Unusual Easements & Servitudes – Created, Modified, and Extinguished

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What is an Easement?

Idaho: Easements can be Problematic (1)

Bob Daniels & Sons v. Weaver,
106 Idaho 535, 681 (1984)

- "Few things are as certain as death, taxes and the legal entanglement that follows a sale of landlocked real estate."

NJ – What is an Easement (1)

Weiltoff v. Kohl:
105 N.J. Eq. 181; 147 A. 390; 1929

- We think that in adding this condition to the decree the **learned vice-chancellor lost sight of the essential nature of the equitable restriction** resulting from a restrictive covenant, and **confused it with the estate or interest in land which exists in the case of a legal easement.**
- The latter, **generally defined as "a liberty, privilege, or advantage without profit**, which the owner, as such, of one parcel of land, may have in the lands of another," …
- …is said to lie "in grant" and is in fact a legal estate arising from a grant (actual or implied) of an interest in the survient property.

NJ – Negative Reciprocal Servitudes (3)

Weiltoff v. Kohl:
105 N.J. Eq. 181; 147 A. 390; 1929

- This, I understand, is the doctrine and properly results from the doctrine enunciated by Chief Justice Beasley, speaking for this court…
- …where, after citing ***Tulk v. Moxhay***, Western v. MacDermott, and a number of other cases, he said:
- "It will be found upon examination, that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another, from defeating such rights, and **not** upon the idea that the engagements enforced create easements or are of a nature to run with the land."

Penn: What is an Easement: (1)

Forest Glen Condominium Ass'n v. Forest Green Commons Ltd. Partnership: 900 A.2d 859 (2006)

- Forest Glen's main argument is that the easement agreement is a form of a contract, and thus the UCA expressly grants the executive board the authority to unilaterally terminate it.
- It is true, as Forest Glen observes, that courts of this Commonwealth have applied general contract principles to aid interpretation of the language of particular easements.
- **However, that is not to say that an easement is nothing but a contract and must, in all circumstances, be treated as such.**

Penn: What is an Easement: (2)

Forest Glen Condominium Ass'n v. Forest Green Commons Ltd. Partnership: 900 A.2d 859 (2006)

- By contrast, "[a]n easement is an abstract property interest that is legally protected."
- The Restatement of Property defines an easement as follows.
- 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

Penn: What is an Easement: (3)

Forest Glen Condominium Ass'n v. Forest Green Commons Ltd. Partnership: 900 A.2d 859 (2006)

- (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.

Penn: Extinguishing an Easement: (4)

Forest Glen Condominium Ass'n v. Forest Green Commons Ltd. Partnership: 900 A.2d 859 (2006)

- From these definitions it is clear that an easement is a property right with peculiar characteristics.
- Of crucial import here is the additional fact that terminating an easement is not a simple matter.
- The introductory note to this particular section of the Restatement explains that
- *"[a]n easement may terminate either through the operation of the limitations of its creation or by extinguishment." For example, in Pennsylvania, mere nonuse of an easement does not extinguish an express easement created by a deed.*

Penn: Extinguishing an Easement: (5)

Forest Glen Condominium Ass'n v. Forest Green Commons Ltd. Partnership: 900 A.2d 859 (2006)

- Rather, courts have explained that an express easement may not be considered abandoned by the owner of the dominant tenement unless there is a showing of an intent to abandon, "coupled with either
- (1) adverse possession by the owner of the ser-vient tenement; or
- (2) affirmative acts by the owner of the easement that renders the use of the easement impossible; or
- (3) obstruction of the easement by the owner of the easement that is inconsistent with its further enjoyment."

NY: Easement is not a License (1)

Katz 737 v. Shapiro:
107 Misc. 2d 127; 433 N.Y.S.2d 543; 1980

- A **license is a "personal, revocable and non-assignable** privilege, conferred either by writing or parol, to do one or more acts upon land without possessing any interest therein"
- In contrast, an **easement is "a permanent interest in the land,** for some specified period, amounting to an estate in the land, which is assignable, is irrevocable, and gives a right at all times to enter and remain in possession, during its continuance"

NJ – Easement Theory: Six Factors (1)

Leach v. Anderl:
218 N.J. Super. 18; 526 A.2d 1096; 1987

- At common law an **easement is defined as a nonpossessory incorporeal interest** in another's possessory estate in land, entitling the holder of the easement to make some use of the other's property.
- **Six factors are integral to this definition:**
- (1) the fact that it is **an interest in land** which is in the possession of another;
- (2) the content of the interest as a **"limited" use or enjoyment** of the land in which the interest exists;

NJ – Easement Theory: General (2)

Leach v. Anderl:
218 N.J. Super. 18; 526 A.2d 1096; 1987

- (3) the availability of **protection of the interest** as against interference by third persons;
- (4) the **absence of terminability at the will of the possessor of the land;**
- (5) the fact that it is **not a normal incident of a possessory land interest**, and
- (6) the fact that it is **capable of creation by conveyance**.

Penn: Characteristics of an Easement: (1)

Borgel v. Hoffman, 219 Pa. Super. 260 (1971)

- It is apparent from the record in this case that each owner of property abutting the driveway enjoyed an easement over the driveway in common with all the other abutting owners. This, in general, is characteristic of an easement appurtenant, which, by its very nature, contemplates a tract of land (the servient tenement) used for the benefit of another tract (the dominant tenement)
- There is no requirement that the servient and dominant tracts be contiguous; the dominant tract may and often is physically separated from the servient tract.

Penn: Easement & Statute of Frauds (1)

Overbrook Farms Club v. MacCoy:
32 Pa. D. & C.2d 603 (1963)

- The pertinent statute of frauds, which is the Act of March 21, 1772, 1 Sm. L. 389, sec. 1, 33 PS §1, pro- vides, inter alia:
- "... all ... estates ... of, in or out of any... lands, tenements or hereditaments, made ... by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only,...; except, nevertheless, all leases not exceeding the term of three years from the making thereof . . ."

Penn: Easement & Statute of Frauds (2)

Overbrook Farms Club v. MacCoy:
32 Pa. D. & C.2d 603 (1963)

- " 'An easement is a liberty, privilege or advantage which one may have in the lands of another without profit ... It may be merely negative . . . and may be created' by a covenant or agreement not to use land in a certain way
- **An easement is within the statute of frauds: *Yeakle v. Jacob, 33 Pa. 376 (1859)*.**

Penn: Negative Easements (3)

Overbrook Farms Club v. MacCoy:
32 Pa. D. & C.2d 603 (1963)

- "Negative easements . . . are agreements that re- strain the owner 'from doing with and upon property' that which, except for the covenant or agreement, might lawfully be done"
- We repeat, since it is impossible to take continuous and exclusive possession of a negative easement such as a right to limit the height or other dimensions of one's neighbor's buildings, we conclude that such easements cannot be created without a writing to satisfy the requirements of the statute of frauds.

NM: General Principles for Easements (1)

Dethlefson v. Weddle: 2012-NMCA-077; 284 P.3d 452

- An **easement is distinguished from a fee**, and constitutes a **liberty, privilege, right, or advantage which one has in the land of another."**
- It is created by express agreement, prescription or by implication.
- The existence of an express easement and its corresponding scope are "determined according to the intent of the parties."
- In discerning that intent, we "place heavy emphasis . . . on the [parties'] written expressions."

Creating a Right

- Implication (private)
  - ❖ Prior Use (quasi-easement)
  - ❖ Necessity (the necessity implies the right)
  - ❖ Plat
- Part Performance (private)
- Common Scheme (reciprocal servitude)
  - Easement by Common Scheme
- Prescription (private/public*)
- Custom (public*)
- Estoppel (private or public)

Identification by the Senses And the Meeting of Minds

Identification by the Senses – Mass. (1)

Harrison v. Dolan: 172 Mass. 395; 52 N.E. 513 (1899)

- The tenant manifested her **intent** to maintain possession of the locus, even if she did it under a mistaken description.
- ***Proesentia corporis tollit errorem nominis*, identification by the senses overrides description, as in many other cases in the law.** …
- We interpret the finding and ruling as meaning that the tenant in actual fact occupied the premises adversely during the whole twenty years,

Quasi-Easements

Kentucky: What is a Quasi-Easement? (1)

Cole v. Gilvin:
59 S.W.3d 468; 2001

- This theory is based on a legal inference that the original owner intended to create an easement in favor of one section of his realty.
- A quasi-easement is based on the rule that "where the owner of an entire tract of land or of two or more adjoining parcels **employs one part so that another derives from it a benefit of continuous, permanent and apparent nature**, and ***reasonably necessary to the enjoyment of the quasi-dominant portion,*** then upon a severance of the ownership a grant or reservation of the right to continue such use arises by implication of law."

Kentucky: Quasi-Easement v. Estoppel (2)

Cole v. Gilvin:
59 S.W.3d 468; 2001

- Quasi- easement involves **implying by operation of law** the use of property based on a **determination of the intent of the parties from the circumstances surrounding** creation of an easement and the conveyance.
- **Estoppel, meanwhile**, concerns prohibiting a party from denying the existence of a right to use property…

NJ – Quasi-Easement Theory (1)
Adams v. Cale:
48 N.J. Super. 119; 137 A.2d 92; 1957

- An **easement by way of implied reservation requires consideration of the theory of quasi-easement.**
- It arises as the result of the apparent use by the common owner at the time of the conveyance of a portion of the property usually denominated "quasi-servient tenement."

NJ – Quasi-Easement Theory (2)
Adams v. Cale:
48 N.J. Super. 119; 137 A.2d 92; 1957

- The **"quasi-dominant tenement,"** the remaining portion of the premises in the hands of the grantor, may have the **benefit of this easement** if the grantor can establish certain well-recognized requirements, referred to infra, as of the time of the conveyance.
- **This theory is an exception to the general rule that a grantor may not be heard in derogation of his grant.**
- However, **an easement by implied reservation is more difficult to establish than that of an implied grant.**

NJ – How to Lose a claim…Assume…(4)
Adams v. Cale:
48 N.J. Super. 119; 137 A.2d 92; 1957

- In the application of the above principles to the facts of the instant controversy, there is a clear void in the required proofs.
- The **defendants' only argument is that at the time of the creation of the right of way, the grantor was a real estate company** akin to our present-day land developers and
- …since there was no convenient access to the waterfront lots on Barnegat Bay most distant from Princeton Avenue, **it was only reasonable to assume** that an implied easement was reserved for access from each lot

Penn. : Quasi-easements (1)
Frick v. Wirt Company:
2 Pa. D. & C. 405; 1922

- One of the essential features of an easement is that it is a right or interest in the land of another; **a man cannot have an easement in his own property.**
- While this is true, it has been held that the owner of an entire tract of land, or of two or more adjoining parcels, **may so employ a part thereof as to create a seeming servitude, or, as it is sometimes termed, a quasi-easement,** in favor of another portion to which the use becomes appurtenant.

Penn. : Quasi-easements (2)
Frick v. Wirt Company:
2 Pa. D. & C. 405; 1922

- When the quasi-dominant tenement is then conveyed without an express reference in the deed to the servitude, …
- …the quasi-easement **is, or is not, held to have been impliedly granted,** ***depending upon the nature or character of the use*** imposed upon the quasi-servient tenement, by invoking the presumption that the parties contracted with reference to the conditions at the time of the sale, and that the grantor intended to convey a right to use the easement and that the grantee reasonably expected to take and hold such right.

