1988), considers the nature of government-issued taxicab medallions that authorize the bearer to operate a taxi service:

> The government also contends that the medallion is, in essence, the equivalent of an easement to use the city streets. At the risk of dwelling too long on the esoterica of property, the medallions could not properly be equated with easements. An easement is generally appurtenant, which is to say that it is a right which the owner of one parcel of land (the dominant tenement) may exercise in or over the land of another (the servient tenement) for the benefit of the former. An easement in gross is a right created in a person to use the land of another, which the owner of that easement may enjoy even though he does not own or possess a dominant estate. Although the concept of an easement in gross has been recognized, such an easement is rare.

You should now be equipped to follow and evaluate the logic of this argument.

1.5. In the United States, most of the work that could have been done by negative easements is largely performed by real covenants or equitable servitudes. *See* RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.2 ("A 'negative' easement, the

obligation not to use land in one's possession in specified ways, has become indistinguishable from a restrictive covenant, and is treated as such in this Restatement."). Nineteenth century English law gave negative easements a narrow domain. They were available only to prevent the servient estate from restricting light, air, support, or the flow of water of an artificial stream to the dominant estate. *Id.* § 1.2 cmt. h. Such easements were likewise not widely embraced in the United States, where equitably enforced negative covenants held in gross were disfavored.

For the most part, negative easements only arise by agreement or grant. U.S. courts therefore consistently reject the English "doctrine of ancient lights," which recognizes a right to light from a neighbor's land after the passage of time under certain circumstances. 4-34 Powell on Real Property § 34.11.

The limitations of negative easements complicated efforts to create conservation and preservation easements. Such easements tend to be held in gross (e.g., by a conservation organization), and the common law prohibited equitable enforcement of negative covenants held in gross. The law likewise was skeptical about expanding the categories for which negative easements were available. Restatement (Third) of Property (Servitudes) § 1.6 cmt. a (2000). The problem was addressed by the Uniform Conservation Easement Act, which has now been adopted by every state. 4-34A Powell on Real Property § 34A.01.

1.2 Formation

Typically, an easement is created expressly through a conveyance from the landowner to the benefit recipient. Easements can also arise by operation of law. An implied easement is one that arises because of the geography and usage of the parcels of land. There are two types: the easement implied by existing use, and the easement by necessity. Additionally, an easement by prescription can arise after a long period of acquiescence, akin to adverse possession.

Each of these three forms of non-express easements has specific (and often jurisdiction-dependent) rules governing whether it exists. Pay close attention to what the conditions of formation are, and ask yourself whether the rules are justified and properly tailored.

1.2.1 Express Easements

Because easements are interests in land, express easements are subject to the Statute of Frauds. Failures to comply with the statute may still be enforced in cases

of reasonable detrimental reliance. *See, e.g.*, RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.9.

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

The modern trend discards this restriction. *See, e.g.*, *Minton v. Long*, 19 S.W.3d 231, 238 (Tenn. Ct. App. 1999); *Willard v. First Church of Christ, Scientist*, 7 Cal. 3d 473, 476-77 (1972) (describing the traditional reservation rule as "clearly an inapposite feudal shackle today"). The modern RESTATEMENT likewise dispenses with the traditional approach, allowing the direct creation of easements on behalf of third parties. RESTATEMENT § 2.6. Some jurisdictions nonetheless retain the bar, citing reliance interests and the prospect that such easements create instability in title records. *Estate of Thomson v. Wade*, 509 N.E.2d 309, 310 (N.Y. 1987).

There is an argument that the extra transactions required by the traditional rule promote better title indexing. The RESTATEMENT observes:

> To avoid the prohibition, two conveyances must be used: the first conveys the easement to the intended beneficiary; the second conveys the servient estate to the intended transferee. The only virtue of the rule is that it tends to ensure that a recorded easement will be properly indexed in the land-records system, but there are so many exceptions to the rule, where it is still in force, that it does not fill that function very well.

RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.6 cmt. a (2000). Are you persuaded that the benefits of a separate transaction for recording purposes outweigh the costs?

