

A. Easements

a. Express Easements: Classification & Manner of Creation

i. Possessory v. Non-Possessory Interests**

- *Possessory*: Interest owner has a present or potential right to real property
- *Non-Possessory*: Interest owner has certain rights in real property possessed by **another person**. (e.g., servitudes)

ii. Servitudes

- Type of **non-possessory** interests that refers to land owned or possessed by one party that serves another.
 - ◆ Examples of servitudes:
 - ◇ *Easements*
 - ◇ Promissory Servitudes:
 - ◇ Equitable servitudes/Restrictive covenant/Negative covenant (synonymous)
 - ◇ Profit
 - ◇ License
- **Obligation & Benefit of a servitude "run w/the land"**

iii. Easements (Restatement):

- An interest in land in the possession of another which:
 - ◆ Entitles the owner of such interest to a **limited use or enjoyment** of the land
 - ◆ Entitles him to **protection against third persons from interference of use or enjoyment**
 - ◆ Is NOT subject to the **will of the possessor of the land**
 - ◆ Is NOT a **normal incident of possession of any land possessed by the owner of the interest**; and
 - ◆ Is **capable of creation by conveyance**

iv. Affirmative Easement:

- Holder of an easement has **the right to do things on the servient estate** which, were it not for the easement, should would not be permitted to do.
 - ◆ No affirmative act by owner of the servient estate required.
 - ◆ Question: *What can the person do on the land?*

v. Negative Easement (i.e., "Restrictive Covenant"):

- Holder of easement may, by virtue of the easement, **prevent the possessor of the servient estate from performing acts upon the land that he would otherwise have a legal right to perform**.
- **NOTE**: Neither affirmative nor negative easements authorize an affirmative action by the owner of the servient estate.
 - ◆ **Servient owner merely refrains from interfering w/the rights of the dominant estate (easement holder).**

vi. **Appurtenant**

- Easements that attach to and **benefit the DOMINANT ESTATE.**
- **PRESUMED b/c:**
 1. It is **reasonable to assume** that the questioned easement was also intended (unless contrary evidence exists)
 2. Presumption **protects the grantee** of that estate for failing to include a separate grant of an easement w/a grant of the fee
 3. Any **detriment** to the servient estate is **offset by a benefit to the dominant estate.**

vii. **In Gross**

- Do NOT ATTACH to and benefit a land; may be PERSONAL to the easement owner
 - ◆ Common in American law to have affirmative easements in gross
 - ◆ Assumption is you cannot assign easements in gross.

viii. **Creating Express Easements**

- **"RESERVING" or "Granting" = Easement:**
 - ◆ Grantor retains a NEWLY created easement, while the grantee receives a fee interest in the rest of the property.
- **"EXCEPTING" = FEE:**
 - ◆ Grantor excepts a PRE-EXISTING interest in a described geographical part of the property, which he or she ***continues to own in fee simple***

ix. **Fee v. Easement**

- Courts primarily consider the parties' INTENTIONS to determine whether a fee or an easement was created.
- **FEE:**
 - ◆ High consideration
 - ◆ **Precise description of the property (requires a reasonable certainty of boundaries)**
 - ◆ Very certain statement of intent
 - ◆ No reference to a "right of way" in the language
 - ◆ **Virtually no restrictions**
- **EASEMENT:**
 - ◆ When terms "*over and across*" are used in conjunction w/a **restriction of the use as a right of way**. It is considered to be that an easement was intended
 - ◆ Uncertainty of the eventual "location" of land
 - ◇ "Gates/fences" don't usually matter
 - ◇ ROADWAYS are usually considered easements
 - ◆ **Strips of land (interferes as a public policy w/the productivity of the larger parcel)**
 - ◆ Subject to restrictions
 - ◆ Past use by grantor

b. Express Easements: Interpretation & Extent

i. **Intent**

- *Court's primary consideration: **Parties' intent wrt the purpose of the easement.**

ii. **Determining Rights**

1. **Language**

2. **Circumstances**

- ◆ Granted or reserved?
- ◆ Consideration
- ◆ Prior use
- ◆ Conduct of the parties

3. **Ambiguous easement length, width, and location**

- ◆ If no specified L, W, and location, easement is construed to extend only over much of an area that is ***reasonably necessary*** to effect the purpose of the easement.