Penn. : Quasi-easements (3)
Frick v. Wirt Company:
2 Pa. D. & C. 405; 1922

- This doctrine of the creation of easements by implication rests upon the **exceptions to the rule that written instruments shall speak for themselves.**
- **It was originally restricted to ways of necessity,** which were implied upon a conveyance of land having no means of ingress and egress, because it was for the public good that the land should not be unoccupied.
- But it **has been broadly extended to include existing servitudes or quasi-easements.**

Easement Implied By Prior Use

Indiana: 3 Requirements for Prior Use (1)

Haak v. Wilusz:
949 N.E.2d 833; 2011

- On the other hand, an easement of prior use will be implied

I. "where, during the **unity of title**, …

II. …an **owner imposes an apparently permanent and obvious servitude on one part of the land** in favor of another part and the servitude is in use …

III. …when the parts are severed

- … if the **servitude is reasonably necessary** for the fair enjoyment of the part benefited."

Ohio: Elements-Easement by Prior Use (1)

Ciski v. Wentworth:
122 Ohio St. 487, 172 N.E. 276 (1930)

- As a result, an implied easement will be found only if the following four elements are met:
- "(1) A **severance of the unity** of ownership in an estate;
- (2) that, **before the separation takes place,** the use which gives rise to the easement shall have been so **long continued and obvious or manifest** as to show that it was meant to be permanent;
- (3) that the easement shall be **reasonably necessary** to the beneficial enjoyment of the land granted or retained;
- (4) that the servitude shall be **continuous as distinguished from a temporary** or occasional use only."

Penn. : Easement Implied by Prior Use (6)

Frick v. Wirt Company:
2 Pa. D. & C. 405; 1922

- in Pennsylvania, the general rule is that when, …
- …during the unity of title, an apparently permanent and obvious servitude is continued or is imposed by the owner of an entire tract upon one part of his estate, or of several parcels, in favor of another, …
- …and which at the time of the severance is in use and is reasonably necessary for the enjoyment of the other,…
- … then, upon a severance of such ownership, there arises by implication of law a right in the grantee to continue such use:

Penn: Easement by Prior Use: (1)

Thomas v. Deliere: 359 A.2d 398 (1976)

- In 1947, appellee purchased the lot in Cecil Township, Washington County, on which appellants now reside. In 1949, appellee constructed a concrete driveway along the northeastern boundary of her property.
- Unbeknownst to appellee, her driveway encroached upon her neighbor's land to the northeast, and, thereby, appropriated a triangular strip of ground measuring 18 inches at the base …and approximately 5 feet in height (along the common boundary between the two properties).

Penn: Easement by Prior Use: (2)

Thomas v. Deliere: 359 A.2d 398 (1976)

- In 1960, appellee purchased the neighbor's tract; thus, the two lots were joined together.
- Eventually, appellee moved to the house on the second lot. In November, 1972, appellee sold the lot which she originally occupied to appellants.
- There was no mention in the deed of an easement in favor of appellants over any part of appellee's property.

Penn: Easement by Prior Use: (3)

Thomas v. Deliere: 359 A.2d 398 (1976)

- Appellants do not claim an express easement; rather, they contend that an easement should be implied because of the prior use when the two adjoining lots were owned by appellee.
- *When an easement is not expressed and is sought to be attached to the grant of a fee, the implication must clearly arise from the intention of the parties as shown by the terms of the grant, the surroundings of the property and the other res gestae of the transaction.*

Penn: Factors for Prior Use: (4)

Thomas v. Deliere: 359 A.2d 398 (1976)

- In determining whether the circumstances under which a conveyance of land is made create an implied ease- ment, *§ 476 of the Restatement* suggests that the following factors are important:
- "(a) whether the claimant is the conveyor or the conveyee,
- (b) the terms of the conveyance,
- (c) the consideration given for it,
- (d) whether the claim is made against a simultaneous conveyee,

Penn: Factors for Prior Use: (5)

Thomas v. Deliere: 359 A.2d 398 (1976)

- (e) the extent of the necessity to the claimant,
- (f) whether reciprocal benefits result to the conveyor and the conveyee,
- (g) the manner in which the land was used prior to its conveyance, and
- (h) the extent to which the manner of prior use was or might have been known to the parties."

Penn: Factors for Prior Use: (6)

Thomas v. Deliere: 359 A.2d 398 (1976)

- "In the greater number of cases, its neces- sity to the use of land of the claimant is the circumstance that contributes most to the implication of an easement. If no use can be made of the land conveyed or retained without the benefit of an easement, it is assumed that the parties intend the easement to be created." Conversely, as the degree of necessity decreases, the need to refer to other factors suggestive of an intent to create an easement increases substantially.

Penn: Factors an favor of Prior Use: (7)

Thomas v. Deliere: 359 A.2d 398 (1976)

- The fact that the claimant is the conveyee of the benefited fee, …
- …that the conveyance was not gratuitous but made for fair consideration, …
- …that the claim is made against the claimant's grantor rather than a simultaneous grantee, …
- …that the use of the land has continued for a substantial period of time, and …
- …that the prior use was known to all of the parties,…
- … would tend to support the implication that the parties intended to create an easement.

Penn: Factors Opposing Prior Use: (8)

Thomas v. Deliere: 359 A.2d 398 (1976)

- On the other hand, there are factors which overwhelmingly detract from the implication of an easement:
- the fact that the deed did not mention such an easement but rather established a boundary, which was unknown to either party until the appellee's property was surveyed;…
- the fact that the alleged easement was so small (measuring less than 3 and % square feet) that it could hardly be described as necessary to the beneficial use of the appellants' property; …
- …and the fact that there are no reciprocal benefits as between the conveyor and conveyee.

Penn: Conclusion: Prior Use: (9)

Thomas v. Deliere: 359 A.2d 398 (1976)

- Weighing the factors and circumstances enumerated in the Restatement, …
- …we conclude that the clear evidence of a mistake as to the true boundary, …
- …the nearly complete absence of necessity, and …
- …the absence of reciprocal benefits demonstrate that the parties never intended that an easement be created when the properties were severed.

Prior Use IS NOT Practical Location

Practical Location & Easement: Missouri (1)

Southern Star v. Murray: 190 S.W.3d 423; 2006

- "The general rule applicable to descriptions in conveyances of easements holds that **where the conveyance does not definitely fix the location of the easement, the grantee is entitled to a convenient, reasonable and accessible way** within the limits of the grant." ***Edward Runge Land Co. v. Busch, 594 S.W.2d 647, 650 (Mo.App. 1980); see also Hall v. Allen, 771 S.W.2d 50, 53 (Mo. banc 1989)*** (holding that
- "if the location is not precisely fixed when the easement is first created, the grantee is entitled to a convenient, reasonable and accessible use").

Practical Location: Missouri (2)

Southern Star v. Murray: 190 S.W.3d 423; 2006

- As such,
- 'if an **easement in land is created in general terms but without giving a definite location** and description,
- a **selection may be inferred** within the boundaries of the land over which the right is granted by **proof of the use of a particular course or way on the part of the grantee** or owner of the dominant estate along with the **acquiescence of the grantor or owner of the servient estate.'**

Penn: Practical Location of Easement: (1)

Kraut's Appeal, 71 Pa. 64 (1872)

- Under the deed of Frederick Fox, of July 14th 1859, the appellant is clearly entitled to a passage-way, from the premises thereby conveyed, over and across the grantor's remaining ground to Marlborough street, for the purposes specified in the conveyance.
- The right of way is expressly granted, but its precise location and limits are not fixed and defined by the deed.

Penn: Practical Location of Easement: (2)

Kraut's Appeal, 71 Pa. 64 (1872)

- Looking to the general terms of the grant and the condition of the ground at the date of the deed, the reasonable construction and inference would seem to be, that the parties intended that the right should be exercised over that part of the ground which was then vacant…
- But it was competent for them to define the location and determine the limits of the passage-way, which were undefined by the deed, by subsequent agreement, use and acquiescence.

Penn: Practical Location of Easement: (1)

Taylor v. Heffner, 359 Pa. 157 (1948)

- "Where a right of way is expressly granted and its precise location and limits are not fixed or defined by the deed, it is competent for the parties to define the location and determine the limits of the right of way by subsequent agreement, use and acquiescence:

Penn: Practical Location of Easement: (1)

Werry v. Sheldon, 148 Pa. Super. 13 (1942)

- "The rule has been established in many jurisdictions that if an easement is granted in general terms which do not fix its location, the owner of the servient estate has the right, in the first instance, to designate the location of such easement. This right, however, must be exercised in a reasonable manner with due regard to the rights of the owner of the easement.

Penn: Practical Location of Easement: (2)

Werry v. Sheldon, 148 Pa. Super. 13 (1942)

- In this situation, if the owner of the servient estate does not designate the location, the person entitled to an easement may select a suitable route, taking into consideration the interest and convenience of the owner of the land over which the easement, passes.

Maryland: Practical Location of Easement

Sibbel v. Fitch: 182 Md. 323; 34 A.2d 773 (1943)

- Where an easement in land, such as a way, is granted in general terms, **without giving definite location and description** of it,
- the location may be subsequently fixed by an express agreement of the parties, **or by an implied agreement arising out of the use of a particular way by the grantee and acquiescence on the part of the grantor,** provided the way is located within the boundaries of the land over which the right is granted.
- As otherwise expressed, it is a familiar rule, that, when a right of way is granted without defined limits,

Easement by Necessity

NJ: Prior Use -- is Not Necessity (3)

Leach v. Anderl:
218 N.J. Super. 18; 526 A.2d 1096; 1987

- **Implied easements are generally of two types:** easements by necessity and quasi-easements.
- An **implied easement by necessity arises by operation of law** where "an owner of land conveys to another an inner portion thereof, which is entirely surrounded by lands owned by the conveyor. . . ."
- Such an easement is found only in relation to the boundary **conditions existing at the time of the original subdivision** severing common ownership.

Penn. : Easement by Necessity (1)
Youst v. Keck's Food Service:
2014 PA Super 121; 94 A.3d 1057; 2014

- However, an easement by necessity is also an implied easement …
- The three fundamental requirements for an easement by necessity to arise are the following:

Penn. : Easement by Necessity (2)
Youst v. Keck's Food Service:
2014 PA Super 121; 94 A.3d 1057; 2014

- 1) The titles to the alleged dominant and servient properties must have been held by one person[;]
- 2) This unity of title must have been severed by a conveyance of one of the tracts[;]
- 3) The easement must be necessary in order for the owner of the dominant tenement to use his land, with the necessity existing **both at the time of the severance of title and at the time of the exercise of the easement**.

Penn. : Easement by Necessity (3)
Youst v. Keck's Food Service:
2014 PA Super 121; 94 A.3d 1057; 2014

- An easement by necessity is always of strict necessity.
- An easement by necessity never exists as a mere matter of convenience…
- [A]n easement by necessity is **extinguished when the necessity from which it resulted ceases to exist**.
- Initially, we have scoured the appellate caselaw from this Commonwealth and **have discovered no case that has recognized an easement by necessity for any other purpose than for ingress to a piece of land and egress from the piece of land**.

Colorado: Easement by Necessity (1)
Campbell v. Summit Plaza:
192 P.3d 465; 2008

- An implied easement of necessity arises when the owner of a tract of land conveys part of that tract to another party, **leaving either the part conveyed or the part retained without access except over the other part.**
- While implied easements are generally not looked upon with favor by the courts, …**public policy supports the principle that property should not be rendered unfit for use for lack of access**.
- Thus, when owners sell a portion of their property, it is presumed that they intended to provide access over the retained lands.

Colorado: Three Requirements – Necessity (2)
Campbell v. Summit Plaza:
192 P.3d 465; 2008

- Three requirements must be met to establish an implied easement of necessity for access to land:
- (1) there must be unity of ownership of the entire tract prior to severance, meaning that the original ownership of the entire tract must have been held by a single grantor prior to a division thereof;
- (2) the necessity for the easement must exist at the time of severance; and
- (3) the necessity for the easement must be great.