1.2.2 Easements Implied by Existing Use

An **easement implied by existing use** may arise when a parcel of land is divided and amenities once enjoyed by the whole parcel are now split up, such that in order to enjoy the amenity (a utility line, or a driveway, for example), one of the divided lots requires access to the other. Imagine, for example, a home connected

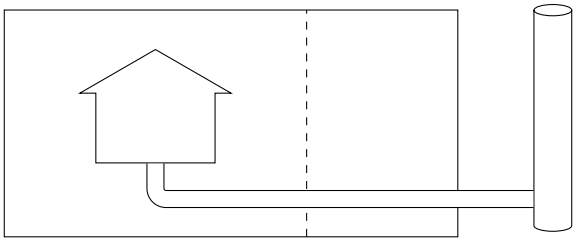

Figure 1.1: A divided parcel of land with a sewer line running through both lots.

to a city sewer line via a privately owned drainpipe, on a parcel that is later divided by carving out a portion of the lot between the original house and the sewer line connection, as shown in Figure 1.1.

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

> [T]he easement implied from a preexisting use, [is] also characterized as a quasi-easement. Such an easement arises where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part. The servitude must be in use at the time of severance and necessary for the reasonable enjoyment of the severed part. A grant of a right to continue such use arises by implication of law. An implied easement from a preexisting use is established by proof of three elements: (1) common ownership of the claimed dominant and servient parcels and a subsequent conveyance or transfer separating that ownership; (2) before severance, the common owner used part of the united parcel for the benefit of another part, and this use was apparent and obvious, continuous, and permanent; and (3) the claimed easement is necessary and beneficial to the enjoyment of the parcel conveyed or retained by the grantor or transferrer.

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

Notes and Questions

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

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

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

1.7. **Reasonable necessity**. Reasonable necessity is something less than absolute necessity. *See, e.g.*, *Rinderer v. Keeven*, 412 N.E.2d 1015, 1026 (Ill. App. 1980)

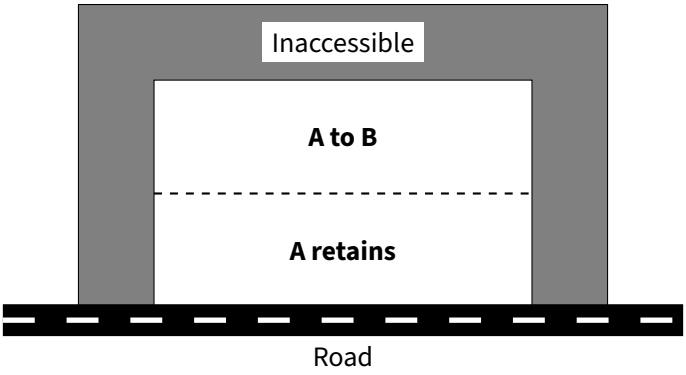

Figure 1.2: A "landlocked" parcel of land.

("It is well established that one who claims an easement by implication need not show absolute necessity in order to prevail; it is sufficient that such an easement be reasonable, highly convenient and beneficial to the dominant estate." (internal quotation and citation omitted)). Does this leave courts with too much discretion to impose easements? A minority of jurisdictions make a formal distinction between implied easements in favor of grantees and grantors, requiring strict necessity in the case of the latter. RESTATEMENT § 2.12. *But see Tortoise Island Communities, Inc. v. Moorings Ass'n, Inc.*, 489 So. 2d 22, 22 (Fla. 1986) (concluding that an absolute necessity is required in all cases).

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

1.2.3 Easements by Necessity

An **easement by necessity** (or sometimes **way by necessity**) arises when land becomes landlocked or incapable of reasonable use absent an easement. For example, if A owns a rectangular parcel bordered on the north, east, and west by pri-

vately owned land and on the south by a public street, and conveys to B a strip of her land on the northern boundary, B will acquire an easement by necessity across the southern portion of the parcel retained by A, as shown in Figure 1.2.

Thomas v. Primus

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

MIHALAKOS, J.

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

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

Both the plaintiffs' and the defendant's properties originally were part of a single lot owned by Martha Thomas, the grandmother of the plaintiffs. In 1959, Martha Thomas conveyed the one and one-quarter acres of landlocked property, currently owned by the defendant, to Arthur Primus, the defendant's brother. At the conveyance, which the defendant attended, Martha Thomas and Arthur Primus agreed that access to the landlocked property would be through the passway, which until that time had been used by Martha Thomas to access the eastern portions of her property. In 1969, the defendant took possession of the land. In 2002, the plaintiffs took possession of the western portion of Martha Thomas' property, including the passway.

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

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

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

I

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

Originating in the common law, easements by necessity are premised on the conception that "the law will not presume, that it was the intention of the parties, that one should convey land to the other, in such manner that the grantee could derive no benefit from the conveyance . . . ." *Collins v. Prentice*, 15 Conn. 39, 44 (1842). An easement by necessity is "imposed where a conveyance by the grantor leaves the grantee with a parcel inaccessible save over the lands of the grantor . . . ." *Hollywyle Assn., Inc. v. Hollister*, 164 Conn. 389, 398, 324 A.2d 247 (1973). The party seeking an easement by necessity has the burden of showing that the easement is reasonably necessary for the use and enjoyment of the party's property.