4. **Changes in types, frequency, and intensity of use**

- ◆ General rule: A party may not use an easement for purposes that differ from or exceed those originally authorized --> trespass.
- ◆ ***However, courts must determine whether a new use of an easement would have been contemplated by the parties when creating the express easement, especially as conditions evolve, technology advances, or the easement holder's activities change.***
- ◆ ***Absent express language to the contrary, assumed to have contemplated normal increase in the frequency and intensity of use of the easement over the years!***

5. **Easement relocation**

- ◆ Majority rule: **CANNOT** be *relocated* w/out the **consent** of both parties.
- ◆ The Restatement (Third) of Property: The owner of the servient estate is allowed to relocate an easement as long as the relocation affords the dominant estate benefits that are **substantially similar**.

6. **Use of non-dominant land**

- ◆ **Majority rule**: Appurtenant easement owners **CANNOT** use the easement, nor permit its use, for the service of land which was not part of the dominant estate at the time the easement was created.

7. **Maintenance and repair**

- ◆ Dominant owner must make necessary repairs so as not to interfere w/the servient owner's use and enjoyment of his property.

8. **Servient estate owner's duties**

- ◆ Servient estate owner may not interfere w/the easement owner's enjoyment

c. Express Easements: Succession

i. **Analysis**

1. Step One:

- ◆ Is the easement appurtenant or in gross?

2. Step Two:

- ◆ *Personal* to the grantee, it will be **non-transferrable**
 - ◇ **Presumption that the parties intended the easement to be appurtenant**
 - ▶ May be overcome by **significant** evidence showing intention for in gross
- Consider:
- Language in grant
 - Circumstances surrounding the grant
 - ◆ Types of rights conveyed by the easement
 - ◆ Relationship btwn the easement and other real property owned by the grantee.

ii. Dominant Estate - Appurtenant

- Running of **BENEFIT** of appurtenant easement
 - ◆ PRESUMED to be transferred w/the dominant estate, even if the deed transferring the estate does not mention the easement
 - ◆ Successor's possession is subject to same rights and privileges as his predecessor
 - ◆ Terms of deed could:
 - ◇ Extinguish easement upon transfer
 - ◇ Make appurtenant --> in gross
 - ◆ Must specify the consequences, or else
 - ◇ Extinguished, OR
 - ◇ Provision in deed preventing transfer = ineffective

iii. Servient Estate - Appurtenant

- Running of the **BURDEN** of appurtenant easement
 - ◆ Without notice --> extinguished
 - ◆ **2 requirements for easement to run:**
 1. Intent that the easement will run w/servient estate
 - ▶ Presumption that parties intended the burden to run.
 2. Notice of easement:
 - ▶ Actual
 - ▶ Constructive

iv. Succession of Easements in Gross

- **Restatement (Modern) View**
 - ◆ Easement in gross will **NOT PASS** when the owner of the easement sells his or her land.
 - ◆ For it to pass, it **MUST** be **assigned**.
 - ◇ Presumption that the benefit of easement is assignable, **UNLESS** it's personal
 - ◆ Personal if:
 - ◇ It appears from all of the circumstances that the parties did **NOT** intend it to be transferrable.
- **Old View**
 - ◆ Purpose of easement:
 - ◇ To **gain economic benefit** = *commercial*
 - ▶ Rebuttable presumption that it is assignable
 - Presumption may be overcome --> sufficient evidence of intent
 - ◇ To **gain personal satisfaction** = non-commercial
 - ▶ Presumption it's **NOT** assignable.
 - ◆ **Factors to determine intent:**
 1. **Relationship btwn the grantor of easement and grantee**
 2. **Increased burden on servient estate either by increasing or decreasing its value**
 3. **Consideration paid for easement**
 4. **Temporary and personal?**
 - ◆ *By definition, the **benefit** of an easement in gross does **NOT** attach to the land of the easement holder.
 - ◆ **The **BURDEN** of an easement in gross **DOES** attach to the land of the servient estate.