Colorado: Three Requirements – Necessity (3)
Campbell v. Summit Plaza:
192 P.3d 465; 2008

- "The critical time in determining the existence of an easement by necessity is the time when the dominant estate is severed from the servient estate."
- We are persuaded by this reasoning, and we therefore hold that the unity requirement is satisfied if the grantor owns separate but contiguous parcels before conveying one of them.

Easement by Necessity: Unusual Variants

NY: Easement by Necessity – Water (1)
Foti v. Noftsier:
72 A.D.3d 1605; 901 N.Y.S.2d 434; 2010

- In order to establish the existence of an easement by necessity, plaintiffs were required to prove by clear and convincing evidence …
- …"unity [and the subsequent separation] of title and, further, that at the time of severance [in 1904] …
- …an easement over defendants' property was absolutely necessary in order to obtain access to plaintiff[s'] land"
- **As plaintiffs correctly concede, the availability of access to their property by a navigable waterway would defeat their entitlement to easements by necessity** ….

NY: Easement by Necessity – Water (2)
Foti v. Noftsier:
72 A.D.3d 1605; 901 N.Y.S.2d 434; 2010

- Inasmuch as the existence and extent of an easement by necessity is determined based on the circumstances as they existed at the time of severance …**we reject plaintiffs' contention that evidence that the river in question was not navigable subsequent to the severance of the parcels in 1904 is relevant.**
- Further, the 1893 property deeds submitted by plaintiffs in support of their motion provide no legible facts from which to infer that the river in question was not in fact navigable in 1904.

Easement by Implication, Necessity, or… Something Else?

Missouri: Policy vs. Property Rights (11)
Hillside v. Fields
928 S.W.2d 886; 1996

- …some cases have stated that "the **tendency of the courts**, as a general rule, is to **discourage implied grants of easements,** since the obvious result, especially in urban communities, is to fetter estates, retard buildings and improvements, and violate the policy of recording acts." Missouri…
- Other, often later, cases, however, have recognized **competing public policy considerations** with regard to implied easements, including the policy favoring utilization of land and the principle that courts **should not presume that parties intended to render land unfit for occupancy.**

NM: Prior use vs. Necessity…(4)
Venegas v. Luby:
49 N.M. 381; 1945-NMSC-045; 164 P.2d 584; 1945

- Since under the general doctrine of implied easements, the existence of an obvious servitude or quasi easement is pre-supposed, the rule is not to be confused with the specific principle under which an ordinary way of necessity arises.
- **The two are not the same, although the factor of necessity enters into each.**

Penn: Statute: Private Condemnation: (1)

Chapter 5 – PRIVATE ROADS
Layout, Opening & Repair

- 36 Pa. Stat. § 2732
- If it shall appear by the report of viewers to the court directing the view, that such road is necessary, the said court shall direct what breadth the road so reported shall be opened, and the proceedings in such cases shall be entered on record, as before directed, and thenceforth such road shall be deemed and taken to be a lawful private road.

Penn: Statute: Private Condemnation: (2)

Chapter 5 – PRIVATE ROADS
Layout, Opening & Repair

- 36 Pa. Stat. § 2736
- The damages sustained by the owners of the land through which any private road may pass shall be estimated in the manner provided in the case of a public road, and shall be paid by the persons, associations, partnership, stock companies, corporations, or executive or administrative department of the Commonwealth, at whose request the road was granted or laid out: Provided, That no such road shall be opened before the damages shall be fully paid.

Implied Easement for Monitoring Well required By Government Agency

NM: Implied Access for Monitoring Well (1)

Smith & Marrs Inc. v. Osborn:
143 N.M. 684; 2008-NMCA-043; 180 P.3d 1183; 2008

- On appeal, Plaintiff urges us to adopt a broad reading of the terms "take care of" and "save."
- Under such a reading, the activities relating to the abatement plan would be part of the larger oil and gas production effort because Plaintiff could be considered to be "tak[ing] care of" or "sav[ing]" any byproduct produced in the operation.
- However, applying a reasonable construction to the plain language of the leases, we disagree.

NM: Implied Access for Monitoring Well (2)

Smith & Marrs Inc. v. Osborn:
143 N.M. 684; 2008-NMCA-043; 180 P.3d 1183; 2008

- Plaintiff's argument ignores the fact that the "save" and "take care of" clauses in both leases relate exclusively to "said products," meaning oil, gas, and/or minerals.
- This language does not specifically authorize Plaintiff to "save" or "take care of" any surface or groundwater resources, and we will not read such an authorization into the unambiguous meaning of the language of the leases.
- When a contract or agreement is unambiguous, we interpret the meaning of the document and the intent of the parties according to the clear language of the document,

NM: Plaintiff Argument for Monitoring Well (3)

Smith & Marrs Inc. v. Osborn:
143 N.M. 684; 2008-NMCA-043; 180 P.3d 1183; 2008

- We next address **Plaintiff's argument** that even if it is not expressly permitted to do so under the plain language of the leases at issue in this case, **the leases create an implied right to enter Defendants' land, drill monitoring wells, and periodically return to oversee the wells.**
- Plaintiff contends that OCD's demand that it drill monitoring wells was incidental to the underlying purpose of the leases, and therefore, abiding by that demand constitutes a reasonable and necessary use of the surface estate under the lease agreements.

NM: Plaintiff Argument for Monitoring Well (4)

Smith & Marrs Inc. v. Osborn:
143 N.M. 684; 2008-NMCA-043; 180 P.3d 1183; 2008

- Plaintiff's argument focuses on the **long-standing rule** that our Supreme Court expressed in ***Amoco Production Co. v. Carter Farms Co., 103 N.M. 117, 119, 703 P.2d 894, 896 (1985)***, that a mineral lessee "is **entitled to use as much of the surface area as is reasonably necessary for its drilling and production operations.**"
- The rule has more recently been interpreted to mean that a mineral lessee has an **implied easement by necessity** to engage in activities required to effectuate the purpose of the lease, namely oil and gas production.

NM: Extent of Easement by Necessity (5)

Smith & Marrs Inc. v. Osborn:
143 N.M. 684; 2008-NMCA-043; 180 P.3d 1183; 2008

- Generally, the scope of an implied easement in a situation similar to Plaintiff's is **only broad enough to carry out the activities reasonably necessary to produce oil and gas.**
- Accordingly, **we must determine whether** the **abatement and monitoring of the groundwater pollution that resulted from Plaintiff's operation are activities that are reasonably necessary to produce oil and gas.**

NM: Extent of Easement by Necessity (6)

Smith & Marrs Inc. v. Osborn:
143 N.M. 684; 2008-NMCA-043; 180 P.3d 1183; 2008

- Because we fail to see the direct connection between the reasonable necessity of state-mandated pollution abatement and monitoring and the production of oil and gas, we agree with Defendants and conclude that Plaintiff's implied easements do not stretch to such a length.
- While Plaintiff's implied easements entitle it to perform any action reasonably necessary to extract or produce oil, gas, and minerals from Defendants' property, they …
- …**do not provide Plaintiff with carte blanche to access Defendants' property** to ameliorate pollution based on a settlement agreement with OCD.

NM: Extent of Easement by Necessity (7)

Smith & Marrs Inc. v. Osborn:
143 N.M. 684; 2008-NMCA-043; 180 P.3d 1183; 2008

- Furthermore, Plaintiff's argument in favor of finding implied easements does not intimate that the groundwater pollution that triggered OCD's mandate was either inevitable or inextricably linked to its right under the leases to extract oil, gas, and minerals from Defendants' property, …
- …and we will not make such an assumption in order to find an implied right of entry in Plaintiff.
- We therefore conclude that Plaintiff's implied easements do not include an access right to Defendants' land in order to implement its agreement with OCD.

Easement by Part Performance

Indiana: Part Performance & Easement (1)

Thrailkill v. Robinson
110 Ind. 117; 10 N.E. 647; 1887

- The appellant's counsel are right in asserting that an **easement is an interest in land, and that a contract creating such an interest is within the statute of frauds.**
- ***If the claim of the appellees rested solely on the words of a parol contract,*** there would be much more difficulty in the case; but it does not rest on the contract alone, for there was possession and user of the way.

Indiana: Part Performance & Easement (2)

Thrailkill v. Robinson
110 Ind. 117; 10 N.E. 647; 1887

- "immediately after the purchase of the said road, took possession and continuously used said road until he sold the said real estate to the plaintiffs, …
- …and that from the time of the purchase of said road the same was continuously used and occupied by all the owners of said land."
- We think there is shown such a part performance as takes the case out of the statute.

Alaska: Part Performance or Estoppel? (1)

O'Buck v. Cottonwood Village
750 P.2d 813; 1988

- In case there is **an attempted oral grant of an easement**…
- … and the intended grantee makes improvements for the purpose of exercising the easement, …
- …equity will recognize and enforce the easement on the theory of what is ordinarily referred to as that of part performance but which is essentially the theory of estoppel.

Virginia: Part Performance or Estoppel? (1)

Carpenter v. Stapleton:
169 Va. 22; 192 S.E. 792; 1937

- "Mere acquiescence by the licensor should not furnish grounds for an estoppel in favor of the licensee.
- …affirmative conduct on the part of the licensor, inducing expenditures, will be basis for an estoppel.
- "It seems, however, to be admitted that if the transaction be one which, if it were under seal, would create an easement, it being classed as a license merely because it is oral, upon a part performance thereof by the licensee by the expenditure of money or otherwise, a court of equity may regard it as an equitable easement, and therefore irrevocable in equity."

Penn. : Part Performance & Easements (1)

Valvano v. Galardi:
363 Pa. Super. 584; 526 A.2d 1216; 1987

- The Statute of Frauds is to be used as a shield and not as a sword as it was designed to prevent fraud.
- It does not make void contracts relating to land which fail to comply with the Statute of Frauds.
- The purpose of the Statute of Frauds is to avoid the opportunity for fraud and perjury likely to arise from oral conveyances of estates in land.

Penn. : Part Performance & Easements (2)

Valvano v. Galardi:
363 Pa. Super. 584; 526 A.2d 1216; 1987

- In order to prevent the Statute of Frauds from being used as a sword by one not needing its protection, the law has developed the doctrine of part performance. **Where, however, the party seeking to enforce the conveyance has partially performed the contract, so as to render recission inquitable and unjust, the contract may be outside the operation of the statute.**

Penn. : Part Performance & Easements (3)

Valvano v. Galardi:
363 Pa. Super. 584; 526 A.2d 1216; 1987

- In the instant case, the sellers fully performed their obligations under the contract which were
- (1) to convey the land to the buyers and
- (2) to give the buyers an option for two years to purchase an additional 20 acres of land which were landlocked.
- The buyers, having received full performance of the obligations owed to them, will not be permitted to raise the Statute of Frauds as a defense against the performance of their obligations, which included the grant of an easement in the event that they did not exercise their option.

NY: Part Performance (2)
Shapiro v. Fam:
26 Misc. 2d 502; 208 N.Y.S.2d 778; 1960

- Furthermore, there was **sufficient part performance to take the grant of the oral easement out of the Statute of Frauds**
- "The rule as to what manner of part performance will justify enforcement by a court of equity of a contract involving an interest in realty, although there is no writing as required by the Statute of Frauds, is stated as follows …

NY: Part Performance requirements (3)
Shapiro v. Fam:
26 Misc. 2d 502; 208 N.Y.S.2d 778; 1960

- 'There must be performance **"unequivocally referable" to the agreement,** performance which alone and without the aid of words of promise is unintelligible or at least **extraordinary unless as an incident of ownership,** assured, if not existing.
- "An act which admits of explanation without reference to the alleged oral contract or a contract of the same general nature and purpose is not, in general, admitted to constitute a part performance"
- **What is done must itself supply the key to what is promised.** It is not enough that what is promised may give significance to what is done.'"