A

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

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

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

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

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

[2]The plaintiffs' sole authority in support of their position; *Griffeth v. Eid*, 573 N.W.2d 829 (N.D. 1998); is distinguishable from the case before us. In that case, the North Dakota Supreme Court upheld a trial court's ruling that a party seeking an easement by necessity had not met his burden of establishing reasonable necessity because potential alternate access existed, including the possibility of purchasing an easement over another abutting property, and the party had not provided evidence that he had pursued these options and found them unavailing. In this case, there is no evidence in the record that the defendant had the opportunity to purchase alternate access.

of the passway is currently necessary for the use and enjoyment of the defendant's property. . . .

C

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

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

In this case, the court found that the defendant's property was landlocked and that access over the pass-way was reasonably necessary for the use and enjoyment of the defendant's property. Therefore, the court found an easement by necessity to exist over the pass-way. This conclusion was supported by the record and there is no legal deficiency in the court's analysis. . . .

Notes and Questions

1.9. As *Thomas* indicates, there are two traditional rationales for easements by necessity. The first considers it an implied term of a conveyance, assuming that the parties would not intend for land to be conveyed without a means for access. The second simply treats the issue as one of public policy favoring land use. *See* Restatement (Third) of Property (Servitudes) § 2.15 cmt. a (2000).

1.10. *Thomas*'s implication to the contrary aside, the traditional view is that the necessity giving rise to an easement by necessity must exist at the time the property is severed. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.15 (2000) ("Servitudes by necessity arise only on severance of rights held in a unity of ownership."); *Roy v. Euro-Holland Vastgoed, B.V.*, 404 So. 2d 410, 412 (Fla. Dist. Ct. App. 1981) ("[I]n order for the owner of a dominant tenement to be entitled to a way of necessity over the servient tenement both properties must at one time have been owned by the same party . . . . In addition, the common source of title must have created the situation causing the dominant tenement to become landlocked. A further requirement is that at the time the common source of title created the problem the servient tenement must have had access to a public road.").

1.11. Easements by necessity are typically about access, but other kinds of uses may be necessary to the reasonable enjoyment of property. For example, suppose O conveys mineral rights to Blackacre to A. A would have both an easement of access to Blackacre and the right to engage in the mining necessary to reach the minerals. Likewise, an express easement of way may require rights to maintain and improve the easement. Access for utilities may also give rise to an easement by necessity, creating litigation over which utilities are "necessary":

> When questioned by defendants as to why he could not use a cellular phone on his property, plaintiff testified he ran a home business and a cellular phone was not adequate to handle his business needs; for example, a computer cannot access the Internet over a cellular phone. Plaintiff also testified solar power and gas generators were unable to produce enough electricity to make his home habitable.

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

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

allowing easements despite access by water, reflecting a recognition that most people today think in terms of 'driving' rather than 'rowing' to work or home.").

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

1.2.4 Prescriptive Easements

Easements may also arise from prescription. An **easement by prescription** is acquired in a manner similar to adverse possession, as it is a non-permissive use that ultimately ripens into a property interest. Recall the five elements of adverse possession: Entry and possession that is (1) actual, (2) exclusive, (3) hostile or under claim of right, (4) open and notorious, and (5) continuous for the statutory limitations period. Which (if any) of these elements might have to be modified where the right being acquired is not a right of possession, but a right of use?

Felgenhauer v. Soni

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

Gilbert, P.J.

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

Facts

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

bank. The parking lot is between a public alley and the back of the Felgenhauers' restaurant.

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

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

James Enloe testified he did not believe he had the right to use the bank's property and never claimed the right. Enloe said that during his tenancy, he saw the bank manager in the parking lot. The manager told him the bank planned to construct a fence to define the boundary between the bank's property and the Felgenhauers' property. Enloe asked the manager to put in a gate so that he could continue to receive deliveries and have access to a trash dumpster. The manager agreed. Enloe "guess[ed]" the fence and gate were constructed about three years into his term. He said, "[Three years] could be right, but it's a guess." In argument to the jury, the Sonis' counsel said the fence and gate were constructed in January of 1988.

