Easement Novelties*

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"THERE are certain known incidents to property and its enjoyment; among others, certain burthens wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner; all which incidents are recognized by the law .... But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner." So spoke Lord Chancellor Brougham in 1834.¹

In one sense, the Lord Chancellor was certainly mistaken. Land is surely burdened with rights of maintaining billboards, and of operating heavier-than-air craft which had not been recognized by the law in 1834. In another sense, he was certainly correct. There are burdens so clearly against public policy, such as total restrictions on transfer, that the law still refuses to enforce them.

The problem which remains is to distinguish the fancies and caprices which the law will effectuate from those which it will not. On this occasion the inquiry will be limited to such fancies and caprices as burden the land with privileges of persons other than the possessor to use it—interests which are usually called affirmative easements.

*This article is one of a series on easements and licenses, of which the following have been previously published: The Requirement of a Sealed Instrument for Conveying Easements (1940) 26 Iowa L. Rev. 41; Easements, Licenses and Statutes of Frauds (1941) 15 Temp. L. Q. 222; Words Which Will Create an Easement (1941) 6 Mo. L. Rev. 245.

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NOVELTY OF ACTS AUTHORIZED

An elementary idea about what may be the subject of an easement is the thought that the conduct which an easement authorizes must be the same kind of conduct which some past easement has authorized. This may be expressed in a mere list of permissible varieties, as in an English writer's pronouncement that "nothing can amount to a valid easement unless the subject matter of the claim is capable of being referred to one or other of six definite heads—air, light, support, water, ways and fences." Another Englishman, in his treatise upon easements, thought it more accurate to say that "the law will not permit a landowner to create easements of a novel kind and annex them to the soil . . . ." In accordance with ideas of this sort, it has been argued that there can be no easement of walking for pleasure, of boating for pleasure, of withdrawing from land its subjacent support, of maintaining trees whose limbs cross a boundary, of opening sluices of a reservoir when its level rises dangerously or of maintaining bathhouses, either because such an easement does not conform to the prevailing conception of any of the listed varieties, or simply because it is novel. In the course of the opinion in the boating case, Baron Martin declared,

"None of the cases cited are at all analogous [to] this, and some authority must be produced before we can hold that such a right can be created." The learned Baron went on to warn of the consequences of sustaining an easement without precedent; it "would lead to the creation of an infinite variety of estates in land". In this prediction he was no doubt correct. That servitudes are infinite in variety had been acknowledged with complete composure by one of the earliest expositors of English law.

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2 BEEAN, COVENANTS AFFECTING LAND (1924) 45.
3 GODDARD, LAW OF EASEMENTS (8th ed. 1921) 111, 112. See also Note (1930) 170 LAW TIMES 533.
4 Dyce v. Hay (1852) 1 Macq. H. L. Cas. 305.
8 Simpson v. Mayor of Godmanchester [1896] 1 Ch. 214.
9 Eckert v. Peters (1897) 55 N. J. Eq. 379, 36 Atl. 491.
11 2 BRACON, DE LEGIBUS ET CONSUETUDBNIBUS ANGLIAE (circa 1250, Woodbine's ed. 1922) f. 53b. "Et quod dictum est de iure pascendi, fiat de iure eundi, agendi, aquamve ducendi, et de omnibus aliis servitutibus, quae sunt infinitiae et non referat."
Efforts to stem the tide of legal progress by enumerating the limits of its past advances have a familiar ring. Constitutional lawyers recall how the United States Supreme Court of the 1920's sought to limit businesses "clothed with a public interest" to those franchised by, or granted to the public, and also to "certain occupations...recognized from the earliest times" such as inns, cabs and grist mills.\(^2\) Tort lawyers remember how Judge Sanborn sought to salvage remnants of *Winterbottom v. Wright*\(^3\) by restricting departures from it to three exceptions "well defined and settled".\(^4\) No lawyer will be surprised to learn that easements, like manufacturers' liabilities and enterprises affected with a public interest, broke the bounds that were set for them.

From quarters of the highest authority, the rule against novelty of subject matter has been denounced. The classic statement was made by Lord St. Leonards on a Scotch Appeal.

"...there is no rule in the law of Scotland which prevents modern inventions and new operations from being governed by old and settled legal principles. Thus, when the art of bleaching came into use, there was nothing in its novelty which should exclude it from the benefit of a servitude or easement, if such servitude or easement on other legal grounds was maintainable. The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind. The law of this country as well as the law of Scotland, frequently moulds its practical operation without doing any violence to its original principles."\(^5\)

If Lord St. Leonards' statements were but dicta as to English law, they were made law by their adoption, almost verbatim, in a Privy

(\(^{\text{Italics added.}}\) Cf. 3 *Bracton, De Legibus et Consuetudinibus* (Travers Twiss' ed. 1880) f. 222.

\(^{12}\) *Wolff Packing Co. v. Court of Industrial Relations of Kansas* (1923) 262 U. S. 522, 535; *Hamilton, Affectation with a Public Interest* (1930) 39 Yale L. J. 1089; *McAllister, Lord Hale and Business Affected with a Public Interest* (1930) 43 Harv. L. Rev. 759.


\(^{14}\) *Huset v. Case Threshing Mach. Co.* (C. C. A. 8th, 1903) 120 Fed. 865; *Bohlen, Liability of Manufacturers to Persons Other than Their Immediate Vendees* (1929) 45 L. Q. Rev. 343.

\(^{15}\) *Dyce v. Hay*, supra note 4, at 312. The famous jurist made the novelty doctrine appear ridiculous by confusing novelty of the use with novelty of its recognition as an easement. "...I fancy no one supposes that recreation, taking the air, and strolling, are to be regarded as any particular novelties; or that if you are tired in a meadow, and lie down to repose yourself, the refreshment thence arising can reasonably be described as an invention." *Ibid.* at 313.
Council decision of 1915. Meanwhile an ex-Lord Chancellor had announced that

"Easements may be of various characters, and it is a fallacy to suppose that every easement must be brought within some particular class which has been recognized, such as the class relating to water-courses, or light or air or otherwise."

A similar opinion is held by estimable English writers on the subject.

In America, judicial discussion of novelty in affirmative easements seems limited to two intermediate court decisions of the last century, one repeating Baron Martin's resistance to novelty, the other echoing Lord St. Leonards' proclamation of adaptability. "It results from the cases," the latter decision announced, "that the owner in fee of land, may impose upon it any burden, however injurious or destructive, not inconsistent with his general right of ownership, if such burden is not in violation of public policy, and does not injuriously affect the rights or property of others."