Part Performance can Extinguish an Easement

Illinois: Part Performance Extinguished Easement (1)
Dunn v. Youmanns:
224 Ill. 34; 79 N.E. 321; 1906

- It is admitted that this small drain across the Dunn land had been there so long that it would be, under the law, an easement in favor of appellee. **But this easement or license to drain across the Dunn land by means of tile could be renounced, modified or extinguished by parol.**
- These decisions all recognize that a parol agreement between the owners of dominant and servient tenements will operate to extinguish an easement when such agreement is acted upon.
- In this case **the agreement has been acted upon.**
- **It is an executed contract.**

Minnesota: Extinguished by Part performance (1)
Davidson v. Kretz:
127 Minn. 313; 149 N.W. 652; 1914

- **It is quite well settled that an easement may be extinguished or modified by a parol agreement granted by the owner of the dominant tenement and executed by the owner of the servient tenement.** ***Boston & P.R. Corp. v. Doherty, 154 Mass. 314, 28 N.E. 277***
- If the owner of an easement of way verbally agrees that the owner of the servient estate may erect thereon an obstruction of a permanent character and substitute another way, this agreement when executed extinguishes the right to the easement to the extent of the obstruction.

Penn. : Part Performance & Abandonment (1)
Hudson v. Watson:
2 Pa. Super. 422; 1896

- Whilst it is true that an **easement** is a liberty, privilege or advantage in land, without profit, and existing distinct from the ownership of the soil, it is nevertheless …
- …**such an interest in land as is included in the statute of frauds** and must be founded upon or acquired, so far as the evidence in this case is concerned, by grant, or prescription; …
- …and whilst it is also true as claimed by the appellant that an abandonment of an easement such as was claimed in this case

Penn. : Part Performance & Abandonment (2)

Hudson v. Watson:
2 Pa. Super. 422; 1896

- once created must be in writing or by cesser, yet, **inasmuch as a parol grant executed will be upheld and sustained under the same circumstances and on the same principles that a parol contract for the sale of land would be sustained, ...**.
- ...it follows that a parol agreement for the abandonment of an easement will be sustained, when such an agreement has been so far executed as to make it inequitable to rescind the same.

Common Scheme

California: Common Scheme a "Quagmire" (1)

Citizens for Covenant Compliance v. Anderson:
12 Cal. 4th 345; 906 P.2d 1314; 47 (1995).

- **The law in this area is an unspeakable quagmire.** The intrepid soul who ventures into this formidable wilderness never emerges unscarred.
- Some, the smarter ones, quickly turn back to take up **something easier like the income taxation** of trusts and estates.
- Others, having lost their way, plunge on and after weeks of effort emerge not far from where they began, clearly the worse for wear.
- On looking back they see the trail they thought they broke obscured with foul smelling waters and noxious weeds. **Few willingly take up the challenge again.**

General Scheme-Easements and Intent: Ohio

Kuebler v. Cleveland Short Line Ry. (1)
20 Ohio Dec. 525; 1910

- **Where the owner of a tract of land adopts a general scheme for its improvement**, dividing it into lots and conveying these with uniform restrictions as to the purpose for which the land may be used.
- such restrictions create equitable **easements** in favor of the owners of the several lots which may be enforced in equity by one of such owners. Such restrictions are not for the benefit of the grantor only, but for the **benefit of all purchasers.**

General Scheme-Easements and Intent: Ohio

Kuebler v. Cleveland Short Line Ry. (2)
20 Ohio Dec. 525; 1910

- The owner of each lot has, as pertinent to his lot, a right in the nature of an **easement** upon the other lots which he may enforce in equity. **Whether such restriction creates a right which inures to the benefit of purchasers, is a question of intention.**
- And to create such a right, it must appear from the terms of the grant, or from the **surrounding circumstances, that the grantor intended** to create an **easement** in favor of the purchasers.
- The fact that like restrictions have been inserted in all the deeds of the grantor conveying adjacent land is a circumstance to be considered

Penn: Common Scheme Doctrine: (1)

Ladner v. Siegel, 294 Pa. 360 (1928)

- It is true that building restrictions inserted for mutual benefit may be enforced, if the intention to so provide is apparent:
- Such limitations are not to be extended by mere implication, but must be shown by some express agreement of the parties, or conduct indicating the existence of such ...

Penn: Common Scheme Doctrine: (2)

Ladner v. Siegel, 294 Pa. 360 (1928)

- "The mere fact that the grantor in selling several lots imposed restrictions in the conveyances which, it was expected, would benefit the premises which were subjected to them, and a common advantage to all of the lots may for this reason have been anticipated, is not sufficient to establish a general scheme or plan which will create an equitable easement":

Penn: Common Scheme Doctrine: (1)

Baederwood, Inc. v. Moyer, 370 Pa. 35 (1952)

- The real question involved is whether the purchasers of lots containing various restrictions may under the facts in this case invoke the doctrine of reciprocal covenants so as to bar the original common owner and grantor from erecting two-story multiple family dwelling houses.

Penn: Common Scheme Doctrine: (2)

Baederwood, Inc. v. Moyer, 370 Pa. 35 (1952)

- All of the deeds made by Baederwood, Inc. provide that no part of the land shall be used for any industrial, commercial or mercantile purposes whatsoever.
- In other respects, however, the restrictions vary in many of the deeds; and there is no express restriction with reference to the land which is still owned by the plaintiff.

Penn: Common Scheme Doctrine: (3)

Baederwood, Inc. v. Moyer, 370 Pa. 35 (1952)

- Restrictions may arise
- (1) by express covenants, or
- (2) by implication
- (a) from the language of the deeds, or
- (b) from the conduct of the parties.
- To ascertain the intention of the parties, the language of á deed should be interpreted in the light of the subject matter, the apparent object or purpose of the parties and the conditions existing when it was executed:

Penn: Common Scheme Doctrine: (4)

Baederwood, Inc. v. Moyer, 370 Pa. 35 (1952)

- Such restrictions by implication will be enforced when the facts clearly show the understanding of the parties to have purposed their inclusion, though not fixed by express words:
- This is usually found where lots have been sold according to a plan indicating a general scheme of restricted development:

Penn: Common Scheme Doctrine: (5)

Baederwood, Inc. v. Moyer, 370 Pa. 35 (1952)

- "…where there is a definite plan of a real estate development for residential purposes, as shown, for example, by the filing of a map, in pursuance of which numerous conveyances of lots are made containing uniform restrictions, there is presumably created thereby a neighborhood or community scheme that may give rise to an implied reciprocal covenant on the part of the grantor that he will not thereafter convey any part of the original tract without imposing thereon the same restrictions, and that he will not himself devote the remaining part of the property to the prohibited purposes.

Penn: Common Scheme Doctrine: (6)

Baederwood, Inc. v. Moyer, 370 Pa. 35 (1952)

- But the mere fact that a grantor imposes restrictions on parts of a tract winch he sells does not raise any inference that he means thereby to obligate himself to restrict the remainder of his property; in every such case there must appear [clear and] definite evidence of a purpose to bind the remaining land, and that purpose must be clearly made known to the grantees:

Common Scheme: NJ (1)

Murphy v. Trapani:
255 N.J. Super. 65; 604 A.2d 635; 1992

- While it is true that the restriction does not prohibit "decks" per se, we must examine not only the language of the restriction, but the circumstances surrounding its creation.
- Also, while generally we apply the rule of strict construction when dealing with a covenant, this rule should not be used to defeat the obvious purpose of the restriction.

Common Scheme: NJ (3)

Murphy v. Trapani:
255 N.J. Super. 65; 604 A.2d 635; 1992

- Moreover, it is apparent that the restriction pertaining to "obstructions" affecting the lagoons was an **integral part of a "neighborhood scheme."**
- Neighborhood schemes are the **product of restrictive covenants**, and to be effective and enforceable must be universal, reciprocal and reasonably uniform.

Common Scheme: NJ (4)

Murphy v. Trapani:
255 N.J. Super. 65; 604 A.2d 635; 1992

- **where there is a general scheme or plan, adopted and made public by the owner of a tract,** for the development and improvement of the property, …
- …by which it is divided into streets, avenues and lots,
- …and **contemplating a restriction as to the uses to which buildings or lots may be put**, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser; …
- …and it appears, **by writings or by the circumstances**,
- **[KK note: continued next slide]**

Common Scheme: NJ (5)

Murphy v. Trapani:
255 N.J. Super. 65; 604 A.2d 635; 1992

- …that such covenants are **intended for the benefit of all the lands**, …
- …and that **each purchaser is to be subject to and to have the benefit** thereof; and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan; …
- …one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns,
- …if he has bought with knowledge of the scheme, and the covenant has been part of the subject-matter of his purchase.

Common Scheme: NJ (6)

Murphy v. Trapani:
255 N.J. Super. 65; 604 A.2d 635; 1992

- Here, when the property owners in Section II purchased their properties, they took their lots subject to a reasonably uniform set of restrictions, easements and reservations.
- The evidence established that the developer intended to create an integrally related lagoon community, with appropriate restrictions against obstructions in or over the lagoons, both to preserve the aesthetics of the waterfront neighborhood and to prevent navigational hazards in the waterways.

Prescriptive Easements

What is the effect of the passage of time on title?

Praescriptio Temporis and Its Relation to Prescriptive Easements in the Anglo-American Law Marian P. Opala (Tulsa Law Review, 1971) (1)

- Lapse of time, coupled with non-possession or inaction, may alter a man's legal position vis-a-vis his property, both corporeal and incorporeal, in several different ways.
- The law may **(1) bar the owner from asserting his rights** by a droitural action and thus leave these rights suspended in a state of unenforceability;
- **(2) extinguish his legal right as well as his remedy;**
- **(3) transfer his rights to another** who has exercised them by long-continued possession or use; and
- **(4) impose a presumption that long-continued possession or use by another had its beginning in a lawful devolution of right.**

Praescriptio Temporis and Its Relation to Prescriptive Easements in the Anglo-American Law Marian P. Opala (Tulsa Law Review, 1971) (2)

- The approach described in the fourth example, that of **imposing a presumption, differs somewhat from an acquisitive prescription**, though its effect is also investitive.
- A presumption **does not afford a mode of acquiring new rights but rather provides a means of protecting a presumably lawful acquisition** of presently existing rights, whose origin is lost in antiquity.
- It is a legal substitute for title supplied through an evidentiary device. **Its employment is found both in the common and Roman law systems.**

Praescriptio Temporis and Its Relation to Prescriptive Easements in the Anglo-American Law Marian P. Opala (Tulsa Law Review, 1971) (3)

- The English law since the time of Bracton (1200-1268), if not since a century earlier, has allowed easements to be acquired through immemorial user termed "prescription".
- This was the only form of acquisitive prescription known to the common law. Its application has been firmly restricted to easements and profits.