d. Express Easements: Termination & Extinguishment

i. **Express Terms & Impossibility**

- Time limitation
- Loss of purpose of easement

ii. **Changed conditions**

- **R(3)P** --> terminated b/c has become **unreasonably burdensome**, obsolete, or *economically wasteful*

iii. **Release and Abandonment**

- **Release**: in **formal written instrument** that meets the requirements necessary to create an easement.
- **Abandonment**: through **ACTIONS** - results when the owner, **INTENDING** to relinquish his easement rights, **engages in sufficiently unequivocal conduct manifesting his intent**
 - ◆ ****Non-use alone (no matter how long) is almost never enough to extinguish an easement.**

iv. **Misuse & Overuse**

- Generally NOT sufficient to extinguish an easement, but the servient estate holder can get an injunction to enjoin excessive use.
 - ◆ When a court can't find a remedy to misuse or overuse by limiting use of the easement, it will generally choose **complete extinguishment** over no use at all.

v. **Lack of Notice**

- Burden of an express easement will not run if the successor in interest to the servient estate is a bona fide purchaser for value **w/o notice of the easement**

vi. **Prescription**

- When the servient owner of an estate extinguishes an easement by making adverse use of the burdened parcel. Generally:
 - ◆ **Sufficient**: Non-moveable, substantial, permanent structures --> buildings, elevated structures, massive fireplace
 - ◆ **Insufficient**: Trees, hedges, stone walls

vii. **Merger**

- Dominant estate holder acquires ownership of the servient estate
- May just be suspended for limited period of time

viii. **Estoppel**

- Servient owner reasonably relying on actions of the dominant owner engages in conduct **inconsistent** w/the continuance of the easement.

ix. **Third Party Actions**

- Eminent domain, mortgage foreclosures, tax sales
 - ◆ Original easements established before a mortgage will not be extinguished

e. Non-Express Easements

i. Definition

- Informal easements that may arise through implication from:
 - ◆ Prior use
 - ◆ Map or boundary description
 - ◆ Necessity
 - ◆ Prescription

ii. Implied

- Focus on use of claimed dominant and servient parcels **prior to severance of common ownership**
- **Elements** --> **intention of the parties!!**:
 - ◆ **APPARENT** (i.e., discoverable upon careful inspection)
 - ◆ **CONTINUOUS** (i.e., NOT casual or temporary)
 - ◆ **Intended to be PERMANENT**
 - ◆ Important or reasonable **NECESSARY** for enjoyment of the claimed dominant estate
- **Scope - Implied**
 - ◆ Extent of use prior to severance
 - ◇ *Additional use from foreseeable changes in dominant estate*
- **Rule - Implied**
 - ◆ Every implied easement is appurtenant and is presumed to pass w/grants of the dominant estate EXCEPT:
 1. Prohibited by terms of the transfer
 2. Not in accord w/the circumstances surrounding the creation of an easement

iii. Necessity

1. Original unity of ownership
 2. Necessity at the time of severance of unity of ownership
- Prior use = unimportant
 - **Purpose**
 - ◆ To promote the productive use of land
 - ◆ **Policy**: Courts will often find an intent to create an easement by necessity unless it affirmatively appears from the language or circumstances of the conveyance that the parties intended a different result.
 - **LANDLOCKED parcel**
 - ◆ Most prevalent type of easement by necessity --> right of way arises upon conveyance or retention of landlocked parcel
 - **Scope**
 - ◆ Rights --> **reasonably essential** to use of the land
 - **Termination**
 - ◆ Rights granted terminate as soon as necessity disappears

iv. Takeaway:

- **Analysis**
 1. ****UNITY OF OWNERSHIP****
 2. Implied or necessary?
- **Implied Easement**:
 - Convenience

- ◆ Beneficial to the dominant estate
- ◆ Intent to create an easement
- ◆ Continuous prior use
- ◆ Public Policy considerations
- **Easement by Necessity**
 - ◆ Necessity, but jurisdictions differ as to whether it needs to be REASONABLY necessary or strictly necessary
 - ◇ Reasonable necessity: preferred
 - ◇ Strictly necessary: not preferred b/c burden on servient estate may be negligible
 - ◆ Look for land-locked parcels

B. Covenants

a. Covenants Running w/the Land

i. "Real Covenants" --> "Affirmative Covenants"

- Covenants that the law courts recognize as running w/the land.
 - ◆ **"Enforceable at law"** --> the breach of that covenant will give rise to a cause of action for damages (\$\$), a legal remedy
 - ◆ Require specific **acts**
 - ◆ Ex. promising to pay dues

ii. "Equitable Servitudes" --> "Negative Covenants"

- Most restrict the use of the burdened land by prohibiting the owner from using the land in certain specified ways.
 - ◆ Usually only **"enforceable in equity"** --> INJUNCTION
 - ◇ Ex. promising only to use a premise as a "single family home"
- **Covenants can be both real covenants AND equitable servitudes, and can be enforced in equity and at law.**

iii. Running of Covenants?