More substantial evidence of the freedom with which novel easements can be created may be found in the cases which uphold them without discussion. Bill-posting contracts have been repeatedly enforced as creating easements, although they can hardly be classified among the five or six recognized varieties mentioned above. The easement of pleasure boating, which was specifically condemned in the leading

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17 Simpson v. Mayor of Godmanchester, supra note 8, at 218. On appeal to the House of Lords [1897] A. C. 696, the argument based on novelty (ibid. at 699) was not among those which were found to be "the only points deserving notice" (ibid. at 701).
18 CHESHIRE, MODERN LAW OF REAL PROPERTY (3d ed. 1933) 256-258; GALE, EASEMENTS (11th ed. 1932) 28.
19 Negative covenants not to compete provoked dicta against novel servitudes generally in Norcross v. James (1885) 140 Mass. 188, 192, 2 N. E. 946, 949, by Holmes, J.; and in Rubel Bros. v. Dumont Coal & Ice Co. (1920) 111 Misc. 658, 669, 182 N. Y. Supp. 204, 210, rev'd on the ground that the agreement could be enforced as a covenant although not as a servitude, one judge dissenting, (1922) 200 App. Div. 135, 192 N. Y. Supp. 705.
20 Eckert v. Peters, supra note 9, refusing to recognize an easement to maintain bath houses.
21 Van Rensselaer v. Albany & S. R. R. (1874) 8 N. Y. Sup. (1 Hun) 507, 509, sustaining easement to maintain an embankment which in wet weather subsided upon adjacent land.
English decision against novel easements, has been recently recognized, together with the easement of bathing.\textsuperscript{28}

The usefulness of a list of permissible servitudes has been neatly tested in California by reason of a code section which exists also in the Dakotas, Montana and Oklahoma.\textsuperscript{24} It provides that "The following land burdens or servitudes upon land, may be attached to other land ... and are then called easements," and enumerates a generous list of seventeen. Even these proved insufficient in a case where the value of 3850 acres of lowland depended upon the right to use a pumping station situated upon another 50 acres. No servitude of operating a pumping station had been listed. But the court declared,

"The ingenuity and foresight of the legislature would be taxed in vain to name and classify all the burdens which might be imposed upon land ... it is of no consequence whether that particular burden will fall into or can be forced into any of the seventeen subdivisions of section 801."\textsuperscript{25}

In the Roman law, as well as in Anglo-American, new ways of using land have been obstructed by an ancient list of permissible servitudes. The Code of Justinian contained a list of four rural and four urban servitudes, with four more rurals which "some think... are rightly included."\textsuperscript{26} A French sociological jurist has predicted that,

"... the doctrine will no doubt find favor that the mere will of the parties may establish novel kinds of rights 'in rem,' provided only that they do not offend against the fundamental principles of our social order ... there may be also new forms of easements besides the servitudes expressly recognised by the law, and other ways of establishing a divided ownership, whereby the utilization of property may be diversified and its value increased."\textsuperscript{27}

\textsuperscript{23} Miller v. Lutheran Ass'n (1938) 331 Pa. 241, 200 Atl. 646. Although the court did not discuss the doctrine of novelty, it was raised by the briefs, with citation of Hill v. Tupper, \textit{supra} note 5. See also Bosworth v. Nelson (1930) 170 Ga. 279, 152 S. E. 575, stranger enjoined from encroaching upon exclusive fishing and boating rights.

\textsuperscript{24} CAL. CIV. CODE § 801; MONT. REV. CODES (Anderson & McFarlane, 1935) § 6749; N. D. COMP. LAWS (1913) § 5330; OKLA. STAT. (Harlow, 1931) § 11774; S. D. CODE (1939) § 51.0601.

\textsuperscript{25} Jersey Farm Co. v. Atlanta Realty Co. (1912) 164 Cal. 412, 415, 129 Pac. 593, 594; Burby, \textit{Land Burdens in California—Easements} (1930) 4 So. CALIF. L. REV. 115.

\textsuperscript{26} CORPUS JURIS CIVILIS, Institutes, Lib. II, tit. 3.

The apparent discordance between the judges who denounce novel servitudes and those who defend them is often superficial. The defenders hedge their liberal pronouncements with such phrases as "on other legal grounds maintainable," or "not in violation of public policy." It is likely that they would agree in their disposition of many controversies.

One type of case upon which most judges would probably agree is that involving a covenant which protects the covenantee from competition. Such covenants have no real relevancy to affirmative easements, but the cases involving them have been the source of the most famous generalizations against novel servitudes. It should be a sufficient objection to them that they do not benefit the land in any direct physical way, but through trade and the profits of trade. They therefore violate a rule as old as Lord Coke which requires covenants to "touch and concern" the land. This was the specific ground of decision in two American cases which contained some very general language opposed to novelty, as well as in the leading case of Keppell v. Bailey.

Likewise in other cases there is a specific rule of policy underlying the broad condemnation of novelty. In Hill v. Tupper, where Baron Martin objected simply to the novelty of the easement, Chief Baron Pollock held it unnecessary "to assign any other reason . . . than that the case of Ackroyd v. Smith expressly decided that it is not competent to create rights unconnected with the use and enjoyment of land . . . ." From a later case which refers to a suppressed opinion over which Pollock and Martin disagreed, it appears that Pollock never accepted the rule against mere novelty. In three cases

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28 See text to note 15, supra.
29 See text to note 21, supra.
30 Spencer's Case (1583) 5 Co. 16a, 16b, 77 Eng. Rep. 72.
31 Norcross v. James (covenant by conveyer of quarry not to open quarry on land retained); Rubel Bros. v. Dumont Coal & Ice Co. (covenant made with ice company not to use land for ice business), both supra note 19.
32 Supra note 1, covenant to obtain limestone from covenantee's pits, and transport it over covenantee's railway.
33 Supra note 5, at 127, 159 Eng. Rep. at 53, exclusive right to permit pleasure boating.
34 (1850) 10 C. B. 164, 138 Eng. Rep. 68, holding easement must be used for benefit of dominant tenement.
35 Richards v. Harper (1866) L. R. 1 Ex. 199, 205, privilege of causing surface to subside through mining operations. Martin, B., said that after the first argument, which was on the question "whether . . . the right claimed by the defendant to withdraw support . . . was a right which could by law be created so as to run with the lands". Ibid. at
in which Lord Justice Farwell objected to easements on the ground of novelty, he supported his argument by pointing out that it violated some specific rule supported by authority, because it was "precarious", or a mere pleasure right, a "jus spatiiandi".36

Justice Holmes seems to have had identifiable rules of policy in mind whom he adverted to the novelty rule in Norcross v. James.37 He declared,

"... equity will no more enforce every restriction that can be devised, than the common law will recognize as creating an easement every grant purporting to limit the use of land in favor of other land. The principle of policy applied to affirmative covenants applies also to negative ones. They must 'touch or concern,' or 'extend to the support of the thing' conveyed. They must be 'for the benefit of the estate'. ... Or, as it is said more broadly, new and unusual incidents cannot be attached to land, by way either of benefit or of burden."38