Real Property Statutes Passed in the Reign of William IV and Victoria: Leonard Shelford, Esq. 1842 2 & 3 William IV. c. 71. (1st August 1832)

- II. And be it further enacted, That no **claim which may be lawfully made** at the common law, **by custom, prescription, or grant**, to any way (d) or other easement, or to any watercourse, (e) or the use of any water, to be enjoyed or derived upon…
- …shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of **twenty years**

Real Property Statutes Passed in the Reign of William IV and Victoria: Leonard Shelford, Esq. 1842

2 & 3 William IV. c. 71. (1st August 1832)

- …and were such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid **for the full period of forty years,**
- the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Doctrine of Presumed Grant (Lost Grant Theory)

Doctrine of Presumed Grant: U.S. (1)

Ricard v. Williams: 20 U.S. 59; 5 L. Ed. 398; 1822

- For the **law will never construe a possession tortious unless from necessity**.
- On the other hand, it will consider every possession lawful, the commencement and continuance of which, is not proved to be wrongful. And this upon the plain principle, that **every man shall be presumed to act in obedience to his duty**, until the contrary appears.
- When, therefore, a naked possession is in proof, unaccompanied by evidence, as to its origin, it will be deemed lawful

Doctrine of Presumed Grant: U.S. (2)

Ricard v. Williams: 20 U.S. 59; 5 L. Ed. 398; 1822

- The **doctrine, as to presumptions of grants**, has been gone into largely, on the argument, and the general correctness of the **reasoning is not denied**.
- There is **no difference** in the doctrine, whether the grant relate to **corporeal or incorporeal** hereditaments.
- A grant of land may as well be presumed, as a grant of a fishery, or of common, or of a way.
- Presumptions of this nature are adopted from the **general infirmity of human nature**, the **difficulty of preserving muniments of title,** and the public policy of supporting long and uninterrupted possessions.

Doctrine of Presumed Grant: U.S.

Fletcher v. Fuller: (1)

120 U.S. 534; 7 S. Ct. 667; 30 L. Ed. 759; 1887

- **When, therefore, possession and use are long continued, they create a presumption of lawful origin, that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property.**
- It may be, in point of fact, that permission to occupy and use was **given orally**, or upon a **contract of sale**,
- with **promise of a future conveyance, which parties have subsequently neglected to obtain,** or the conveyance executed may not have been acknowledged, so as to be recorded, or **may have been mislaid or lost. Many circumstances may prevent the execution of a deed**

Doctrine of Presumed Grant: (1)

U.S.A. V. Fullard-Leo: 331 U.S. 256 (1947)

- Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American law …
- …that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure*, **wherever, by possibility, a right may be acquired in any manner known to the law."**

Doctrine of Presumed Grant: (2)

U.S.A. V. Fullard-Leo: 331 U.S. 256 (1947)

- In order for the doctrine of a lost grant to be applicable, the **possession must be under a claim of right, actual, open and exclusive.**
- A chain of conveyances is important. So is the payment of taxes.
- **A claim for government lands stands upon no different principle in theory** so long as authority exists in government officials to execute the patent, grant or conveyance.
- As a practical matter it requires a higher degree of proof because of the difficulty for a state to protect its lands from use by those without right.

Penn: Lost Grant Theory: (1)

Wilson v. Stoner, 9 Serg. & Rawle 39 (1822)

- Presumptions from length of time are those which the law makes without regard to what may have been the actual state of the fact., They are conclusions of law, not of fact; and neither the court nor the jury is, supposed to believe what they take to be conclusively established as true.
- The particular circumstances of possession and length of time are to be determined by the jury; but the inference from them is for the court.

Penn: Lost Grant Theory: (2)

Wilson v. Stoner, 9 Serg. & Rawle 39 (1822)

- This principle of decision is had recourse to from necessity, because, from the remoteness of the period of the supposed transaction there is no means of ascertaining the actual state of the fact; and it therefore holds in judging only of things which belong to antiquity.
- In England a grant may be presumed against the Crown; but less readily than against an individual.
- In this state, from the very nature of our land titles, the reason of this difference holds with additional force.

Penn: Lost Grant Theory: (1)

Mertz v. Dorney, 25 Pa. 519 (1855)

- The presumption of grant arising upon the lapse of time applied to the land actually flooded, and not to the height of the dam.
- If therefore the plaintiff 's land was flooded by means of the repairs to the dam to a greater extent than it had been for a period of twenty-one years, the defendant was liable for the injury, although the height of the dam may not have been increased.

Penn: Lost Grant Theory: (1)

Donegal Twp. School Dist. v. Crosby
178 Pa. Super. 30 (1955)

- Subsequent to the date of John's will but prior to his death, probably in 1889 or 1890, the plaintiff school district came into possession of a one acre plot out of the 85 acre farm devised by John to George, built a school building thereon and continued to use it for school purposes until 1945.
- Thereafter the school was closed, and the pupils transported to another building at another location. On August 28, 1948 the school board decided to sell the plot. Prior to the sale, however, defendant took possession of the land and padlocked the building claiming that the plot belonged to her.

Penn: Lost Grant Theory: (2)

Donegal Twp. School Dist. v. Crosby
178 Pa. Super. 30 (1955)

- Since the early days of the Commonwealth the doctrine of a presumptive grant has been recognized and sustained by our courts.
- This doctrine provides that after a great lapse of time and a series of circumstances disclosing the enjoyment of an unchallenged title during such period, the courts will presume whatever grant may be necessary to quiet the title.

Penn: Lost Grant Theory: (3)

Donegal Twp. School Dist. v. Crosby
178 Pa. Super. 30 (1955)

- "The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society."
- It is founded in necessity.
- In Garrett v. Jackson, 20 Pa. 331, 335 (1853) it was said: "…where one uses an easement whenever he sees fit, without asking leave, and without objection, it is adverse, and an uninterrupted adverse enjoyment for twenty-one years is a title which cannot be after- wards disputed.

Penn: Lost Grant Theory: (4)

Donegal Twp. School Dist. v. Crosby
178 Pa. Super. 30 (1955)

- Such enjoyment, without evidence to explain how it began, is presumed to have been in pursuance of a full and unqualified grant.
- The owner of the land has the burden of proving that the use of the easement was under some license, indulgence, or special contract inconsistent with a claim of right by the other party."

Penn: Lost Grant vs. Eminent Domain: (4)

Donegal Twp. School Dist. v. Crosby
178 Pa. Super. 30 (1955)

- There is authority for the proposition that where the right of eminent domain exists in a corporation it cannot claim by adverse possession.
- This is on the theory that a corporation when it takes possession of land does not do so as a willful trespasser, whose trespass may grow into a title, but under its power of eminent domain.
- It does not follow, however, that the doctrine of presumptive grant cannot be applied to any school dis- trict property obtained between 1867 and 1911.

Modern Prescriptive Easement Principles

Penn. : Prescriptive Easements (1)

McNaughton v. Midpenn:
2009 PA Super 173; 981 A.2d 222; 2009

- A prescriptive easement is a **right to use another's property** which is not inconsistent with the owner's rights and which is acquired by a **use that is open, notorious, and uninterrupted for a period of 21 years**.
- As we indicated in Soderberg, a prescriptive easement "differs markedly from an express grant easement, because the prescriptive easement is not fixed by agreement between the parties or their predecessors in interest."

Penn. : Prescriptive Easements (1)

Slice & Hook v. Fairways Golf:
DKT. No. 2011-04043 (2014)

- In order to find the existence of a prescriptive easement, the jury must have concluded that there was
- "clear and positive" evidence of
- open, notorious,
- continuous, uninterrupted,
- adverse, and hostile use…
- …for 21 years of the property in question.

Penn: Confusion: Prescriptive Way: (1)

Donahue v. Punxsutawney Borough,
298 Pa. 77 (1929)

- Furthermore, the evidence was wholly insufficient to establish a claim by prescription.
- This alleged seventy-nine feet extension of Water Street by prescription, began at a gate and ended at a board fence, in which was a gate or bars.
- It ended at the line of the Davis land and so far as shown the only use made of it was to reach his property or possibly that of the plaintiff, except on two occasions to reclaim some lumber carried down the creek in times of flood.

Penn: Limits of Prescriptive Way: (2)

Donahue v. Punxsutawney Borough,
298 Pa. 77 (1929)

- The only evidence of a road on the ground was wagon tracks.
- It was never improved as a highway, had neither ditch, turnpike, nor fence, and that it was ever used at a greater width than for one wagon does not appear.
- Merely crossing a lot in going to and from a private residence, without more, would not create a public street by prescription; at most it would be evidence of a private right-of-way.

Penn: Limits of Prescriptive Way: (3)

Donahue v. Punxsutawney Borough,
298 Pa. 77 (1929)

- Moreover, this was not the only way by which the Davis property could be approached.
- To claim a public highway of the width of fifty feet, under such circumstances, is unthinkable.
- A way by prescription, whether public or private, can never be wider than that used on the ground.

Penn: Limits of Prescriptive Way: (4)

Donahue v. Punxsutawney Borough,
298 Pa. 77 (1929)

- "If the right to the way depends solely upon user, then the width of the way and the extent of the servitude is measured by the character of the user, for the easement can not be broader than the user": *Elliott on Roads and Streets, page 136.*
- This differs from a highway by dedication which may be of the full width dedicated although only a part is presently opened to public use:

NJ – Tax Sale and Prescriptive Easement (1)

Chelsea Laundry v. Toscano:
14 N.J. Super. 496; 82 A.2d 473; 1951

- I find as a fact that the use of the alley by plaintiff or its predecessors … was open, continued, notorious and adverse for upwards of 20 years.
- **The tax sale foreclosure by the City of Atlantic City did not serve to extinguish that easement.** The easement was appurtenant to the plaintiff's dominant tenement.
- In a foreclosure of a tax sale certificate against the servient tenant, such an easement cannot be extinguished even though the holder of the dominant tenement is joined as a defendant.

NJ – Tax Sale and Prescriptive Easement (2)

Chelsea Laundry v. Toscano:
14 N.J. Super. 496; 82 A.2d 473; 1951

- A tax sale certificate is not an outright conveyance. It creates nothing more than a lien on the premises sold.
- A tax sale does not operate as a final and irrevocable divestiture of the title of the owners of the land. It merely vests the purchaser with an inchoate right or interest, subject to a statutory right of redemption.
- Only upon a proceeding under the statute or a strict foreclosure in the Superior Court are the original owners of the fee and the holder of a tax sale certificate barred and divested of title.

NJ – Tax Sale and Prescriptive Easement (3)

Chelsea Laundry v. Toscano:
14 N.J. Super. 496; 82 A.2d 473; 1951

- It follows, therefore, that adverse possession and user will run during the period that the City of Atlantic City held the tax sale certificate and prior to its final decree in the foreclosure.

NM: Where is the Prescriptive Easement? (1)

Maloney v. Wreyford:
111 N.M. 221; 1990-NMCA-124; 804 P.2d 412; 1990

- The general rule is that the prescriptive right encompasses only the portion of the servient estate actually used.
- …**the extent of a prescriptive easement is established by its historical usage.**
- **the character and extent of prescriptive easements are determined by the use under which the easement was acquired**

New Mexico: Width of a Prescriptive Way? (1)

State v. Baxter:
107 N.M. 315; 1988

- Historically, the Old Bishop's Lodge Road was used as a means of reaching Archbishop Lamy's retreat and chapel.
- In 1919, the road became State Road 22. The road became a public highway by means of prescription.
- A public highway can be established by use of the general public continued for the length of time necessary to create a right of prescription if the use had been by an individual; …
- *[KK note: continued next slide]*

New Mexico: Width of a Prescriptive Way? (2)

State v. Baxter:
107 N.M. 315; 1988

- … this use is sufficient to create a public highway by prescription, provided that the use is **open, uninterrupted, peaceable, notorious, adverse, under a claim of right and continued for a period of ten years with the knowledge, or imputed knowledge of the owner.**
- The problem with public highways established by prescription is that ***questions arise concerning the width of the highway.***

New Mexico: Width of a Prescriptive Way? (3)

State v. Baxter:
107 N.M. 315; 1988

- The rule regarding the width of the highway generally follows the rule of the extent of an easement by prescription.
- The majority rule, as it relates to public highways acquired by prescription, is that where the public has acquired a right by use, **the right is not limited to the width of the beaten path,** …
- …**but is the width reasonably necessary for public travel.**

New Mexico: Width of a Prescriptive Way? (4)

State v. Baxter:
107 N.M. 315; 1988

- When Old Bishop's Lodge Road became a state highway, no width was specifically stated. The Egolfs argued and the court found that because no width was stated, the width was 60 feet.
- This argument was based on NMSA 1978,
- ***Section 67-5-2, which stated that all public highways laid out in this state shall be 60 feet in width.***

New Mexico: Width of a Prescriptive Way? (5)

State v. Baxter:
107 N.M. 315; 1988

- The width requirement of the statute should not be applied in this case because the highway was established by means of prescriptive use.
- ***Where a highway is established by prescription, the statutory width does not apply.***
- The statutory width does not apply because the highway was established by use, not by statutory authority.
- *This road was established by prescription and there was no evidence that it has ever been wider than 18 feet.*
- Therefore, the Egolfs can only be abutters where their property is within 9 feet of the center line.

