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Robert Kratovil

EASEMENT LAW AND SERVICE OF NON-DOMINANT TENEMENTS: TIME FOR A CHANGE

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I. INTRODUCTION

Easement law has long followed a rigid rule prohibiting use of an appurtenant easement to service non-dominant land. At times, this rule has led to litigation seeking to block use of an access easement where a valuable building has been placed on non-dominant land.[1] Such litigation has been unsuccessful in some instances in which the increased burden on the easement has been slight. Yet, if the owner of a servient tenement wishes to pursue a matter of this sort, an easement owner may be subjected to a type of "legal extortion"[2] if he has, in ignorance of this technical rule, expanded his operations beyond the boundaries of the dominant tenement. The ensuing litigation is usually needless, expensive and time consuming.

The time has come to adopt a new standard for judging the increase of burden upon an easement. Such a standard should allow for flexibility without forcing unnecessary litigation and without unfairly burdening the owner of the servient tenement. This article proposes that the situation described be brought within the scope of the familiar "unreasonable increase of burden" rule governing other aspects of easement law. Additionally, consideration of the existing rule when creating an easement could eliminate subsequent problems arising from an increase of burden. Creation of better standards for allowing increase of burden and for determining the rights of servient and dominant owners is needed.

II. BURDENING NON-DOMINANT TENEMENTS

Where an appurtenant easement exists, the rights of the owners

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* J.D. De Paul University; Professor, The John Marshall Law School, Chicago, Illinois.

1. *See infra*, notes 3-25 and accompanying text.
2. *See infra*, notes 32-33 and accompanying text.

of two (or more) tracts of land, often adjoining tracts,[3] must be reconciled. For example, A owns Blackacre and B owns adjoining Whiteacre. A grants B an easement of ingress and egress over a portion of Blackacre so that B can enjoy more convenient access to Whiteacre. Because A continues to own the underlying fee and the easement does not give B the exclusive right to use the easement tract,[4] both A and B will use the easement premises. Therefore, opportunities for conflict exist.

In the above illustration, Whiteacre is the dominant tenement or dominant estate. Quite obviously, as time wears on, changes may take place in the dominant tenement. Consider the following scenarios for the future of Whiteacre:

1) When the easement was created, Whiteacre was grazing land. It is now converted to farm land with trucks and farm machinery traveling across the easement;

2) Whiteacre was improved with a residence when the easement was first created. Now the residence has been demolished and replaced with a hotel;

3) When the easement was first created, Whiteacre was a truck farm. Now it has been subdivided and twenty homes have been erected and sold to homebuyers;

4) When the easement was first created, Whiteacre was a forty-acre farm. The owner has since acquired another forty acres adjoining Whiteacre and uses the easement for the entire eighty acres.

It is obvious that in all these scenarios the problem is one of achieving an accommodation that is fair to both parties. Yet, it is only in the last example that any litigation between the parties will be decided without considering the question of fair accommodation.

It is a well-established rule that an appurtenant easement must be used to service only the dominant tenement. It must not be used to service non-dominant land. In *Penn Bowling Recreation Center Inc. v. Hot Shoppes Inc.*,[5] a tract of land owned by Hot Shoppes was subject to an easement of ingress and egress for the benefit of Blackacre. The owner of Blackacre subsequently acquired additional adjacent land and constructed a building that occupied parts of the dominant tenement and the acquired property. The Circuit Court of Appeals held that use of the easement to service this building could not be permitted, stating: "[T]he owner of the dominant tenement

3. There is no requirement of contiguity. Allendorf v. Daly, 6 Ill. 2d 577, 129 N.E.2d 673 (1955).

4. Easements are not exclusive. Etz v. Mamerow, 72 Ariz. 228, 233 P.2d 442 (1951).

5. 179 F.2d 64 (D.C. Cir. 1949), Annot., 16 A.L.R.2d 602 (1951).

may not subject the servient tenement to use or servitude in connection with other premises to which the easement is not appurtenant."[6]