When he had an opportunity to distinguish the case at bar from an earlier one on the ground of novelty, he preferred to say,

"If it be asked what is the difference in principle between an easement to have land unbuilt on, such as was recognized in Brooks v. Reynolds... and an easement to have a quarry left unopened, the answer is, that, whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in the indirect way which we have mentioned."39

An easement is not objectionable because it is novel, but because

36 Burrows v. Lang [1901] 2 Ch. 502, (1902) 2 Col. L. Rev. 265 (right to water cattle at millpond whenever its level should be high enough to be accessible); International Tea Stores Co. v. Hobbs [1903] 2 Ch. 165 (involving a right of way but discussing Burrows v. Lang, and also the right of strolling); Attorney General v. Antrobus [1905] 2 Ch. 188 (public right to visit rocks at Stonehenge).
37 Supra note 19, at 192, 2 N. E. at 949.
38 Citing Keppell v. Bailey, supra note 1; Ackroyd v. Smith, supra note 34; Hill v. Tupper, supra note 5.
39 (1870) 106 Mass. 31, right to have light well kept open.
40 Norcross v. James, supra note 19, at 192, 2 N. E. at 949.
it violates some specific rule of policy. Someone will interpose that the rule against novelty is a specific rule of policy. The validity of such a statement is not immediately obvious unless one assumes that the law has reached a state of perfection beyond which it need not grow, a state of mind of which Victorian Englishmen have not been unsuspected. Since the rise and fall of the doctrine against novelty is strikingly contemporaneous with Queen Victoria, there may have been a mite of this philosophy in some of the judges.

Novelty might be objectionable for a more persuasive reason, based on the fact that the English, prior to 1925, were without a recording system. The purchaser of a legal estate was bound by its servitudes regardless of notice, actual or constructive. His protection rested principally upon the responsibility of his vendor, and upon his ability to see by the state of the premises what rights of way, eavesdroppings and ancient lights should be inquired into. His problem would be infinitely complicated if he had to look out for all the possible new servitudes which the ingenuity of generations might have added.

With this problem in mind, counsel argued in Richards v. Harper against the existence of an adjacent owner’s easement to cause his neighbor’s land to sink, while conceding that a subjacent owner might have such an easement. Counsel contended,

"... even if such a grant as was here contended for would be valid between the surface owner and the owner of subjacent strata (as in

41 See W. S. Gilbert, Iolanthe (1882), where the Lord Chancellor sings,

"The Law is the true embodiment
Of everything that’s excellent,
It has no kind of fault or flaw,
And I, my lords, embody the Law."

42 My first judicial record of the doctrine is from 1834; my last, from 1905. It was particularly flourishing between 1850 and 1900 (see supra notes 4-8). Queen Victoria reigned from 1837 until 1901.

43 See quotations from Baron Martin, text to note 10 et seq., supra.


45 See Leech v. Schweder (1874) L. R. 9 Ch. App. 463, 475; and Keppell v. Bailey, supra note 1, at 536, 39 Eng. Rep. at 1049, where Lord Brougham, L. C., observed,

"Every close, every messuage, might thus be held in several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common is of a public as well as of a simple nature, and no one who sees the premises can be ignorant of what all the vicinage knows." (Italics added.)

46 Supra note 35.
Rowbotham v. Wilson\textsuperscript{47} . . . where the fact of such separate ownership would be itself notice of some unusual legal relation, it could not be so between the owners of lands lying horizontally adjacent to one another, where nothing but the ordinary rights would be supposed to exist.\textsuperscript{48}

This objection would seem to militate against non-apparent easements rather than against novel ones. It may be sufficiently answered in the United States by the rule that non-apparent easements do not arise by implication or prescription, and that if they arise by unrecorded agreement they are extinguished by purchase without notice.

"GRANTABILITY"

The rejection of the novelty notion has left critical writers at some loss for bounds to the field of easements. They hesitate to say that there are no bounds, but it is not at all clear what bounds there are. An English writer has ingeniously suggested that the subject matter must be "something which without absurdity we can imagine one man granting to another . . . ."\textsuperscript{49} The draftsman of the Property Restatement has put a related thought in the words "capable of creation by conveyance".\textsuperscript{50}

What meaning is borne by these phrases is far from patent. Conveyance was aptly used in the Property Restatement relating to Estates as a "wholly colorless" word to signify any attempt to create any property interest.\textsuperscript{51} Grant has been defined primarily as "a generic term applicable to all transfers of real property", and more specifically as a mode of transfer of incorporeal property by deed.\textsuperscript{52} Applying the primary meanings of these words to our troublesome phrases we are informed that the subject of an easement must be an interest which some one may attempt to create, or may effectively create, or may create by deed. This advances us very little. Even the reference to a deed does not help unless we already know some specific rules applicable to deeds.

To the extent that rules limiting creation by deed are known, the rule of grantability tells us that the same rules are applicable to


\textsuperscript{48} Richards v. Harper, supra note 35, at 203. (Italics added.)

\textsuperscript{49} CHESIRE, op. cit supra note 18, at 255.

\textsuperscript{50} PROPERTY RESTATMENT T. No. 12 (Am. L. Inst. 1939) 74.

\textsuperscript{51} PROPERTY RESTATMENT (Am. L. Inst. 1936) § 11, p. 30.

\textsuperscript{52} BOUVIER, LAW DICTIONARY (8th ed. 1914) 1378.
creation by other means, such as prescription. It was in this way that
the rule proved useful in some of the English prescription cases. On
the theory that prescription presumed a lost grant, they refused to
recognize prescriptive easements which could not have been granted.
Accordingly there could be no prescriptive easement without a defin-
ite owner who could have been grantee,53 nor without a servient
owner having capacity to grant,54 nor which was indefinite in its
scope,55 nor which violated public policy.56

Writers who say that the subject of an easement must be capable
of being granted or conveyed mean to do more than refer their read-
ers to some group of rules concerning grants and conveyances. They
attempt to derive from these words some inherent meaning. Appar-
tently that meaning could be rendered as delivery. Thus a man who
grants his land or chattel seemingly delivers something; and one who
grants a right of way may be thought to do likewise. It is not so easy
to regard as a delivery a restrictive covenant against building a house
costing under ten thousand dollars. "A conveyance", explains the
Property Restatement, "presupposes the existence as a thing of the
subject matter of the conveyance."57 Cheshire uses the grantability
rule in this way to exclude equitable restrictions. The Restatement
apparently intends to exclude as well certain affirmative easements
which are new and strange, thus salvaging a portion of the discarded
rule against novelty.58

The rule of grantability in this sense contains within it a very
keen analysis of judicial behavior. It is a fact that some judges have
recognized new or different easements when they were able to con-
ceive of them as things, but balked when they were able to discern
only aggregations of rights and privileges. The classic example is the
Pennsylvania decision which said that a deed created no easement

53 Goodman v. Mayor of Saltash (1882) 7 App. Cas. 633, 655, right of free inhabi-
tants of borough to fish.
54 See Philipps v. Halliday [1891] A. C. 228, 231, pew right, claimed against trus-
tees of church.
55 Chastey v. Ackland [1895] 2 Ch. 389, 403 (right of free passage of air currents
over whole lot); Harris v. De Pinna (1886) 33 Ch. D. 238, 262 (free air passage);
Dalton v. Angus (1881) 6 App. Cas. 740, 795; Bryant v. Lefever (1879) 4 C.P.D. 172,
177 (free air passage).
per North, K. C., arguing that right of pasture which was exclusive, yet limited to cattle
levant and couchant, was against public policy because it created a situation in which
no one might be entitled to use the pasture.
57 Property Restatement T. No. 12, op. cit. supra note 50, at 75. (Italics added.)
58 Ibid.
of causing subsidence because all it gave was an irrevocable right to do something without liability. The example is classic because Hohfeld made it the principal butt of his paper on "Faulty Analysis".