How to Interrupt a Prescriptive Easement Claim

Difficult Standard of Interruption: NC (1)

Concerned Citizens v. State: 329 N.C. 37; 404 S.E.2d 677; 1991

- The fact that the barricades placed by the defendant may have discouraged the use of the pathway by a few members of the public or even suspended its use very briefly by the entire public does not destroy the public's continuity of use for the period necessary to establish its right by prescriptive use.
- To effectively defeat a prescriptive right, an interruption of the use must be accompanied by some act of the owner which prevents the use of the easement.
- A "substantial" interruption during the period of use will defeat the plaintiffs' claim to the prescriptive easement.

The More Common Standard : S.C. (1)

Pittman v. Lowther:
363 S.C. 47; 610 S.E.2d 479; 2005

- We decline to adopt the analysis applied by the North Carolina Supreme Court and conclude a more reasoned approach was articulated by the Oregon Court of Appeals in *Garrett v. Mueller, 144 Ore. App. 330, 927 P.2d 612 (Or. App. 1996).*
- The **court embraced the opinion of Justice Oliver Wendell Holmes Jr.,** who stated the following in determining what a landowner must do to interrupt prescriptive use.

The More Common Standard : S.C. (2)

Pittman v. Lowther:
363 S.C. 47; 610 S.E.2d 479; 2005

- A landowner . . . is not required to battle successfully for his rights. It is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action.
- Such an assertion interrupts the would-be dominant owner's impression of acquiescence, and the growth in his mind of a fixed association of ideas;
- or, if the principle of prescription be attributed solely to the acquiescence of the servient owner, it shows that acquiescence was not a fact.

The More Common Standard : S.C. (3)

Pittman v. Lowther:
363 S.C. 47; 610 S.E.2d 479; 2005

- We conclude actions are sufficient to interrupt the prescriptive period when the servient landowner engages in overt acts, such as erecting physical barriers, which cause a discontinuance of the dominant landowner's use of the land, no matter how brief.
- In addition to physical barriers, verbal threats which convey to the dominant landowner the impression the servient landowner does not acquiesce in the use of the land, are also sufficient to interrupt the prescriptive period.

Penn: Woodland Exception: (1)
Baptist Church v. Urquhart, 406 Pa. 620 (1962)

- In Trexler, an easement by prescription was claimed by Trexler to nse a road over the lands of Lutz, partly over his fields and partly over his unenclosed woodland to the contiguous woodland of Trexler's.
- The Act of April 25, 1850, P. L. 569, §21, 68 PS §411, provides that a right of way through a woodland cannot be acquired by prescription.
- In holding that the right of way fell, the Superior Court stated, at 27, 28:...

Penn: Woodland Exception: (2)
Baptist Church v. Urquhart, 406 Pa. 620 (1962)

- "We agree with the court below that the right of way stands or falls as a whole. ...The use limits the servitude; the servitude failing because of the statutory non-effect of the use over defendants' woodland, it is plain that the entire and sole object of the servitude is unat- tained and unattainable.
- Therefore, no easement can remain such as would begin at the highway, cross defendants' fields, and terminate at the entrance point from defendants' fields to defendants' woodland.
- Such a right of way was never contemplated or created.'"

Penn: Prescriptive Easement on Woodlot?: (1)
Baptist Church v. Urquhart, 406 Pa. 620 (1962)

- On appeal, WLCI argues for the first time that the Township is statutorily foreclosed from acquiring an easement by prescription in Cemetery Road pursuant to Section 21 of the Act of 1850 (Act) because the Property is unenclosed woodlands. This provision of the Act states:
- *No right of way shall be hereafter acquired by user, where such way passes through unenclosed [sic] woodland; but on clearing such woodland, the owner or owners thereof shall be at liberty to enclose the same, as if no such way had been used through the same before such clearing or enclosure*... 68 P.S. § 411.

Penn: Prescriptive Easement on Woodlot?: (2)
Baptist Church v. Urquhart, 406 Pa. 620 (1962)

- This statute **applies equally to private and public prescriptive easements,**
- ... and "the character of the land itself, is determinative of the application of the Act of 1850."
- Our Supreme Court has held that **"the, act [of 1850]** ... **admits of but one meaning, viz. that a right by prescription to a road through unenclosed woodland cannot be obtained."** *Minteer v. Wolfe, 300 Pa.Super. 234, 446 A.2d 316, 320-21 (1982) (quoting Kurtz v. Hoke, 172 Pa. 165; 33 A. 549, 550 (1896)).*

Adverse Possession can Extinguish an Easement

Penn. : Extinguished by Adverse Use (1)
Nauman v. Kopf:
101 Pa. Super. 262; 1930

- There is no prescription nor presumption from mere non-user of a servitude. Nothing less than an absolute denial of the right, followed by an enjoyment inconsistent with its existence for twenty-one years, can amount to an extinguishment:
- It is well established that a mere non-user does not constitute a release of the servient tenement from a legally imposed obligation:

Penn. : Extinguished by Adverse Use (2)

Nauman v. Kopf:
101 Pa. Super. 262; 1930

- If, however, the **actual control is notoriously adverse, and continues for a sufficient period of time, the easement created may be extinguished."**
- "'When one uses an easement whenever he sees fit without asking leave or without objection, the use is adverse; and an adverse enjoyment for twenty-one years gives an indisputable title to the enjoyment':
- So, **one who obstructs a way, if such action is continued for a sufficient time, will defeat the right of the dominant owner:**

Rights by Custom

Scalia Dissent: S.C.O.T.U.S decision (1)

Stevens v. Cannon Beach:
510 U.S. 1207 (1994)

- The most cogent basis for the decision in this case is the English doctrine of custom.
- Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation.
- An established custom, on the other hand, can be proven with reference to a larger region.

7 Elements for Right by Custom: (2)

Stevens v. Cannon Beach:
510 U.S. 1207 (1994)

- The Supreme Court of Oregon described the English doctrine of custom as applying to land used in a certain manner
- (1) so long that the mind runneth not to the contrary;
- (2) without interruption;
- (3) peaceably;
- (4) where the public use has been appropriate to the land and the usages of the community;

7 Elements for Right by Custom: (3)

Stevens v. Cannon Beach:
510 U.S. 1207 (1994)

- (5) where the boundary is certain;
- (6) where the custom is obligatory (not left up to individual landowners as to whether they will recognize the public's right to access); and
- (7) where the custom is not repugnant to or inconsistent with other customs or laws.

- *Or so it seemed until 1989.*
- That year, the Supreme Court of Oregon revisited the issue of dry-sand beach in the case of McDonald v. Halvorson, 308 Ore. 340, 780 P.2d 714 (1989).

Is Custom a "Taking"?: (4)

Stevens v. Cannon Beach:
510 U.S. 1207 (1994)

- "Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."
- The court held that the doctrine of custom was just such a background principle of Oregon property law, and that petitioners never had the property interests that they claim were taken by respondents' decisions and regulations.

Is Custom a "Taking"?: (5)

Stevens v. Cannon Beach:
510 U.S. 1207 (1994)

- "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."
- if it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking.
- To say that this case raises a serious Fifth Amendment takings issue is an understatement.

Back to Blackstone's Commentaries: (6)

Stevens v. Cannon Beach:
510 U.S. 1207 (1994)

- In *Thornton,* the Supreme Court of Oregon appears to have misread Blackstone in applying the law of custom to the entire Oregon coast. *"Customs …affect only the inhabitants of particular districts." 1 W. Blackstone, Commentaries*
- *"Customs must in their nature be confined to individuals of a particular description [and not to all inhabitants of England], and what is common to all mankind, can never be claimed as a custom"*

Maine – a different perspective: (1)

Almeder v. Town of Kennebunkport:
106 A.3d 1099; 2014

- Robert F. Almeder and twenty-eight other owners of property fronting Goose Rocks Beach in Kennebunkport (the Beachfront Owners) **appeal from a decision of the Superior Court** (York County, Brennan, J.) awarding the public a recreational easement over both the intertidal and dry sand portions of the Beach.
- The Beachfront Owners *argue that the court erred* in (1) permitting the State and neighboring landowners to intervene, **(2) awarding a prescriptive easement and an easement by custom** to the public users of the beach

Maine: evidence of custom: (2)

Almeder v. Town of Kennebunkport:
106 A.3d 1099; 2014

- The Town began imposing regulations on the use of the Beach in the 1700s, including some regarding livestock, clamming, and seaweed harvesting.
- More recently, the Town has established regulations concerning dogs and fires on the Beach and parking near the Beach.
- From the 1950s to the 1990s, the Town provided lifeguard service for the Beach;
- The Town has also **used its funds to promote the Beach to tourists** and to provide bus service to and supervision for children at the Beach during the summers.

Maine: Lower court ruling vacated: (3)

Almeder v. Town of Kennebunkport:
106 A.3d 1099; 2014

- On these facts, the court determined that the Town, the Backlot Owners, and the public enjoy a public prescriptive easement as well as an easement by custom to engage in general recreational activities on both the wet and dry sand portions of the entire Beach…
- **We also vacate the court's award of an easement by custom over the Beach.**
- **Custom** was developed in English common law to account for usage that ***"lasted from time immemorial, without interruption and as a right," and that was "reasonable, certain, peaceably enjoyed and consistent with other customs and laws."***

Maine: Custom a "Dead Doctrine?": (4)

Almeder v. Town of Kennebunkport:
106 A.3d 1099; 2014

- **It is "largely a dead doctrine in the United States"** because "[i]t has been argued that **no American custom could have lasted long enough to be immemorial**, and that we have established methods for claiming and recording rights in land" that no longer necessitate employment of the doctrine.
- Although presented with several opportunities to do so through almost two hundred years of land use litigation, we have never recognized an easement by custom as a viable cause of action in Maine.

NJ – Right by Custom (1)
Albright v. Cortright:
64 N.J.L. 330; 45 A. 634; 1900

- Nor could he, as one of the public, acquire this profitable right by custom. In the first place, a common law custom, as distinguished from a usage of trade, must be immemorial, and this, in New Jersey, is impossible.
- "A prescription," says Lord Coke, "always is alleged in the person." ..."Prescription," says Sir William Blackstone, "is merely a personal usage

NY: Custom vs. Prescription: (1)
Gillies v. Orienta Beach Club
159 Misc. 675; 289 N.Y.S. 733; 1935

- The plaintiffs allege that for more than fifty years by a custom and usage the inhabitants of Orienta Point have used and enjoyed the parcel of land in question for access to Long Island Sound, for beach bathing and boating purposes.
- It is further alleged that by virtue thereof the plaintiffs are entitled to the enjoyment of a customary right in the nature of an easement.