- **Covenant Disputes Do Not Always Involve Issues of Succession:**
 - ◆ Covenants in Gross: Most Ks and promises do NOT run w/the land and are intended to benefit a specific person rather than a particular parcel of land
 - ◆ ****If the dispute is btwn the original contracting parties --> it doesn't matter if the promise is one that runs w/the land.**
 - ◇ Key: differentiate whether the situation is dealing w/a simple K or a true "running" question.

b. Enforcement & Running of Covenants

i. Overview

□ Traditional View

At Law	(\$\$)	In Equity	(Specific Performance)
Burden (Lot R)	Benefit (Lot OB)	Burden (Lot R)	Benefit (Lot OB)
Intent	Intent	Intent	Intent
T&C	T&C	T&C	T&C
Notice		Notice	
Horizontal Privity (AA & BB)			
Strict Vertical Privity	Relaxed Vertical Privity		

□ Restatement View

- ◆ Generally controlled by **REASONABLENESS**, however, draws some distinctions btwn affirmative & negative covenants
 - ◇ Intent
 - ◇ Notice
 - ◇ **NO TC**
 - ▶ Exception
 - ◇ **NO HP**
 - ◇ **NO VP**
 - ▶ GENERAL rule
 - ▶ Exception to the general rule.
 - ◇ ***Reasonableness factors

ii. Intent

- That these parties want this covenant to run w/the land?
 - ◆ **Critical intent is the intent of the *original* contracting parties **at the time** they entered into the covenant.
 - ◆ --> **Look to:**
 - ◇ **Language in the original covenant/written promise**
 - ◇ **Surrounding circumstances**

iii. Notice

- Did grantee 2 know about the **burden** of the property when she bought it?
 - ◆ **Rule:** To be binding on a purchaser, she must only have *notice* and not mere knowledge of the covenant *before* she purchases the land.
 - ◆ --> **Look to:**
 1. Constructive Notice
 - ▶ **Covenant has been recorded/could be discovered by a competent search in records**
 2. Actual Notice

iv. Touch & Concern

□ **Original Restatement**

◆ **Burden**

- ◇ Covenant must affect the benefited land in a **PHYSICAL WAY**
 - ▶ Runs only when the promise benefits the beneficiary of the promise in the "**physical use or enjoyment of the land**"
 - ▶ Most courts do **NOT** follow the old Restatement by requiring a physical benefit to the land.
 - "The burden of a covenant doesn't run **AT LAW** unless the covenant benefits the land of either the promisee or the promisor in a **physical way.**"
- ◇ *The burden may run **IN EQUITY** even if does NOT affect the land to be benefited in a physical way.*
 - ▶ Ex. Business competition

- ◆ **Benefit**
 - ◇ "The benefit of a covenant can only run if the performance of the promise will constitute:
 - ▶ Advantage in a physical sense to the beneficiary in the use of his land
 - ▶ Decrease the commercial competition in his use of it, OR
 - ▶ Constitute a return to the beneficiary of the promise for a use of it by the promisor."
 - ▶ --> has been largely discredited.
- **Judge Clark Test**
 - ◆ **Rule:** The benefit/burden of the covenant runs w/the land if the promisee(or)'s **legal relations** in respect to the land are increased or decreased.
 - ◇ Test examines whether the performance or nonperformance of the covenant affect the **land's use** or **value** to be regarded as an integral part of the property.
- **Logical Connected Test**
 - ◆ **Rule:** Is the covenant **logically connected** to the land burdened/benefited by the covenant?
- **Economic Impact Test**
 - ◆ *Primary consideration of courts who still apply the T&C*
 - ◇ **Rule:** Does the covenant have an **economic impact** on the parties' ownership rights by increasing or decreasing the land's value?
- **Reasonableness Test**
 - ◆ Factors:
 1. Duration
 2. Burden vs. benefit (**balancing test**)
 3. Purpose could be **accomplished by other means**
 4. Serves a **frivolous** purpose
 5. **Restrains** sale or use property; or
 6. Promise can be performed by original promisor as easily as it can be performed by the person in possession.