In this limited sense the rule of "grantability" is law—the law of hurried judges and careless counsel. But it is hard to see how a judge with time and ability to analyze the problem would derive any aid from it. Lords Justices St. Leonards, Shaw and Herschell were able to conceive of the grant of an easement, however novel, so long as it should violate no rule of policy. So also were Chief Justice Moschzisker (dissenting), and Justice Stern, among contemporary American judges. Nor does it appear that Mr. Cheshire, the English writer who first suggested the "grantability" test, derives from it any restriction against novelty.

If "grantability" does not distinguish novel easements from traditional ones, it might serve to distinguish negative easements from affirmative ones. For this there is both reason and authority. It is easy to conceive delivering a right of way, but difficult to conceive delivering a right that one shall not darken his neighbor's window. It therefore seemed to Justice Littledale that

"... light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant ...."

This interpretation of "grantability", which makes it somewhat intelligible, proves too much. Both Cheshire and the Restatement draftsman intend to include the negative easement of light within the term easement, although the former inferentially concedes the

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51 Hohfeld, Faulty Analysis in Easement and License Cases (1917) 27 Yale L. J. 66.
52 Supra notes 15, 16, 17.
53 Supra notes 59, 23.
54 Supra note 49.
55 See Rowbotham v. Wilson (1860) 8 H. L. Cas. 348, 362, 11 Eng. Rep. 463, 469, in which Lord Wensleydale, speaking of a privilege of withdrawing subjacent support, remarked, "I do not feel any doubt that this was the proper subject of a grant, as it affected the land of the grantor; it was a grant of the right to disturb the soil from below, and to alter the position of the surface, and is analogous to the grant of a right to damage the surface by a way over it; and it was admitted, at your Lordships' bar, that there is no authority to the contrary." (Italics added.)
57 Cheshire, op. cit. supra note 18, at 258; Property Restatement T. No. 8 (Am. L. Inst. 1937) § 4.
“absurdity” of granting a negative easement.\textsuperscript{67} Jurists are therefore called upon, in applying this criterion, to imagine the granting of negative, as well as of affirmative, easements.

When one has conceived of a negative easement (such as light) as something grantable, he can hardly fail to conceive of restrictive covenants (such as a building restriction) as equally grantable, and the term remains effective only to distinguish passive obligations from active ones. Thus Holmes used the \textit{grant} idea, when he said,

\begin{quote}
"Neither is it necessary to consider the difficulties that have sometimes arisen in distinguishing rights of this latter class [covenants] from pure matters of contract, by reason of their having embraced active duties as well as those purely passive and negative ones which are plainly interests carved out of a servient estate, and \textit{matters of grant}."\textsuperscript{68}
\end{quote}

This case, involving a covenant not to compete, was one which Holmes thought not capable of solution by the “grant” formula. It seems to be the very type which Cheshire and the \textit{Restatement} draftsman hope to solve by it; the former suggests that a right against cutting off the view and breeze is not an easement because it is less grantable than a right against shutting off light from a window.\textsuperscript{69}

Some ground of distinction between easements and restrictions may exist, but grantability seems a poor one. Perhaps the difference consists in the directness of physical advantage\textsuperscript{70} which is greater in the case of light than of view and air, and least in the case of a restriction against building a house costing under $10,000. More probably the distinction is to be found in the apparency of easements—a window’s need of light can be seen; the need of a view is less obvious.\textsuperscript{71}

The need for such a distinction has been felt chiefly in England, where negative easements are acquired by prescription, and bind the land although unrecorded. In the United States these reasons for

\begin{itemize}
  \item \textsuperscript{67} "The fact of the matter is that (putting aside the case of light and perhaps also support) all rights which have ever been held by English courts to constitute easements are intelligible objects of a grant, that is, they always relate to something which without absurdity we can imagine one man granting to another." \textsc{Cheshire}, op. cit. supra note 18, at 255. (Italics added.)
  \item \textsuperscript{68} Norcross v. James, \textit{supra} note 19, at 190, 2 N. E. at 948. (Italics added.)
  \item \textsuperscript{69} \textsc{Cheshire}, \textit{op. cit. supra} note 18, at 254.
  \item \textsuperscript{70} See text to note 40, \textit{supra}.
  \item \textsuperscript{71} This is suggested by Cheshire as a subsidiary basis of distinction. \textit{Op. cit. supra} note 18, at 255. It seems to have more merit than his principal basis.
\end{itemize}
drawing a distinction do not exist; it is common to find courts referring to restrictions as easements without qualification.\textsuperscript{72}

Even for the purpose of distinguishing passive obligations from active ones, "grantability" would be a poor test. Cheshire lists a servitude of fencing as an easement,\textsuperscript{73} and must therefore consider it grantable, although others have called it "spurious".\textsuperscript{74} It is clear that a rent issuing from the land is a subject of grant.\textsuperscript{75} The fact of the matter is that the conception of a legal transfer as the delivery of a \textit{thing} is a fallacy (or a figure of speech) even in the case of "tangible" property. What takes place is an extinguishment and recreation of legal relations; Austin demonstrated this over a century ago.\textsuperscript{76} To test the subjects of easements by their "grantability" is to test them by the elasticity of a legal fiction.

The rule of grantability proves to serve a number of diverse functions. It is an ambiguous way of stating the perfectly proper principle that incidents of an easement must be definite. It may also serve as a very improper mask for condemning an easement that is merely new or unfamiliar. It may be mentioned as a completely meaningless criterion for distinguishing "easements" from "covenants".