NY: Three types of Early English Law: (2)
Gillies v. Orienta Beach Club
159 Misc. 675; 289 N.Y.S. 733; 1935

- "The Law of England, according to Lord Coke, forms a triangle:
- one side of which is the common law, extending to and over the whole Kingdom;
- another side is the statute law, enacted by Parliament for the government either of the whole community, or of such parts and portions of it as in their wisdom the exigencies of the nation require;
- and the third side is formed of the customs, repugnant to the common law and beyond it, and which are applicable to particular communities of individuals."

NY: Presumpton of Governmental Act: (3)
Gillies v. Orienta Beach Club
159 Misc. 675; 289 N.Y.S. 733; 1935

- "A custom can only exist in favor of the community of a town, village or hamlet, &c. and must be pleaded; and...
- ... because the claimants have been in the immemorial use of the right claimed, the legal presumption in England is, that those customs were originally based upon and created by act of Parliament; although not by that body as it is now constituted."

NY: Custom vs. Prescription: (4)
Gillies v. Orienta Beach Club
159 Misc. 675; 289 N.Y.S. 733; 1935

- Blackstone says: "And, first, the distinction between custom and prescription is this: that custom is properly a local usage, and not annexed to any person...
- prescription is merely a *personal* usage; as, that Sempronius, and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege.

NY: Custom vs. Prescription: (5)
Gillies v. Orienta Beach Club
159 Misc. 675; 289 N.Y.S. 733; 1935

- Reeves in his Treatise on the Law of Real Property (pp. 219, 192, 219-220) makes the following reference:
- "**"Custom is distinguished from prescription** in that the former is a mere local usage, not annexed to any particular person, but belonging to the community rather than to its individuals, while the latter is a personal usage or enjoyment confined to the claimant and his ancestors or those whose estate he has acquired.'"

NY: More than 20 years required: (6)

Gillies v. Orienta Beach Club
159 Misc. 675; 289 N.Y.S. 733; 1935

- "Thus, a privilege for the inhabitants of a certain town or parish to dance and play games on a particular piece of land may grow out of a custom immemorially continued
- …but if the owner of a lot of land has a right of way over his neighbor's field because he, or he and his grantors, have walked across it for many years, he is the owner of an easement founded on prescription."
- Custom, moreover, is an outcome of **immemorial usage**, and will not ordinarily result from proof of twenty years of adverse enjoyment.

NY: Easement or Quasi Easement?: (7)

Gillies v. Orienta Beach Club
159 Misc. 675; 289 N.Y.S. 733; 1935

- "Rights in the nature of easements may have their basis in local or particular custom; **but rights arising by custom are not true easements.**
- ***Quasi easements founded on custom appertain to many as a class,*** and not as grantees, nor do such rights require the existence of a dominant tenement.
- A right of way by custom appertains to a certain district of territory, but not to any particular tenement forming part of that territory.

NY: Easement or Quasi Easement?: (8)

Gillies v. Orienta Beach Club
159 Misc. 675; 289 N.Y.S. 733; 1935

- Where, however, rights capable of being the subject of grant as true easements are claimed by custom as belonging to those entitled in respect of their estates, no essential of a true easement is lacking, except that the origin of the right is custom, and not grant or prescription.
- Rights of a character not allowable as easements may be claimed by custom, but a right in the nature of a profit *a prendre* cannot exist by custom."

NY: Custom in the New World: (9)

Gillies v. Orienta Beach Club
159 Misc. 675; 289 N.Y.S. 733; 1935

- An examination of the texts and authorities elsewhere is of service. Reeves, in his *Treatise on the Law of Real Property (supra)*, says:
- "In a country like this, **where towns and villages are newer and change more rapidly than in England,** while the theory of the creation of servitudes by custom may prevail, …
- …yet the **circumstances which give rise to the above-enumerated requisites rarely occur;** and in many of the United States such rights have never been held to have been called into existence."

NY: Connecticut Rejected Custom: (10)

Gillies v. Orienta Beach Club
159 Misc. 675; 289 N.Y.S. 733; 1935

- The political and legal institutions of Connecticut have, from the first, differed in essential particulars from those of England. Feudalism never existed here. There were no manors or manorial rights.
- **A recording system was early set up and has been consistently maintained,** calculated to put on paper, **for perpetual preservation and public knowledge, the sources of all titles** to or incumbrances affecting real estate.
- Nor have we all the political subdivisions of lands which are found in England.

NY: New York rejects Custom: (11)

Gillies v. Orienta Beach Club
159 Misc. 675; 289 N.Y.S. 733; 1935

- A careful reading of the English authorities convinces one that the custom had its origin in the fact that from time immemorial the use had been permitted; that because of the length of time the use had existed **any records of statutes creating the right had been destroyed;** a presumption that the use had been duly authorized was, therefore, created.
- The **necessity for such a fiction does not exist in this State.** England is of the Old World, our State is of the New. Its statutes have not been lost or destroyed. Its recording acts have been in existence since early in its history.

Texas: Easement by Custom (1)

Severance v. Patterson: 370 S.W.3d 705; 2012

- …the **State claims that it is entitled to an easement** on privately owned beachfront property **without meeting the law's requirements for establishing an easement**--a dedication, prescription, or custom.
- Under the common law, the State's right to submerged land, including the wet beach, is firmly established, regardless of the water's incursion onto previously dry land.
- In contrast, the State has provided **no indication** that the common law has given the State an easement that rolls or springs onto property never previously encumbered.

Texas: Open Beaches Act (2)

Severance v. Patterson: 370 S.W.3d 705; 2012

- Indeed, the original, unrestricted transfer by the Republic to private parties leaves little occasion for the argument …
- …that background principles in Texas common law at the inception of this jurisdiction provide a basis for impressing the West Beach area with a public easement, absent appropriate proof.
- The **OBA provides the State with a means of enforcing public rights to use of State-owned beaches** along the Gulf of Mexico and of privately owned beach property along the Gulf of Mexico **where an easement is established in favor of the public by prescription or dedication or where a right of public use exists "by virtue of continuous right in the public since time immemorial**

Texas: Rolling Easements (3)

Severance v. Patterson: 370 S.W.3d 705; 2012

- The **parties do not dispute that no easement has ever been established on the Kennedy Drive property**. A public easement for use of a privately owned parcel seaward of Severance's Kennedy Drive property pre-existed her purchase.
- **Hurricane Rita** devastated the adjacent property burdened by an easement and **moved the line of vegetation landward**. The entirety of the house on Severance's Kennedy Drive property is now seaward of the vegetation line. The State claimed a portion of her property was located on a public beachfront easement and **a portion of her house interfered with the public's use of the dry beach.**

Texas: Rolling Easements (4)

Severance v. Patterson: 370 S.W.3d 705; 2012

- The **OBA declares** the State's public policy to be "free and unrestricted right of ingress and egress" to State-owned beaches and to private beach property to which the public "has acquired" an easement or other right of use to that property.
- …**any beach area**, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico **to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial**, **as recognized in law and custom.**

Texas: Custom recognized (5)

Severance v. Patterson: 370 S.W.3d 705; 2012

- Unlike the West Beach of Galveston Island, these jurisdictions have long-standing restrictions inherent in titles to beach properties or historic customs that impress privately owned beach properties with public rights.
- Our holding does not necessarily preclude a factual finding that an easement exists.
- We have determined that the history of land ownership in West Beach undermines the existence of a public easement "by virtue of continuous right in the public since time immemorial, as recognized in law and custom,"

Easement by Estoppel

Many types of Estoppel: Indiana (4)

Brown v. Branch: 758 N.E.2d 48; 2001

- There are a variety of estoppel doctrines including: estoppel **by record**, estoppel **by deed**,
- **collateral** estoppel, **equitable** estoppel
- **– also referred to as estoppel in pais,**
- **promissory** estoppel, and **judicial** estoppel.
- **All, however, are based on the same underlying principle:** ***one who by deed or conduct has induced another to act in a particular manner will not be permitted to adopt an inconsistent position, attitude, or course of conduct that causes injury to such other.***

Utah: Estoppel is a rule of Equity (1)

Hall v. Peterson:
2017 UT App 226; 853

- If injustice can be avoided only by establishment of a servitude, the owner or occupier of land is estopped to deny the existence of a servitude burdening the land when:
- (1) ***the owner or occupier permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, and the user did substantially change position in reasonable reliance on that belief[.]***

Estoppel: New Mexico (1)

Cauble v. Beals: 96 N.M. 443; 1981

- The essential elements of equitable estoppel as related to the **party estopped** * * * are:
- **(1) conduct which amounts to a false representation or concealment** of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;
- **(2) intention that such conduct shall be acted upon by the other party** * * *; and
- **(3) knowledge, actual or constructive, of the real facts…**

Estoppel: New Mexico (2)

Cauble v. Beals: 96 N.M. 443; 1981

- As related to **[the party] which claims estoppel**, the essentials are:
- (1) **lack of knowledge** and of means of knowledge of the truth as to the facts in question * * *;
- (2) **reliance** upon the conduct of the party estopped * * *; and
- (3) **action** based thereon of such a character as to **change its position prejudicially**.

Estoppel: New Mexico (3)

Cauble v. Beals: 96 N.M. 443; 1981

- …Under the facts of this case as set out above, the application of estoppel was inappropriate. During the period in which Beals constructed improvements along the fence line, **the record owners of Cauble's property were unaware of either the true boundary or the fence line, or both.**
- There is **not a shred of evidence** in the record that Cauble, or any of his predecessors, were guilty of the kind of wrongful conduct which would give rise to an estoppel.

NY: Easement by Estoppel (1)

Katz 737 v. Shapiro:
107 Misc. 2d 127; 433 N.Y.S.2d 543; 1980

- An easement by estoppel may arise if an owner of land,
- …**through specific representations**, …
- …leads another to reasonably **believe a permanent, alienable interest** in real property has been created, …
- …and if in **reliance** on such representations, …
- …the other makes permanent or **valuable improvements** on the land.
- To invoke the doctrine of estoppel, it must be shown that it would be inequitable to allow the owner to interrupt the enjoyment of the easement

Del. – Easement by Estoppel (2)
Hammond v. Dutton:
C.A. No. 696, S.C. (1978)

- I find that the elements required to create an easement by estoppel are here present namely that is
- (1) a representation had been communicated to the promisee;
- (2) that such representation had been believed, and
- (3) that there had been reasonable reliance on such communication,

NJ – Easement by Estoppel (3)
Quigley v. Miller Family Farms:
266 N.J. Super. 283; 629 A.2d 110; 1993

- However, where a finding runs counter to a policy embodied in the Statute of Frauds, and equitable relief is based upon **reasonable reliance on representations of the promisor** -- a form of promissory estoppel --…
- … ***rather than*** on the theory that part performance is a substitute for the requisite writing, proof of such promise, the proofs which establish such conduct and reliance must be of a "clear and convincing" or "clear and unequivocal" quality.

NJ – Part Performance & Estoppel (4)
Quigley v. Miller Family Farms:
266 N.J. Super. 283; 629 A.2d 110; 1993

- A **similarly enhanced evidential standard must be applied** in cases in which it is urged that an estoppel has arisen because the paramount title owner has knowingly and silently permitted a party to spend money on real estate improvements under a mistaken belief that it has a property right.
- Among the classes of cases to which this enhanced proof requirement has been applied are suits to **enforce oral contracts respecting land**, and proceedings to reform or modify written transactions.