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

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

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

Discussion

I

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

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

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

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

The Sonis attempt to make much of the fence the bank constructed between the properties and Enloe's request to put in a gate. But Enloe was uncertain when the fence and gate were constructed. The Sonis' attorney

argued it was constructed in January of 1988. The jury could reasonably conclude that by then the prescriptive easement had been established.

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

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

Notes and Questions

1.13. **Fiction of the lost grant.** *Felgenhauer* refers to the fiction of the lost grant. The principle traces back to English law. 4-34 POWELL ON REAL PROPERTY § 34.10 ("In early England the enjoyment had to have been 'from time immemorial,' and this date came to be fixed by statute as the year 1189. Towards the close of the medieval period, this theory was rephrased and an easement of this type was said to arise from a grant, presumably made in favor of the claimant before the time of legal memory, but since lost."). The usual American approach is to ignore the fiction and simply apply rules of prescription that largely track those of adverse possession. *See id.*

1.14. How do the elements of a prescriptive easement differ from the elements of adverse possession? Why do you think they differ in this way? How do the resulting interests differ?

1.15. **Easements acquired by the public.** What happens if city pedestrians routinely cut across a private parking lot? May an easement by prescription be claimed by the public at large? Does it matter that the right asserted is not in the hands of any

Figure 1.3: Image by the Greater Southwestern Exploration Company, available under a Creative Commons Attribution 2.0 Generic license, *link*.

one person? Here, too, the fiction of the lost grant may play a role in the willingness of courts to entertain the possibility.

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

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

What then should the owner of a publicly accessible location do? The owners of Rockefeller Center reportedly block off its streets one day per year in order to prevent the loss of any rights to exclude. David W. Dunlap, *Closing for a Spell, Just to Prove It's Ours*, N.Y. TIMES (Oct. 28, 2011), *link* ("But there is another significant hybrid: purely private space to which the public is customarily welcome, at the owners' implicit discretion. These spaces include Lever House, Rockefeller Plaza and College Walk at Columbia University, which close for part of one day every year."). Another option is to post a sign granting permission to enter (thus negating any element of adversity). Some states approve this approach by statute. CAL. CIV. CODE § 1008 ("No use by any person or persons, no matter how long continued, of any land, shall ever ripen into an easement by prescription, if the owner of such property posts at each entrance to the property or at intervals of not more than 200 feet along the boundary a sign reading substantially as follows: 'Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code.' ").

1.3 Rights and Duties

M.P.M. Builders, LLC v. Dwyer

809 N.E.2d 1053 (Mass. 2004)

COWIN, J.

We are asked to decide whether the owner of a servient estate may change the location of an easement without the consent of the easement holder. We conclude that, subject to certain limitations, described below, the servient estate owner may do so.

1. *Facts.* The essential facts are not in dispute. The defendant, Leslie Dwyer, owns a parcel of land in Raynham abutting property owned by the plaintiff, M.P.M. Builders, L.L.C. (M.P.M.). Dwyer purchased his parcel in 1941, and, in the deed, he was also conveyed an easement, a "right of way along the cartway to Pine Street," across M.P.M.'s land. The cartway branches so that it provides Dwyer access to his property at three separate points. The deed describes the location of the easement and contains no language concerning its relocation.

In July, 2002, M.P.M. received municipal approval for a plan to subdivide and develop its property into seven house lots. Because Dwyer's easement cuts across and interferes with construction on three of M.P.M.'s planned lots, M.P.M. offered to construct two new access easements to

Dwyer's property. The proposed easements would continue to provide unrestricted access from the public street (Pine Street) to Dwyer's parcel in the same general areas as the existing cartway. The relocation of the easement would allow unimpeded construction by M.P.M. on its three house lots. M.P.M. has agreed to clear and construct the new access ways, at its own expense, so "that they are as convenient [for the defendant] as the existing cartway[ ]." Dwyer objected to the proposed easement relocation, "preferring to maintain [his] right of way in the same place that it has been and has been used by [him] for the past 62 years." . . .

3. *Discussion.* . . .

The parties disagree whether our common law permits the servient estate owner to relocate an easement without the easement holder's consent. Dwyer, citing language in our cases, contends that, once the location of an easement has been defined, it cannot be changed except by agreement of the parties. . . . M.P.M. claims that our common law permits the servient estate owner to relocate an easement as long as such relocation would not materially increase the cost of, or inconvenience to, the easement holder's use of the easement for its intended purpose. M.P.M. urges us to clarify the law by expressly adopting the modern rule proposed by the American Law Institute in the Restatement (Third) of Property (Servitudes) § 4.8(3) (2000).