\section*{ABNORMALITY OF LEGAL INCIDENTS}

Abnormality in the legal incidents of easements is wholly independent of the novelty of the acts authorized, discussed above. An ordinary right of way may be taken as the standard of normality. Its outstanding legal incident is the privilege of doing what would otherwise be a trespass or nuisance; it is additionally characterized

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{72} See Stewart v. Alpert (1928) 262 Mass. 34, 159 N. E. 503; State \textit{ex rel.} Britton v. Mulloy (1933) 332 Mo. 1107, 61 S. W. (2d) 741; Couch v. Southern Methodist University (Tex. Civ. App. 1927) 290 S. W. 256, 259. A sampling of cases in the Fourth Decennial Digest which discussed the nature of restrictive agreements showed 3 out of 10 Massachusetts decisions, 3 out of 10 Missouri decisions, 1 out of 24 New York decisions and 3 out of 12 Texas decisions referring to them as easements. Two of the 24 New York decisions noted without approval that restrictions are sometimes called easements. Another New York decision (not in the sample) drew a dubious distinction between the legal consequences of denomining the interest a restrictive covenant and an easement. See also Pound, \textit{Progress of the Law, 1918-1919, Equity—Equitable Servitudes} (1920) 33 Harv. L. Rev. 813, noting that the servitude is called \textit{easement} for the purpose of applying the statute of frauds and \textit{contract} for the purpose of holding that it will not be enforced after a change in the conditions for which it was created.
\item \textsuperscript{73} \textit{Cheshire, op. cit. supra} note 18, at 259.
\item \textsuperscript{74} See 3 Tiffany, \textit{Real Property} (3d ed. 1939) 230.
\item \textsuperscript{75} 2 BL. COMM. *317.
\item \textsuperscript{76} \textit{Austin, Jurisprudence} (1832) lectures 13, 14.
\end{enumerate}
\end{footnotesize}
by a degree of definiteness as to ownership, the identity of the servient easement, and the scope of acts authorized; by burdening the servient tenement and benefitting the dominant tenement in whosesoever hands they may come; and by receiving judicial protection complete in scope and perpetual in time. An easement to swing shutters across a boundary, which is doubtless novel as to the acts which it authorizes, is wholly normal with respect to its legal incidents. But a right of passage which has no definite owner or scope, and which is quite normal as to the acts which it authorizes, is unenforceable because of this abnormality in its legal incidents.

The requirements of definiteness are quite intelligible without any reference to "grantability". The owners of a servitude must be sufficiently definite so that a court may identify them. If its benefit extends to every one who may be interested, it is not "unknown to the law", but it is a public, not a private right, and subject to different legal principles.

No cases appear to have pointed out the necessity of a definite servient owner, but it is equally obvious. One should not be permitted to claim a private right of following the hounds wherever they may run, although he should be permitted to prove that he has acquired such an easement in any number of particular tenements.

Likewise an easement must confer privileges of doing particular things, not of doing anything from fishing to farming. This is not because the law is opposed to unlimited rights in land, but because rights which are unlimited are estates, not easements.

Another possible departure from the norm relates to the duration of the easement. Durations which may be regarded as normal include analogies to all the standard estates—in fee, for life and for years—excepting easements at will, which are generally called licenses. An estate at will is also called a license occasionally, to suggest the lack of rights against the lessor; but it is convenient to regard it as an estate because it gives a right of action against trespassing strangers. A privilege which might be called an easement at will is com-

78 Simpson v. Mayor of Godmanchester, supra note 8.
79 Cf. PROPERTY RESTATMENT T. No. 8, op. cit. supra note 66, § 1. "An easement or a profit is an interest in land in the possession of another which (a) entitles the owner to a limited use or enjoyment of the land ...." (Italics added.)
monly believed to confer no rights against third persons, and to be therefore no easement at all but only a consent or license. Nevertheless, the recognition of easements at will would probably be desirable, since it would avoid the confusion incident to using license for the interest created as well as for the transaction which creates it, and would possibly lead to a fairer determination of the existence of a right to protection against strangers.

A more significant departure from normal durations is involved in cases where the easement is subject to a qualified power of termination in the servient owner. Such was the claim in an English case, of a right to water cattle whenever the servient owner's mill pond should be high enough to be accessible. It was claimed that even though the pond owner might prevent exercise of the easement by lowering the water, he might not otherwise obstruct its exercise when the water was high. The court held against the easement, on the ground that an easement must not be precarious, citing authorities against prescription through precarious use. It would certainly be undesirable to permit prescription in such cases, and perhaps also implication on severance, which was involved in the case at bar. But no reason appears for refusing to recognize such an easement when created by agreement of the parties. The fact that the servient owner cannot be prevented from interfering with the easement in a certain manner is no reason to let him interfere with it in every other manner. In accordance with this view, two American decisions have recognized existence of an easement to use a stairway in a particular building, although the servient owner had power to terminate it whenever he chose to demolish his building.

A very subtle departure from the normal easement is one which may be called an incomplete easement. The normal easement confers a complete privilege, since the dominant owner can neither be made to pay damages, nor be enjoined, nor be lawfully obstructed. The

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83 The right to protection against third persons is an element of the definition of easement in Property Restatement T. No. 8, op. cit. supra note 66, § 1(b).
84 See Clark, Licenses in Real Property Law (1921) 21 Col. L. Rev. 757, 760.
85 Burrows v. Lang (1901) 2 Ch. 502, (1902) 2 Col. L. Rev. 265.
86 See Clark, Licenses in Real Property Law (1921) 21 Col. L. Rev. 757, 760.
87 3 Bracton, op. cit. supra note 11, f. 222b; Co. Litt. *113b.
owner of an incomplete easement likewise cannot be enjoined nor lawfully obstructed, but he can be made to pay damages for harm done. In this respect he is like the storm-tossed mariner of tort law who may use another’s dock under pressure of necessity, but must pay for the consequences. In Aspden v. Seddon an English court grudgingly accepted this peculiar aggregate of legal relations in a case involving a miner’s right to let down the surface on paying damages. It has been found a useful aggregate for pipe line easements, the grant of which is sometimes accompanied by an agreement to indemnify the servient owner for any harm caused to his land.

Incomplete easements frequently arise in a manner practically unnoticed in legal literature, as a result of the equitable doctrine of balance of convenience. Suppose that the owner of a coal stratum, who has obtained no grant of an easement to cause subsidence of the surface, finds it impossible to mine without causing subsidence; because of the great value of the coal, and the slight value of the surface, a court of equity may “balance the conveniences” and refuse to enjoin the miner; yet he is admittedly committing a nuisance for which he will be liable in damages. The resulting legal relations are substantially the same as in Aspden v. Seddon, where the coal had been granted with express permission to let down the surface on paying damages.

Under what circumstances conveniences should be so balanced, and whether they should ever be, have provoked spirited debates, partly concerned with a difference of opinion about what the balancing of conveniences actually accomplishes. When refusing the injunction, courts are prone to treat the matter as purely procedural. In such a case, the Pennsylvania court declared, “The real question

89 Vincent v. Lake Erie Trans. Co. (1910) 109 Minn. 456, 124 N.W. 221. For usage of the terms “complete” and “incomplete”, see Torts Restatement (Am. L. Inst. 1934) § 197, i; Bohlen, Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality (1926) 39 Harv. L. Rev. 307.