NJ – Estoppel Requirements (5)
Quigley v. Miller Family Farms:
266 N.J. Super. 283; 629 A.2d 110; 1993

- Equitable estoppel requires proof of misrepresentation of material facts, or concealment thereof, …
- …known to the party sought to be estopped …
- …and unknown to the party claiming estoppel, …
- …done with the intention or expectation that it will be acted upon by the other party and …
- …upon which the other party reasonably and justifiably relies, to its detriment.

Penn: Extinguished by Estoppel: (3)
Baptist Church v. Urquhart, 406 Pa. 620 (1962)

- The lower court in holding that the appellants' right of way was extinguished by estoppel, relied on 3 Powell, Property, §425, and Restatement, Property §505 (1944), which states: "An easement is extinguished when action is taken by the owner of the servient tenement inconsistent with the continued existence of the easement, if…

Penn: Extinguished by Estoppel: (4)
Baptist Church v. Urquhart, 406 Pa. 620 (1962)

- (a) such action is taken in reasonable reliance upon conduct of the owner of the easement; and
- (b) the owner of the easement might reasonably have foreseen such reliance and the consequent action; and
- (c) the restoration of the privilege of use authorized by the easement would cause unreasonable harm to the owner of the servient tenement."

Penn: Diminished by Estoppel: (5)

Baptist Church v. Urquhart, 406 Pa. 620 (1962)

- It is obvious that if the appellants are permitted to use the full reservation of thirty feet and thereby take some two inches off of the parsonage, or to construct the proposed road within six inches of the parsonage, that an unreasonable harm would fall on the appellee because the parsonage will become uninhabitable.
- So, too, if the appellants were estopped altogether from using their easement over Tract No. 2, it would be an inequitable result, because they gave a substantial amount of land to the appellee as an outright gift, clearly reserving a thirty foot right of way.

Penn: Diminished by Estoppel: (6)

Baptist Church v. Urquhart, 406 Pa. 620 (1962)

- Therefore, after giving careful consideration to the rights and the conduct of the parties, and due weight to the equities involved, we feel that if the appellants are permitted to use only ten feet of the thirty foot right of way furthermost removed from the parsonage, while in its vicinity, coupled with adequate and proper fencing along Tract No. 2 to keep children from straying on the road, that the unreasonable harm to the appellee would cease to exist.

Alternate Theory
Easement by Estoppel

Ohio: Two Theories of Estoppel (1)

Arkes v. Gregg:
2005-Ohio-6369; 2005

- Several Ohio courts, however, recognize the equitable remedy of estoppel to create an easement.
- According to these courts, an easement by estoppel may arise when …
- …an owner of land, without objection, permits another to expend money in reliance upon a supposed easement, …
- …when in justice and equity the former ought to have disclaimed his or her conflicting rights.

Ohio: Two Theories of Estoppel (2)

Arkes v. Gregg:
2005-Ohio-6369; 2005

- An easement by estoppel may also exist in a boundary **strip passageway partly on each owner's premises where adjoining landowners have enjoyed reciprocal use for a long period of time.**
- The party seeking to establish an equitable easement must show
- (1) a misrepresentation or fraudulent failure to speak, and
- (2) reasonable detrimental reliance.
- Courts are generally reluctant, however, to find an easement by estoppel on the basis of passive acquiescence.

Texas: Clarifying Estoppel Doctrine (1)

O'Leary v. Coleman:
No. 13-07-272-CV; TX App. 2008

- The doctrine of easement by estoppel has not been clearly defined and its application depends upon the unique facts of each case.
- **The owner of land may create an easement by a parol agreement or representation which has been so acted on by others as to create an estoppel in pais.**
- As where he has by **parol agreement granted a right of such easement in his land, upon the faith of which the other party has expended moneys** which will be lost and valueless if the right to enjoy such easement is revoked, equity has enjoined the owner of the first estate from preventing the use of it.

Texas: Estoppel and Long Usage (2)

O'Leary v. Coleman:
No. 13-07-272-CV; TX App. 2008

- An **easement by estoppel may also exist in a passageway over a boundary strip as a result of longstanding reciprocal use** of the strip by the adjoining owners as a passageway.
- In order to create an easement by estoppel, the following elements must exist: (1) a representation was communicated, either by words or action, to the promisee; (2) the communication was believed; and (3) the promisee relied on the communication.
- An easement by estoppel is binding on the successors in title to the servient estate if reliance upon the existing easement continues.

Hawai'i: Reciprocal Estoppel (1)

Tanaka v. Mitsunaga:
43 Haw. 119; 1959

- 17A Am. Jur., Easements, 21, that
- "it has been held that an easement may be created by estoppel where a vendor represents to a purchaser that an easement exists in favor of the premises proposed to be sold over the vendor's other real property, but the conveyance subsequently made does not mention such easement,"
- and that an ***"easement by estoppel has been held to exist in a passageway over a boundary strip as a result of the reciprocal use of the strip by the adjoining owners as a passageway for a long period of time."***

Wyoming: Estoppel doesn't fix everything (1)

Carstensen v. Brown:
32 Wyo. 491; 236 P. 517 (1925)

- …**where both parties are ignorant thereof and have an equal opportunity to know the facts, no estoppel arises.**
- It may be said however, in this connection, that in many states long acquiescence is accepted as a substitute for knowledge of the facts, and an estoppel may arise in cases of mistake by acquiescence, in connection with a change of situation.

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Odd Dispute: Hunt Club Firing On To Neighbors Land

Penn: Easement for Hunt Club: (1)

DiGirolamo v. Philadelphia Gun Club
371 Pa. 40 (1952)

- The shooting facilities and traps of the club are so arranged that portions of the shot fired at birds released during a meet, carry beyond the limits of the club property and fall on plaintiff's land, some 280 feet from the shooting stand.
- Plaintiff operates a farm on this property and employs four or five men to raise green stuffs for market.
- As a result of the shooting by the members of defendant club and their guests, some of plaintiff's produce has been damaged and rendered less marketable and his employes have been forced to seek shelter while the shooting was in progress.

Penn: Easement for Hunt Club: (2)

DiGirolamo v. Philadelphia Gun Club
371 Pa. 40 (1952)

- Upon learning of it he immediately registered his complaint and eventually entered into a yearly lease with defendant from 1937 to 1946, whereby plaintiff, for a specified sum, granted to defendant the right to shoot over his land.
- Defendant sought thereafter to renew that lease but plaintiff refused.
- In spite of that, defendant continued holding its matches until enjoined by the court below.

Penn: How High do You Own??: (3)

DiGirolamo v. Philadelphia Gun Club
371 Pa. 40 (1952)

- The ancient rule that the owner of the land owns all of the air space over that land has been modified slightly by The Aeronautical Code of May 25, 1933, P. L. 1001, §401 so that it extends ". . . only so far as is necessary to the enjoyment of the use of the surface without interference . . ." That the passage of the shot- gun pellets through the air over plaintiff's land does interfere with his enjoyment of his land cannot be questioned…

Penn: Prescriptive Right to Shoot: (4)

DiGirolamo v. Philadelphia Gun Club
371 Pa. 40 (1952)

- It is equally apparent that defendant has acquired no right to shoot over and onto plaintiff's land since he has entered into possession.
- It is defendant's contention, however, that because it has been so conducting shoot- ing meets on this site uninterruptedly for over 21 years since 1895, it has granted as easement by prescription to shoot through the air onto plaintiff's land.

Penn: Prescriptive Right to Shoot: (5)

DiGirolamo v. Philadelphia Gun Club
371 Pa. 40 (1952)

- While the shots fired by the defendant's members and guests may have resounded through the air and been heard throughout the neighborhood or vicinity of the defendant's club, and served as notice to the neighbors of shooting upon its premises, there was nothing to indicate the direction in which these shots were being fired.
- Moreover, it was impossible for anyone to have seen in which direction they were fired…

Penn: Prescriptive Right to Shoot: (6)

DiGirolamo v. Philadelphia Gun Club
371 Pa. 40 (1952)

- Unlike the adverse use of rights of way, artificial watercourses, drains, eavesdrips, rainspouts discharging water on another's premises, and other similar visible, notorious and continuous uses of another's property, from which knowledge of such use could be readily inferred and imputed to the owners of the servient premises, there was no such visible and notorious use of the plaintiff's premises as to have put his predecessors in title on notice, so as to charge them with knowledge and acquiescence of the right and privilege claimed by the club members and guests to use such premises as a shooting range."

Penn: Estoppel & Hunt Club: (7)

DiGirolamo v. Philadelphia Gun Club
371 Pa. 40 (1952)

- Defendant also contends that it has gained an easement by estoppel. This is grounded on the fact that defendant expended considerable sums of money improving its premises between 1934 and 1947, including the erection of a twelve foot high fence.
- The latter was erected after defendant received a letter from plaintiff's counsel in 1947 in which he stated that he believed plaintiff would renew the lease if the fence were erected. Most of those improvements were made while the leases were operating and others were made in order to induce plaintiff to enter into a new lease in 1947.

Penn: Estoppel & Hunt Club: (8)

DiGirolamo v. Philadelphia Gun Club
371 Pa. 40 (1952)

- Those which were made prior to the first lease in 1937 were made at a time when plaintiff was protesting against defendant's shooting activities. Certainly then, it cannot be said that plaintiff stood by and allowed defendant to make the improvements in reliance on his inactivity. On the contrary, defendant knew or should have known that it was acting at the risk of having plaintiff refuse to renew its lease at any time.
- As a matter of law defendant did not establish an easement by description to shoot over plaintiff's. premises and as a matter of proof it failed to establish such an easement by estoppel.

In Closing…
Moving or Relocating Existing Easements

Penn. : Moving Prescriptive Easements (2)

McNaughton v. Midpenn:
2009 PA Super 173; 981 A.2d 222; 2009

- In affirming the trial court's decision, this Court began by recognizing the general rule that "easements may not be modified, changed, altered, or relocated without the consent of both the dominant and servient estates."
- We also acknowledged, however, that prior cases had not established a "per se prohibition" against the unilateral relocation of a prescriptive easement by the owner of a servient estate.

Penn. : Moving Prescriptive Easements (3)

McNaughton v. Midpenn:
2009 PA Super 173; 981 A.2d 222; 2009

- In ***Soderberg***, this Court adopted the latter approach, stating that "we hold that **a court may compel relocation of an easement if that relocation would not substantially interfere with the easement holder's use and enjoyment of the right of way and it advances the interests of justice."**
- We did so to avoid inconsistent results, as the owner of a servient estate could unilaterally relocate an easement without concern that the court would order its return to the original location, but the same owner could not seek relocation of the easement to a new location through judicial proceedings.

NY: Re-locating Easements – Minority view (3)

Lewis v. Young:
705 N.E.2d 649; 682 N.Y.S.2d 657; 1998

- Thus, in the absence of a demonstrated intent to provide otherwise, a landowner burdened by an express easement of ingress and egress may narrow it, cover it over, gate it or fence it off, so long as the easement holder's right of passage is not impaired…
- As a matter of policy, affording the landowner this unilateral, but limited, authority to alter a right of way strikes a balance between the landowner's right to use and enjoy the property and the easement holder's right of ingress and egress…

Del. – Moving an Easement (1)

Edgell v. O'Toole:
402 A.2d 395; 1979

- Lastly, the plaintiffs contend that the easements should be relocated as an alternative to extinguishing them in order to prevent irreparable damage to their use of their land.
- The question, therefore, is whether the holder of the servient estate can have easements relocated, over the objection of the dominant estate, simply because the location and use have become inconvenient to the use and enjoyment of the servient estate.
- **The general rule is well established that an easement may not be relocated without the consent of the owners of both the dominant and servient estates.**

Questions?