v. Privity

- **Horizontal**
 - ◆ **Rule:** For the burden of a covenant to run at law, there must be a **certain kind of relationship btwn the original contracting parties, in addition to the relationship they share stemming from the covenant itself.**
 - ◆ Most courts endorse a less restrictive view, finding that the requirement is satisfied if the covenantor and covenantee have the relationship of:
 - ◇ **LL/Tenant**
 - ◇ **Easement holder & owner of servient estate**
 - ◇ **Grantor/grantee** (i.e., a transfer btwn two parties)
 - ◆ ****NOT NEIGHBORING LANDOWNERS!!!**
- **Strict Vertical**
 - ◆ Successor to the promisee(or) must have succeeded to the **same estate** as that owned by the promisee(or)
 - ◇ Successors of the promisee/or **VP established:**
 - ▶ Grantee
 - ▶ Heir
 - ▶ Devisee

- ◇ **NO VP for:**
 - ▶ Adverse possessors
 - ▶ Those taking title paramount to the promisee/promisor
 - One taking interest through foreclosure proceeding

□ **Relaxed Vertical**

- ◆ Successors can include life tenants, lessees, etc.

vi. **The Restatement**

□ **TC exception**

- ◆ **NO** requirement UNLESS
 - ◇ Illegal
 - ◇ Unconstitutional
 - ◇ Violates Public Policy

□ ****General Rule****

- ◆ Unless prohibited by the parties, *all appurtenant benefits and burdens run*, including to: (ALL)
 - ◇ **A**dverse possessors
 - ◇ **L**ife tenants
 - ◇ **L**essees
 - ▶ **NOTE:** Restatement doesn't discuss running for assignees and sub-lessees.
 - ◇ And those acquiring title through a **L**ien foreclosure proceeding

□ *****Exception to the General Rule*****

- ◆ Those holding superior title can't be burdened.
- ◆ **AFFIRMATIVE** covenants: Persons holding estates of lesser duration aren't subject to EITHER burdens or benefits, unless they are: Life tenants or Lessees:
 - ◇ **Benefits** - to maintain, repair, and render services to the property run
 - ▶ --> applies to both life tenants & lessees

□ **Reasonableness Factors (LFACF)**

- ◆ **L**egitimacy and importance to be served
- ◆ **F**airness of the arrangement
- ◆ **A**lienability/marketability
- ◆ **C**ompetition impact
- ◆ **F**undamental rights interference

c. Defenses to Enforcement of Covenants

i. **Changed Circumstances Doctrine (CCD)**

- Courts may refuse to enforce a covenant if changed circumstances make it unlikely that enforcement will be of a substantial benefit to the covenantee or her successors.
- **Doctrine applies --> only if the changed conditions have adversely affected the benefited land**
 - ◆ Impossible to achieve original goal of the covenant.
- Courts will continue a restriction that is still **substantially valuable** to the benefited land, even if changed circumstances have caused a hardship to the burdened owner.
- **Tests**
 - ◆ Frustration of purpose in light of changed circumstances (Bowie)
 - ◆ **RADICAL** change as to render perpetration of the restriction's enforcement as no substantial benefit to the dominant estate. (Chevy Chase)
 - ◇ --> or can state together that change has been so radical that it has frustrated the purpose.

the purpose.

ii. **Relative Hardship Doctrine (RHD)**

- Focus on the **hardship of the BURDENED land**
- Courts may refuse to enforce a covenant if enforcement will result in a hardship to the owner of the **burdened** land that is **DISPROPORTIONATE** to the **benefit** of its enforcement.
- Extent to which hardship increased b/c of unanticipated changed circumstances.
- **TEST**
 - ◆ If the burden **SIGNIFICANTLY** outweighs the benefit.