This section provides that:

> Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created.

Section 4.8(3) is a default rule, to apply only in the absence of an express prohibition against relocation in the instrument creating the easement and only to changes made by the servient, not the dominant, estate owner.[1] It "is designed to permit development of the servient estate to the extent it

[1]We previously have concluded that the dominant estate owner, that is, the easement holder, may not unilaterally relocate an easement. According to the Restatement, many

can be accomplished without unduly interfering with the legitimate interests of the easement holder." *Id.* at comment f, at 563. Section 4.8(3) maximizes the over-all property utility by increasing the value of the servient estate without diminishing the value of the dominant estate; minimizes the cost associated with an easement by reducing the risk that the easement will prevent future beneficial development of the servient estate; and encourages the use of easements. Regardless of what heretofore has been the common law, we conclude that § 4.8(3) of the Restatement is a sensible development in the law and now adopt it as the law of the Commonwealth.

We are persuaded that § 4.8(3) strikes an appropriate balance between the interests of the respective estate owners by permitting the servient owner to develop his land without unreasonably interfering with the easement holder's rights. The rule permits the servient owner to relocate the easement subject to the stated limitations as a "fair tradeoff for the vulnerability of the servient estate to increased use of the easement to accommodate changes in technology and development of the dominant estate." Restatement (Third) of Property (Servitudes), *supra* at comment f, at 563. Therefore, under § 4.8(3), the owner of the servient estate is "able to make the fullest use of his or her property allowed by law, subject only to the requirement that he or she not damage other vested rights holders." *Roaring Fork Club, L.P. v. St. Jude's Co.*, [36 P.3d 1229,] 1237 [(Colo. 2001)].

It is a long-established rule in the Commonwealth that the owner of real estate may make any and all beneficial uses of his property consistent with the easement. . . . We conclude that § 4.8(3) is consistent with these principles in its protection of the interests of the easement holder: a change may not significantly lessen the utility of the easement, increase the burden on the use and enjoyment by the owner of the easement, or frustrate the purpose for which the easement was created. The servient owner must bear the entire expense of the changes in the easement.

Dwyer urges us to reject the Restatement approach. He argues that adoption of § 4.8(3) will devalue easements, create uncertainty in property interests, and lead to an increase in litigation over property rights. Our adoption of § 4.8(3) will neither devalue easements nor place property

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jurisdictions have erroneously expanded that sensible restriction into one that prevents the owner of the servient estate from relocating the easement without the consent of the easement holder. Restatement (Third) of Property (Servitudes) § 4.8(3) comment f, at 563 (2000).

interests in an uncertain status. An easement is by definition a limited, nonpossessory interest in realty. . . . An easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose.

The limitations embodied in § 4.8(3) ensure a relocated easement will continue to serve the purpose for which it was created. So long as the easement continues to serve its intended purpose, reasonably altering the location of the easement does not destroy the value of it. For the same reason, a relocated easement is not any less certain as a property interest. The only uncertainty generated by § 4.8(3) is in the easement's location. A rule that permits the easement holder to prevent any reasonable changes in the location of an easement would render an access easement virtually a possessory interest rather than what it is, merely a right of way. Finally, parties retain the freedom to contract for greater certainty as to the easement's location by incorporating consent requirements into their agreement.

. . . The deed creating Dwyer's easement does not expressly prohibit relocation. Therefore, M.P.M. may relocate the easement at its own expense if the proposed change in location does not significantly lessen the utility of the easement, increase the burdens on Dwyer's use and enjoyment of the easement, or frustrate the purpose for which the easement was created. M.P.M. shall pay for all the costs of relocating the easement.

Because we cannot determine from the present record whether the proposed relocation of the easement meets the aforementioned criteria, we vacate the judgment and remand the case to the Land Court for further proceedings consistent with this opinion.

Notes and Questions

1.16. The ability to adapt long-term easements to new uses often depends on formal labels. Suppose a railroad acquires the right to conduct rail service over a stretch of land. Decades pass, and the railroad seeks to abandon the line and turn the tracks over to a local government that will tear them out and create a system of nature trails. Can it? If the railroad had acquired a fee simple, sure. But if it only had an easement of way for railroad operations, the change would exceed the easement's scope, giving the owner of the underlying land a claim. RESTATEMENT (FIRST) OF PROPERTY § 482 (1944) ("The extent of an easement created by a conveyance is fixed by the conveyance."). This is so even if the easement gave the railroad exclu-

sive access to the land in question while the easement was active. *See, e.g.*, *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996).