90 (1876) 1 Ex. D. 496 (awarding damages for subsidence); cf. Aspden v. Seddon (1875) L. R. 10 Ch. App. 394 (denying injunction against causing subsidence.)

91 See agreement reported in Babler v. Shell Pipe Line Corp. (E. D. Mo. 1940) 34 Fed. Supp. 10.


93 (1876) supra note 90.

94 See McClintock’s excellent paper, Discretion to Deny Injunction Against Trespass, and Nuisance (1928) 12 Minn. L. Rev. 565, citing earlier discussions. See also Notes (1939) 25 Va. L. Rev. 465; (1933) 40 W. Va. L. Q. 59; (1932) 5 Rocky Mt. L. Rev. 78.
involved in this case is one of remedy rather than of legal right."\textsuperscript{95}

The Indiana court rationalized more elaborately, and less comprehensibly, as follows:

"In such a case, even though the appellants' conduct might \textit{not} be such as to create a \textit{license} or \textit{easement} in favor of appellees, still their acquiescence in an invasion of their known rights creates what has been termed a \textit{quasi estoppel}, which will \textit{preclude} them from obtaining distinctly \textit{equitable relief}, but which will not cut off their legal remedies."\textsuperscript{96}

When courts award injunctions, and refuse to "balance conveniences", their language is quite different. They point to the substantive aspects of refusing injunctive relief, depriving the offended landowner of the full enjoyment of his property. When on this side of the fence, the Pennsylvania court declared,

"The \textit{right} of a man to use and enjoy his \textit{property} is as supreme as his neighbor's, and no artificial use of it by either can be permitted to \textit{destroy} that of the other."\textsuperscript{97}

In refusing to be guided by the balance of conveniences, the New York Court of Appeals declared,

"Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would \textit{deprive} the poor litigant of his \textit{property} by giving it to those already rich."\textsuperscript{98}

From the fact that refusal of injunction transfers property, it is supposed to follow that injunction \textit{must} be awarded.

Just what kind of property it is which would be taken from one and given to another if injunction were refused is seldom stated. The rights of exclusive possession and the privileges of exploitation remain, but some of the rights of being free from interference with enjoyment have been subtracted. Judge Marshall seems to have analyzed the situation correctly when he said,

"If the injuries inflicted by the defendant are to be regarded as a taking, the defendant does not take the entire land, but simply an

\textsuperscript{95} Berkey v. Coal Mining Co., \textit{supra} note 92, at 73, 69 Atl. at 332.
\textsuperscript{96} Weis v. Cox (1933) 205 Ind. 43, 50, 185 N. E. 631, 633, (1934) 12 Tex. L. Rev. 231. (Italics added.)
\textsuperscript{97} Sullivan v. Steel Co. (1904) 208 Pa. 540, 555, 57 Atl. 1065, 1071. (Italics added.)
\textsuperscript{98} Whalen v. Union Bag & Paper Co. (1913) 208 N. Y. 1, 5, 101 N. E. 805, 806. (Italics added.)
easement to discharge dust and vapors containing sulphurous ... acid on it.\textsuperscript{99}

It does not necessarily follow that a nuisance should always be enjoined. Although a court may be exercising a power of eminent domain when it refuses to enjoine, it is a power historically vested in chancellors which they may and should use to avoid injustice.\textsuperscript{100}

Despite the practical convenience of the incomplete easement, it will probably remain a puzzle to logicians of all schools. It will be particularly embarrassing to those who maintain that an easement must be "an intelligible subject of a grant";\textsuperscript{101} it is difficult indeed to conceive of "granting" a privilege which is good as against specific remedies but not as against damage suits. Nor can the anomaly be explained by the familiar dichotomy between legal and equitable rights. It has been held very appropriately that the encroachment which equity will not enjoin will not be removed by the sheriff on an ejectment judgment.\textsuperscript{102} And despite a lack of cases, it is apparent that the courts which refuse to enjoin mining which caused subsidence would not countenance forcible interference by the surface owner's self-help.

Even Hohfeld's famous system fails to classify the incomplete privilege neatly. His privilege\textsuperscript{103} was a complete one, signifying that for all legal purposes there was not a right-duty relationship. It was actually based on a number of immunities—from damage suits, from injunctions and other specific remedies, and from lawful interference by self-help. The incomplete privilege requires us to distinguish between the immunities to specific relief and immunities to substituted relief by way of damages.

A final problem in abnormal legal incidents is presented by the easement "in gross". It is abnormal in that it continues to belong to the original grantee until he attempts to transfer it, even though he has in the meantime sold all his other property. This characteristic is of course perfectly normal in every kind of property except servi-
tudes; but it is abnormal in a servitude, which typically belongs to
the original grantee only so long as he owns a particular estate with
which the servitude is associated, and thereafter to the owner for the
time being of the dominant estate. In other words, servitudes are
normally appurtenant. An easement “in gross” is abnormal.

Vance,\textsuperscript{104} Simes,\textsuperscript{105} Charles E. Clark,\textsuperscript{106} Rundell,\textsuperscript{107} Aigler\textsuperscript{108} and
Madden\textsuperscript{109} are among the distinguished property scholars who have
directed their attention to the easement in gross.\textsuperscript{110} That might be
reason enough for making no attempt to increase the liberal choice
of theories offered. For further reason, the present paper is intended
to put the question, what may be an easement? In the United States,
it seems clear that an interest may be an easement to the extent of
running with servient land, and of protection against strangers, even
though it is “in gross”. The only problem is whether the easement
“in gross”, which does not pass (like most servitudes) as an appur-
tenance, may pass in some other way, such as by inheritance or a
transfer \textit{inter vivos}.\textsuperscript{111}

\section*{EFFECTS AND FUNCTIONS OF ACTS AUTHORIZED BY EASEMENTS}

The rules about \textit{novelty} and \textit{grantability} have been distilled to
a residue which consists chiefly of certain legal incidents—definite-
ness of dominant and servient owners, of scope and of duration, com-
pleteness of judicial protection, appurtenancy. There remain to be
analyzed certain elements which are not reducible to legal incidents,
but are more specific than mere novelty of acts authorized.