C. Misc.

a. Common Interest Communities

i. **Definition**

- Property is **burdened by servitudes** requiring property owners to contribute to **maintenance of commonly held property** or **pay dues or assessments** to an Owners Association that provides services or facilities to the community
- *Examples*
 - ◆ Condos
 - ◆ Planned communities
 - ◆ Traditional subdivisions
 - ◆ Combination properties w/residential and commercial components
- **NOTE:** Owners only "own" the INSIDE of their unit.

ii. **Overview**

- CICs provide amenities through **covenants**
 - ◆ "Covenants, conditions, and restrictions" --> "CC&R"
 - ◆ ****AFTER THE FIRST PROPERTY is purchased in a development, the covenants become effective and bind ALL OTHER PROPERTIES in the developments.**
- **CC&R Characteristics**
 - ◆ Source of association's power/authority
 - ◆ Often:
 - ◇ Mandate membership in association & require payment of *dues or assessments*
 - ◇ **Restricts the use of the land w/in a CIC & requires association's approval before changes can be made to an individual property**
- Conflicts arise when:
 - ◆ Interests of individual property owner are at odds w/that of other property owners or the association
 - ◇ Center around: Interpreting an existing covenant/rejecting a new covenant/disputing the actions of an association board.

b. Adverse Possession

i. **Requirements**

- **All jurisdictions**
 - ◆ Actual
 - ◆ Open & notorious
 - ◆ Exclusive
 - ◆ Hostile or adverse
 - ◆ Continuous

- **Some jurisdictions additionally require:**
 - ◆ Claim or right of title
 - ◇ Good faith?
 - ◆ Color of title
 - ◆ Improvement, cultivation, or enclosure
 - ◆ Payment of taxes

ii. Elements - All Js

- **Actual**
 - ◆ Must physically use the particular parcel of land in the same manner that a reasonable owner would, given its nature, character, and location.
- **Open & Notorious**
 - ◆ Must be so visible and obvious that a reasonable owner will receive notice of an adverse title claim
 - ◇ Open: everyone can visibly **see** the AP possessing the land.
 - ◇ Notorious: everyone knows about it / would put a reasonable person **on notice**
- **Exclusive**
 - ◆ Must not be shared w/either the true owner or the general public, but must be as exclusive as would characterize an owner's normal use for such land.
- **Hostile or adverse**
 - ◆ "Hostile":
 - ◇ **NO PERMISSION** to use the land from true owner
 - ▶ Minority: **mistaken possession** does not constitute hostility
 - ◆ "Adverse":
 - ◇ Must manifest some act to indicate that occupation is adverse to the true title holder's interest.
 - ◇ Possession is adverse only if it is **w/out authority or permission of the true owner**
 - ▶ CT rule: endorses the objective view of hostility**
 - ▶ ME rule: endorses the subjective view of hostility
 - ◆ **NOTE** on good or bad faith:
 - ◇ Majority: Does not matter whether in good or bad faith --> think you don't need permission
 - ◇ Minority: Must believe in good faith that you don't need permission b/c you think you own title to the land
- **Continuous, for the prescribed statutory period**
 - ◆ Must be as continuous as those of a reasonable owner, given the **nature, location, and character of the land**.
 - ◆ Must use property how an ordinary owner would use it
 - ◇ E.g., if a winter home, living there in the winter!
 - ◆ Tacking: Successive adverse possessors are allowed to tack (add together) their periods of adverse possession provided they are in privity (sufficient nexus or connection btwn the consecutive possessors)
 - ◆ Tolling: Some jurisdictions permit extending required SOL periods under certain circumstances
 - ◇ E.g., if the title holder has a disability
 - ◆ Statutory Period (i.e., "SOL" --> Statute of Limitations)
 - ◇ Varies from state to state
 - ◇ Most states = 10, 15, or 20 years** (up to 60!)

✓ Most states – 10, 15, or 20 years (up to 30)

iii. Elements - Some Js

- **Claim or right of title**
 - ◆ APs get right of title only if they **rightfully believed** they were occupying the land
 - ◇ Avoid conferring title on an adverse possessor who **is intentional wrongdoer or acted dishonestly**, and require that adverse possessor must have had a *good faith* belief that she actually owned the property in question
 - ◆ *Reasonable basis for the belief that the property belongs to the adverse possessor or property owner*
 - ◆ **To discern whether someone had a subjective good faith belief, an OBJECTIVE TEST** is preferred, looking at all relevant circumstances.
- **Color of title**
 - ◆ A person enters under color of title when he or she claims ownership pursuant **to a written instrument**
 - ◆ Sometimes may reduce requirements for an AP who has possessed the property under an instrument purporting to give him or her title but ultimately proving to be void or invalid
 - ◇ E.g., the statutory period required to establish AP
- **Improvement, cultivation or enclosure**
- **Payment of taxes**

iv. AP effect:

- Once the required statutory period has run, the AP is **immune from possession for trespass!**
- **HOWEVER, the adverse possessor himself can bring actions while waiting for SOL to run:**
 - ◆ Ejectment to oust other trespassers
 - ◆ Nuisance/other legal right incident to possession

v. Prescriptive Easements

- **Adverse use**
- Essential: Non-recognition of the owner's authority to permit/prevent use of an easement
- **DO NOT need exclusive use**
- *Look at type of use. Easements are "right of ways"...so needs to be open and notorious and continuous in the sense that you'd do it in the same way most easement owners would do it.*
- SOL invoked:
 - ◆ By analogy, OR
 - ◆ By statute
 - ◇ During statutory period, the owner can bring an action in **TRESPASS**

vi. Implied Dedication/ "Custom"

- When **public at large** creates interest
- Dedication = setting aside of privately owned land for use by the public
- **BOTH CL & statutory** require some unequivocal act indicating the owner's intent to dedicate
- Statutory:
 - ◆ --> usually transfers a **FEE** of the property to a governmental entity
 - ◆ Acceptance approved by a municipal council or planning body

- CL Dedication:
 - ◆ *Operates on a theory of estoppel, offer, and acceptance*
 - ◆ Right conferred is usually an EASEMENT
 - ◇ **Express**
 - ▶ Requires expressed manifestation of the owner's dedicatory intent
 - ◇ **Implied**
 - ▶ Construed from **ACTS** that illustrate an offer & intent, based on ESTOPPEL.
 - ▶ Inferred from public's adverse use of the property & the owner's acquiescence of that use.
 - ▶ *Use must be **WITHOUT** owner's permission, but **WITH** his actual KNOWLEDGE of the use
 - ▶ Public must "accept" the offer
 - If only a limited number of people use it --> likely to be private prescriptive easement.
 - ◆ Custom:
 - ◇ Also allows the general public to acquire rights over private property in some jurisdictions

c. Nuisance

i. Public Nuisance

- Unreasonable interference w/a **right common to the general public**
 - ◆ Closely resembles a misdemeanor
 - ◆ Usually only a public official can sue to abate it
 - ◆ Private citizens prohibited from suing to abate public nuisance
 - ◇ Policy reason: Prosecutorial discretion

ii. **Private Nuisance

- A wrongful **interference** w/the **use or enjoyment** of land of another
 - ◆ A private individual suffering a "different in kind" injury from the general public may bring an action herself.
 - ◆ "Interfere" --> activities don't mean going on someone else's property

iii. Key Considerations

- **2 Variables to Consider in Every Nuisance Case**
 1. **Fairness**
 - ◇ Usually damages --> \$\$\$
 2. **Efficiency**
 - ◇ Most economically efficient
- **2 Questions for the Proposed Rule**
 1. **Which party should pay for it?**
 - ◇ Consider fairness factor
 - ▶ Question: Who is more morally blameworthy? --> they should pay.
 2. **What should be done?**
 - ◇ Consider efficiency factor

iv. Remedies

- **Traditional rule**
 - ◆ Successful Ps get damages for past injuries and an unconditional injunction
 - ◇ If P is unsuccessful, he or she is denied an injunction.

- ✓ If P is unsuccessful, he or she is denied an injunction.
- **Proposed rule**
 - ◆ Appropriate remedy = **injunction** cancellable upon payment of damages for **past injuries and for future injuries that would flow from the continuation of activities.**
 - ◇ Unsuccessful P awarded an injunction contingent on his paying cost of compliance.
- **Boomer**
 - ◆ Permanent damages --> ONE TIME SOLUTION
 - ◆ Balancing interests
 - ◇ Need to keep cement plant going...maximizing resources
 - ◇ Plant operating there more valuable than the homeowners living there
- **Spur**
 - ◆ Laws of equity --> INDEMNIFICATION
 - ◆ Common issue w/**urban sprawling**
 - ◆ **UTILITY:** developers have great utility (efficiency)
- **Prah**
 - ◆ Private nuisance law applicable to access to sunlight for **reasonable use** of solar panels.

d. Zoning