1.4 Irrevocable Licenses

An easement is distinct from a **license**. A license is permission from the owner to enter the land. Because it is permissive, it is revocable. Many difficulties with distinguishing easements from licenses arise when parties fail to clearly bargain over the right to use land. *See, e.g.*, *Willow Tex, Inc. v. Dimacopoulos*, 503 N.E.2d 99, 100 (N.Y. 1986) ("The writing must establish unequivocally the grantor's intent to give *for all time to come* a use of the servient estate to the dominant estate. The policy of the law favoring unrestricted use of realty requires that where there is any ambiguity as to the permanence of the restriction to be imposed on the servient estate, the right of use should be deemed a license, revocable at will by the grantor, rather than an easement.").

Under the right circumstances, a license may become **irrevocable**.

Richardson v. Franc

182 Cal. Rptr. 3d 853 (Cal. App. 2015)

RUVOLO, P.J.

In order to access their home in Novato, California, James Scott Richardson and Lisa Donetti (respondents) had to traverse land belonging to their neighbors, Greg and Terrie Franc (appellants) on a 150-foot long road which was authorized by an easement for "access and public utility purposes." Over a 20-year period, both respondents and their predecessors-in-interest maintained landscaping, irrigation, and lighting appurtenant to both sides of the road within the easement area without any objection. Six years after purchasing the property burdened by the easement, appellants demanded that respondents remove the landscaping, irrigation, and lighting on the ground that respondents' rights in the easement area were expressly limited to access and utility purposes, and the landscaping and other improvements exceeded the purpose for which the easement was granted. Respondents brought this lawsuit seeking, among other things, to establish their right to an irrevocable license which would grant them an uninterrupted right to continue to maintain the landscaping and other improvements. . . .

. . . . In 1989, Karen and Tom Poksay began building their home on undeveloped property at 2513 Laguna Vista Drive in Novato, California. The project included constructing and landscaping a 150-foot long driveway within the 30-foot wide easement running down to the site of their new home, which was hidden from the street. The driveway was constructed pursuant to an easement over 2515 Laguna Vista Drive, which was then owned by [appellants' predecessors in interest]. The easement was for access and utility purposes only.

[The Poksays put a great deal of work into landscaping the driveway, including adding plants and trees, running irrigation and water lines, installing solar lighting, and cultivating the plants. After buying from the Poksays, the respondents continued to maintain and improve the landscaping, installing further bushes and trees.] Respondent Donetti testified that landscapers came weekly or every other week, and the landscapers spent 40 to 50 percent of their time in the easement area. . . . During her testimony, respondent Donetti explained, "we've paid a lot of money to nurture it and grow it. It's beautiful. It has privacy. It's absolutely tied to our house value. It's our curb appeal."

Appellants purchased 2515 Laguna Vista Drive in 2004. [Appellant Greg Franc admitted he knew about the landscaping in the easement area, as well as the hiring of landscapers.] He even admitted that the trees were "beautiful and provide a lot of color and [were] just all-around attractive." From 2004 to August 2010, appellants and respondents lived in relative harmony . . . . It was not until late 2010—approximately six years after appellants bought the property and two decades after the landscaping and other improvements began—that appellants first raised a concern about the landscaping and other improvements. Prior to that date, no one had ever objected.

In late September or early October 2010, without any notice, appellant Greg Franc cut the irrigation and electrical lines on both sides of the driveway. He cut not only the lines irrigating the landscaping on the easement, but also those irrigating respondents' own property. The water valve pumps leading to the irrigation lines were disassembled as well. As part of these proceedings, the trial court granted respondents' motion for preliminary injunction and the irrigation system was restored. . . . Following a bench trial and an on-site visit to the property, the court . . . granted respondents' request for an irrevocable license. . . .

. . . [A]s appellants acknowledge, the grant of an irrevocable license is "based in equity." After the trial court has exercised its equitable powers, the appellate court reviews the judgment under the abuse of discretion standard. . . .

Before we address the specific issues appellants raise on appeal, it is helpful to review the law governing the grant of an irrevocable license. "A license gives authority to a licensee to perform an act or acts on the property of another pursuant to the express or implied permission of the owner." (6 Miller & Starr, Cal. Real Estate (3d ed. 2000) Easements, § 15:2, p. 15-10.) "A licensor generally can revoke a license at any time without excuse or without consideration to the licensee. In addition, a conveyance of the property burdened with a license revokes the license . . . ." (*Id.* at pp. 15-10 to 15-11, fns. omitted.)