The first of these elements relates to the particular manner in
which an easement burdens the land. The typical easement serves to
authorize something to be done on the servient owner's land. In a
case where a right was asserted to excavate on one's own land in such

\textsuperscript{104} \textit{Assignability of Easements in Gross} (1923) 32 \textit{Yale L. J.} 813.
\textsuperscript{106} \textit{The Assignability of Easements, Profits and Equitable Restrictions} (1928) 38 \textit{Yale L. J.} 139.
\textsuperscript{107} Property Restatement T. No. 10 (Am. L. Inst. 1938) 83-96. Professor Oliver S. Rundell is reporter for the division.
\textsuperscript{108} \textit{Ibid.} at 54-56, note on dissenting view of Aigler and Madden, who are among
the divisional advisers.
\textsuperscript{109} \textit{Ibid.}
\textsuperscript{110} See also excellent discussions in (1932) 17 \textit{Iowa L. Rev.} 235; (1929) 13 \textit{Minn. L. Rev.} 593.
\textsuperscript{111} See Clark, \textit{op. cit. supra} note 106; Note (1929) 13 \textit{Minn. L. Rev.} 593.
a way that the servient owner's land might slip into the excavation, it was argued that this could not be an easement. Counsel contended,

"... all easements suppose a right exercised over the servient tenement: even in the case of lights it is the passage of the rays of light and of air; and in the support of the neighboring soil it is its continuance in its place; and that the claim of the defendants here is not to do something on the plaintiff's land, but merely not to be sued for what he does on his own."112

A majority of the Exchequer Chamber, affirmed by the House of Lords, rejected the contention, and this part of the argument in the House of Lords was very casual.113 Said Lord Wensleydale,

"I do not feel any doubt that this was the proper subject of a grant, as it affected the land of the grantor; it was a grant of the right to disturb the soil from below, and to alter the position of the surface, and is analogous to the grant of a right to damage the surface by a way over it...."114

The same problem was later to confuse the Supreme Court of Pennsylvania, although Chief Justice Moschzisker pointed out that an easement was created.115 He may have been the first so to use this term in this jurisdiction, but earlier cases had given effect to the interest as one running with the land.116 A New York court rejected the similar contention that a privilege of maintaining an embankment which slipped in wet weather upon adjoining land was no subject for an easement.117

The other supposed characteristic of the things which an easement may authorize relates to the kind of benefit which the easement confers. Supposedly it must confer a benefit to the enjoyment of the land of the dominant owner.

At first glance, this requirement appears to be merely the fa-

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112 Rowbotham v. Wilson, supra note 47, at 147, 120 Eng. Rep. at 55. (Italics added.)

113 Bramwell, B., in the Exchequer Chamber, was bothered by the point; he based his decision on the fact that the unusual relation of subjacent and superjacent tenements in the same land justified the unusual easement. This rationalization caused difficulty in Richards v. Harper, supra note 35, where the easement of causing subsidence was claimed by an adjacent mine owner.


115 Penman v. Jones, supra note 59. See Hohfeld's article on this case, op. cit. supra note 60.


familiar one that easements should be appurtenant. But *appurtenant* is used in two senses. In one sense an easement is appurtenant provided only that it belongs always to the owner for the time being of the dominant tenement. In this sense a pew may be appurtenant to a mansion,118 and by the same token an opera box might be appurtenant to a penthouse. This requirement has nothing to do with the kind of acts which the easement authorizes.

In the sense which is now relevant, *appurtenant* refers to more than a legal incident. It refers to the benefit which is conferred, which must be not merely "personal", but physically related to enjoyment of the dominant estate. This conception is much more familiar in connection with covenants which must "support the reversioner's [that is, the covenantee's] estate," so that a covenant to hire only residents of the lessor village was invalid. It benefitted the lessor, but not "as landlord".119 The requirement, or a similar one, was applied to restrictive covenants, sometimes called negative easements, by Justice Holmes, when he held that a covenant against opening a quarry could not run with the land because it did not look to "direct physical advantage in the occupation of the dominant estate".120

From the field of covenants and of *negative* easements, this requirement vaulted lightly into the field of *affirmative* easements, in the course of the decision of *Ackroyd v. Smith*. Justice Cresswell declared,

"Now, the privilege or right in question does not inhere in the land, does not concern the premises conveyed, or the mode of occupying them; it is not *appurtenant* to them. A covenant, therefore, *that such a right should be enjoyed, would not run with the land*. Upon the *same principle*, it appears to us that such a right, unconnected with the enjoyment or occupation of the land, cannot be annexed as an incident to it . . . ."121

Having thus referred to the *function subserved* by the easement, the justice now reverted to the *legal incident* of inseparability from its dominant estate. He continued,

". . . nor can a way appendant to a house or land *be granted away, or made in gross*; for, no one can have such a way but he who has the land to which it is appendant: *Bro. Abr. Graunt*, pl. 130 (a.)."122

120 Norcross v. James, *supra* note 19, at 192, 2 N. E. at 949.
That the concept of a servitude "inhering" in the land is a difficult one, the cases on covenants running with the land had already shown. It proved no easier to apply to affirmative easements. In *Hill v. Tupper* a lot had been leased for a boathouse together with an exclusive right of boating in the adjacent canal. It was evident to Chief Baron Pollock that the latter was a right "unconnected with the use and enjoyment of land," which Cheshire paraphrased by saying that "inasmuch as it did not exist for the accommodation and better enjoyment of the land held by the plaintiff at the waterside, it lacked one of the characteristics necessary to the existence of an easement."

Plainly ownership of an exclusive boating right would add to the usefulness of the boathouse; *inhering* in the land means something more. It can only mean as Holmes suggested, something which contributes to the direct physical benefit of the dominant tenement. As applied to rights of way, this conception leads naturally to the view that a way must terminate immediately upon the dominant tenement, a view which found expression in an English lower court's decision in 1934, only to be repudiated upon appeal.

Whatever the relation of this doctrine to covenants, it is not, in the United States, significantly related to affirmative easements. It is an outgrowth of the rule that easements must be *appurtenant* (in the sense of legal inseparability), which has a very limited application in this country.

**INCIDENTAL USES OF LAND**

One type of agreement which is supposed to create no interest in land is that in which, as Professor Burby puts it, "the primary object . . . is not the enjoyment of land as such—the most discussed type of case falling under this heading being the so-called 'theatre ticket case.'" "Since we have not perfected the art of flying," as Judge Charles E. Clark observed in similar context, "most of us do our acts . . . upon the ground"; but it does not follow that all such

124 *Supra* note 5.
125 CHESHERE, *op. cit. supra* note 18, at 258
127 Todrick v. Western Nat. Omnibus Co. [1934] Ch. 190.
129 See *supra* notes 104-11, and text thereto.
contracts create interests in land. Justice Holmes declared in a ticket case that, "The ticket was not a conveyance of an interest in the race track, not only because it was not under seal but because by common understanding it did not purport to have that effect." 132

These observations are penetrating; like many such observations, they may prove more than their authors credit them with. What contracts do have as a primary object the enjoyment of the land as such? Not the ordinary right of way, which uses the land only as a way of getting to other land, which is perhaps to be enjoyed "as such". The right of way is important because of its juxtaposition to a house, just as a theater seat is important because of its juxtaposition to the stage. Inquiry might disclose to our embarrassment that one-third of a nation has no "enjoyment of the land as such", and leases quarters only because it cannot sleep in the air and is not permitted to sleep in the street. For a century economists have been fond of pointing out that most urban land is important by reason of its juxtaposition to such essential activities as transportation and manufacturing.