However, a license may become irrevocable when a landowner knowingly permits another to repeatedly perform acts on his or her land, and the licensee, in reasonable reliance on the continuation of the license, has expended time and a substantial amount of money on improvements with the licensor's knowledge. Under such circumstances, it would be inequitable to terminate the license. In that case, the licensor is said to be estopped from revoking the license, and the license becomes the equivalent of an easement,* commensurate in its extent and duration with the right to be enjoyed. A trial court's factual finding that a license is irrevocable is reviewed for substantial evidence.

In the paradigmatic case, a landowner allows his neighbor the right to use some portion of his property—often a right of way or water from a creek—knowing that the neighbor needs the right to develop his property. The neighbor then builds a house, digs an irrigation ditch, paves the right of way, plants an orchard, or farms the land in reliance on the landowner's acquiescence. Later, after failing to make a timely objection, the landowner or his successor suddenly raises legal objections and seeks to revoke the neighbor's permissive usage. . . .

In the instant case [the trial court concluded that the respondents] "have sufficiently met the requirements for an irrevocable parol license

*This is what the court says, but it's probably more rhetorical than a precise statement of the law. Later, the court says that "a license does not create or convey any interest in the real property," which is inconsistent with an irrevocable license being an easement. —Eds.

for both [respondents], and [respondents'] successors-in-interest. Both law and equity dictate this result."

. . . [Appellants] contend the trial court erred in finding the evidence supported the creation of an irrevocable license because respondents' reliance on continued permission to landscape and make other improvements in the easement area was not reasonable as a matter of law. Appellants point out the evidence at trial revealed that throughout the history of the ownership of the property, there was never an actual request for permission to make and maintain these improvements and express consent was never given. In essence, appellants contend that tacit permission by silence is insufficient to create an irrevocable license and that respondents were required to show an express grant of permission induced them into undertaking the improvements within the easement area.

Permission sufficient to establish a license can be express or implied. . . . A license may also arise by implication from the acts of the parties, from their relations, or from custom. When a landowner knowingly permits another to perform acts on his land, a license may be implied from his failure to object. . . .

. . . Here, the undisputed evidence revealed appellants failed to object to the landscaping and other improvements for *6 years* before appellants first made their demand that the landscaping and other improvements be removed. Thus, with full knowledge that the road providing ingress and egress to respondents' property was landscaped, irrigated, and lit, and with full knowledge that respondents were maintaining these improvements on an ongoing basis, appellants said nothing to respondents. When coupled with the previous 14 years appellants' predecessors-in-interest acquiesced in these improvements, this constituted a total of *20 years* of uninterrupted permissive use of the easement area for the landscaping and other improvements. Therefore, we find the court had ample evidence to conclude that adequate and sufficient permission was granted to respondents by appellants to maintain the extensive landscaping improvements on either side of the roadway.

Appellants next stress that for the license to be irrevocable, there must be substantial expenditures in reliance on the license. In this regard, the trial court made the necessary findings that respondents "have expended substantial monetary sums to improve, maintain, landscape, and care for

the easement area, including the retention of professional landscapers on a regular basis . . . ."

Appellants next challenge "the unlimited physical scope and duration of the license" granted by the trial court. They claim "the trial court, in derogation of equity and the law, decided that [r]espondents . . . should have sole and absolute discretion to decide what will happen on property that is owned by [appellants]." In making this argument, appellants ignore the fact that the trial court was vested with broad discretion in framing an equitable result under the facts of this case. . . . As it was empowered to do, the trial court exercised its broad equitable discretion and fashioned relief to fit the specific facts of this case. The court found "by a preponderance of the evidence that [respondents] hold an irrevocable parol license for themselves and their successors-in-interest to maintain and improve landscaping, irrigation, and lighting within the 30′ wide and 150′ long easement."

Appellants assert "it is wholly erroneous and grossly unfair to make the license *irrevocable in perpetuity.*" (Original italics.) Appellants argue that a proper ruling in this case would be to grant respondents an irrevocable license but "with the license to landscape and garden limited in duration until [respondents] transfer title to anyone else or no longer reside on the property . . . ."

The principles relating to the duration of an irrevocable license were stated by our Supreme Court over a century ago, and these principles are still valid today. An otherwise revocable license becomes irrevocable when the licensee, acting in reasonable reliance either on the licensor's representations or on the terms of the license, makes substantial expenditures of money or labor in the execution of the license; and the license will continue "for so long a time as the nature of it calls for." As explained in a leading treatise, "A license remains irrevocable for a period sufficient to enable the licensee to capitalize on his or her investment. He can continue to use it only as long as justice and equity require its use." (6 Miller & Starr, *supra*, § 15:2, p. 15-15.)