The substantial difference between "the enjoyment of land as such" and its purely incidental enjoyment seems to be the permanency of circumstances making it enjoyable. The dominant tenement (in the case of a right of way) is likely to stay there (although its subsidence into the ocean would terminate its appurtenant easement). But a stage show stays for so short a time that the privilege of being near it is strangely unlike most "interests in land". It is only on this ground that we can distinguish the privilege of seeing a horse race, which is no right in land, 133 from a right to a church pew, which is an acceptable easement 134 because of our assumption that common

132 Marrone v. Washington Jockey Club (1913) 227 U. S. 633, 636. Justice Holmes also declared with apparently the same meaning that "such tickets do not create a right in rem". There was no reason to decide whether the right was in rem in the Austinian sense of a right available against the world, since only the licensor was sued. The question was whether the ticket holder had the right (usually associated with property) to freedom from bodily restraint in exercising an alleged privilege. Justice Holmes made the assumption, which is usually but not always true, that this right would not exist against the proprietor unless it would also exist against strangers. "...if it did not create such an interest, that is to say, a right in rem valid against the landowner and third persons, the owner had no right to specific performance by self help." Ibid. This would seem to result from confusing a "right in re", an interest in a thing, with a right in rem, an interest available against an indefinite number of persons. See Hohfeld, op. cit. supra note 103, at 733.


134 Philips v. Halliday, supra note 54. The right is not called an "easement" by name, but is held as appurtenant to a mansion, is protected by injunction against dis-
prayer will endure as long as private property.

A privilege of using land which is incidental to a contract of entertainment or of employment is logically no more enforceable than the principal contract. If a court would not enjoin a showman from cutting off the view from certain seats, nor an employer from ceasing to furnish employment, it would naturally repudiate any irrevocable privilege to be on the premises, since the latter would be merely incidental to the main contract. It is for this reason that discussion of the ticket cases turns often to the right of "specific performance" of the contract. But it is unsound to make the existence of a right depend on whether equity would grant a decree; there are analogous situations in which interests exist, although they are specifically protectible only by self-help; a landowner must cut off the encroaching roots of trees himself because it is not a practicable case for equitable remedies.\(^3\) It does not follow that the owner of the encroaching trees may obstruct the other's efforts.

As soon as it is conceived that the principal contract is specifically enforceable, the incidental use of land is also conceived of as specifically protectible by injunction or self-help. A remarkable example is the sit-down strike which came hand-in-hand with legislative limitation of the employer's right to fire. Dean Leon Green with his usual plausibility put the case thus:

"An industrial corporation cannot fire an industrial union .... It is thus that employees may peacefully sit and wait until their complaints are ironed out through negotiations between their representatives and the representatives of the corporate group of owners .... They merely occupy them [the premises] because they are an incident to the industry in which they have an interest."\(^3\)

The connection between enforceability of the principal contract and irrevocability of the incidental license was no invention of Dean Green. It had been considered several decades earlier in at least two cases in which persons had contracted with landowners to quarry or to cultivate the latter's land, and the landowners subsequently attempted to terminate the contracts before their expiration. In one of


\(^3\) The Case for the Sit-Down Strike (March 24, 1937) 90 New Republic 199, 200.
the cases, a court of equity refused to aid the landowner in expelling the cultivator in violation of the contract.

"It gave a license to defendant so to enter, which, being granted upon a valuable consideration, was not revocable so as to destroy his right to collect from the crop after it had ripened."  

In the other case, the court enjoined the quarrymen's continuing trespass, but only on the ground that the contract was not specifically enforceable.  

The connection was noticed also by an Australian supreme court justice who, in holding that a ticket to a horse race was revocable, declared,

"Consider, for example, the case of a servant who is employed for a term to do work upon certain premises. He is wrongfully dismissed . . . . The principle approved in Hurst's Case would entitle him to go into and remain upon the premises, although he had been dismissed from his employment, and to obtain damages for assault if he were forcibly removed."

In denying that such privileges are created by ticket sales, it has been said that the parties would be surprised if told that they had made a conveyance of land. So they would, but no more so than would many apartment tenants. In either case they would probably be more surprised if told that they had no rights against eviction. They are merely deficient in fundamental legal conceptions, failing to realize that among lawyers a right against eviction can only result from a "conveyance". If the legal incidents of easements are denied to all who would be surprised by an analysis of what they claim, astute lawyers would share with laymen a sudden loss of essential judicial protection.

Irrevocable interests in land which are incident to contracts of service are perfectly reasonable, if the contracts of service are irrevocable. Nor is it a solecism to protect the incidental privilege although it is impracticable specifically to enforce the principal contract. It is

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137 Ferris v. Hoagland (1898) 121 Ala. 240, 25 So. 834.
140 See Clark, loc. cit. supra note 131. Cf. quotation from Justice Holmes in text to note 132, supra. Clark lets the cat out of the bag when he says that "both theater proprietor and theater patron would be surprised to learn that the purchase of a ticket 'to see a show' was a sale of land". (Italics added.) They should be! It certainly is not a "sale of land" in any sense. They would not be so much surprised to be told their arrangement resembled a pew right, or even a whittled-down apartment lease.
not uncommon for the law to enforce one part of an aggregate of rights while other parts are left without so feasible a remedy. The best example is the artist’s contract, of which the court will enforce the negative covenants although enforcement of the affirmative covenants is impracticable.\textsuperscript{141}

It remains true that most agreements which are to be performed upon land only because we are terrestrial creatures do not create irrevocable interests in land. As Coke and Holmes have declared, a majority of contracts are not intended to be specifically enforceable,\textsuperscript{142} either by the aid of equity or by self-help. To determine whether an irrevocable incidental privilege is created, we should look to see whether the parties intended, or would have intended, had they thought, a principal contract which the landowner could not terminate on merely paying damages.

CONCLUSION

An easement may authorize acts which have not been authorized before and acts whose effects and functions have not been authorized before. It may differ in many legal incidents from previously known easements.

Yet there are limits. An interest so extensive that it amounts to an estate is not an easement. An interest too vague for judicial administration is not an easement. An interest too slight to merit judicial recognition is not an easement. Particular incidents which serve no useful purpose will not be judicially enforced, although they will not prevent the other incidents from being sanctioned.

But in the main, landowners may create in others an unlimited variety of privileges, and attendant rights, to make non-possessory uses of the land. It was wisely said a century ago by the first English writers on easements that, “The number and modifications of rights of this kind may be infinite both in their extent and mode of enjoyment, as the convenience of man in using his property requires.”\textsuperscript{143}

\textsuperscript{143} Gale and Whatley, Easements (1839) *3.