The evidence adduced at trial indicates respondents and their predecessors in interest expended significant money and labor when they planted and nurtured the landscaping abutting the roadway, installed sophisticated irrigation equipment throughout the easement area, and constructed lighting along the roadway. Under such circumstances the trial court did not abuse its discretion in concluding it would be inequitable to require re-

spondents to remove these improvements when the property is transferred, given the substantial investment in time and money and the permanent nature of these improvements. . . .

Lastly, we reject appellants' hyperbolic claim that in fashioning the scope and duration of the irrevocable license granted in this case, "the trial court, without exercising caution, took property that rightfully belonged to [appellants] and ceded it to [r]espondents—and their successors—forever."

This argument ignores that a license does not create or convey any interest in the real property; it merely makes lawful an act that otherwise would constitute a trespass. . . . Far from granting respondents "an exclusive easement amounting to fee title" as appellants' claim, the court's decision simply maintains the status quo that has existed for over 20 years and was obvious to appellants when they purchased the property a decade ago.

Notes and Questions

1.17. The RESTATEMENT characterizes irrevocable license situations as a servitude created by estoppel. RESTATEMENT § 2.10. Is there any difference, then, between an irrevocable license and an easement by prescription? Is there any reason to treat them differently?

1.18. Is landscaping important enough to justify the intrusion into property ownership interests? What do you think would have happened had the appellants won?

1.19. How well does *Richardson* track your intuitions about everyday behavior? Would you ask permission before engaging in the landscaping at issue here? Would you advise a client to? Suppose you asked your neighbor for an easement of way to enable you to build on an adjoining property? You're friends, and he says yes. But you know a thing or two about the law, so you know that if your relations turn sour you would have to rely on an irrevocable license claim. Would you push for a formal grant in writing? Is that a neighborly thing to do? For one view, *see Shepard v. Purvine*, 248 P.2d 352, 361-62 (Or. 1952) ("Under the circumstances, for plaintiffs to have insisted upon a deed would have been embarrassing; in effect, it would have been expressing a doubt as to their friend's integrity."). Does it make a difference that you know to ask? What about those without legal training? Should the law accommodate private ordering or funnel property holders into formal arrangements? Do the interests of third parties, including possible future purchasers of each of the affected properties, matter to your analysis?

1.20. **Assigning licenses.** *Richardson* affirms a trial court's determination of an "irrevocable parol license for both respondents, *and respondents' successors-in-interest*." Is the benefit of a license assignable to others along with the underlying land, like an easement appurtenant? The authorities pretty uniformly say no: "an irrevocable license is a nontransferable personal interest." JON W. BRUCE ET AL., THE LAW OF EASEMENTS AND LICENSES IN LAND § 11:9 (2024) (citing *Blackburn v. Lefebvre*, 976 So. 2d 482, 493–94 (Ala. Civ. App. 2007); *Shearer v. Hodnette*, 674 So. 2d 548, 551 (Ala. Civ. App. 1995)); RESTATEMENT (FIRST) OF PROPERTY § 517, cmt. a (2024) ("Privileges of use constituting licenses often arise out of relations that are highly personal. Where they do so arise they are commonly intended to constitute privileges personal to the licensee alone."). Even the very section of the treatise that *Richardson* itself cites states, "The privilege conferred by a license is personal to the licensee and cannot be inherited, conveyed, or assigned" under California law. HARRY D. MILLER ET AL., MILLER & STARR CALIFORNIA REAL ESTATE § 15:2 (4th ed. 2023).

Is *Richardson* inconsistent with its own authorities? It is possible that the court thought this license unusual and thus assignable, but the opinion offers no reasoning along these lines. A better explanation is that the Francs' attorney simply didn't make the point. In relevant part, the Francs' appellate brief levies three arguments against the scope of the irrevocable license: (1) that the license should have a time limit, (2) that the license "took fee title" away from the Francs, and (3) that it was unclear how much new planting was allowed under the license. Opening Brief of Appellants Greg and Terrie Franc at 37–40, *Richardson v. Franc*, 182 Cal. Rptr. 3d 853 (Cal. App. July 25, 2013) (No. A137815). The brief did not specifically argue that licenses were personal and not transferable, and so the appellate court may not have had occasion to question that aspect of the judgment.