To sustain the rule that the servient tenement may not be used to serve non-dominant land, the ancient authorities point to the possibility that, were the rule otherwise, the easement could be unreasonably burdened. Thus in *Shroder v. Brenneman*[7] the court stated:

> It is a well-settled rule of law, that if a man has a right of way over another's land to a particular close, he cannot enlarge it and extend it to other closes, and this whether his right be by user or by deed: *Rolle* 391, *Howell v. King*; 1 *Mod.* 190, *Henning v. Burnett*; 8 *Exch. Rep.* 192, *Davenport v. Lawson*; 21 *Pick.* 72, *Kirkham v. Sharp*; 1 *Wh.* 323, *Lewis v. Carstairs*; 6 *Wh.* 207.
>
> The reason of the rule is stated in *Howell v. King*, and runs through the subsequent cases, that if the law were not so the owner of the close to which the right is appurtenant might purchase an indefinite number of adjoining acres, and annex the right to them, by which the grantor of the way might be entirely deprived of the benefit of his land; a reason which applies with all its force to a private alley like that in respect to which this suit was brought.[8]

Another reason given for the rule is that permitting use of the easement to service the additional land would have the effect of making an easement in gross out of an easement appurtenant.[9] This is mechanical jurisprudence and contributes little to a solution of the problem. Still another specious reason used to support the rule prohibiting service to non-dominant land is that "no one but the

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6. Penn Bowling Recreation Center Inc. v. Hot Shoppes Inc., 179 F.2d 64, 66; (D.C. Cir. 1949). To like effect are Cooper v. Sawyer, 405 P.2d 394 (Hawaii 1965); Goodwillie Co. v. Commonwealth Electric Co., 241 Ill. 42, 89 N.E. 272 (1909); Kixmiller v. Baltimore & O.S.W.R. Co., 60 Ind. App. 686, 111 N.E. 401 (1916); Thul v. Weiland, 213 Iowa 713, 239 N.W. 515 (1931); Cooley v. Boston & Maine R.R., 303 Mass. 371, 21 N.E.2d 953 (1939); Knotts v. Summit Park Co., 146 Md. 234, 126 A. 280 (1924); French v. Marstin, 24 N.H. 440 (1851); Diocese of Trenton v. Toman, 74 N.J. Eq. 702, 70 A.D. 606 (1908); McCullough v. Broad Exchange Co., 101 A. D. 566, 92 N.Y.S. 533 (1905); College Inns of America Inc. v. Cully, 254 Or. 375, 460 P.2d 360 (1969); Reise v. Enos, 76 Wis. 634, 45 N.W. 414 (1890); Williams v. James, 2 L.R.-C.P. 577 (1867); 25 AM. JUR. 2D *Easements & Licenses* § 77 (1966); Annot., 46 A.L.R.2d 461 (1956); Annot., 122 A.L.R. 1166 (1939).

7. 23 Pa. 348 (1854). *See also* French v. Marstin, 24 N.H. 440, 443 (1851). In short, the purpose of the rule is to prevent an increase of burden on the servient tenement. Wood v. Woodley, 160 N.C. 4, 75 S.E. 719, 720 (1912); Adams v. Winett, 25 Tenn. App. 276, 156 S.W.2d 353, 357 (1941).

8. 23 Pa. 348, 350-51.

9. E. RABIN, FUNDAMENTALS OF MODERN REAL PROPERTY LAW 384 (1974).

owner of land can create an easement over it."[10] The reasons given must be tested against other generally accepted principles of easement law to determine if they can withstand scrutiny.

A. *Increase of Burden—The Reasonableness Test*

Because an easement is not exclusive,[11] both the dominant and the servient owners will make use of the easement premises. When two strangers must share the use of the same premises, disputes and differences of opinion are bound to arise. If the point at issue is not covered by the specific language of the easement grant, the law admonishes both parties to be "reasonable in the exercise of their respective privileges."[12] The authorities allowing the dominant owner any unlimited reasonable use are numerous.[13] Likewise, the servient owner may use his land in any reasonable manner that does not unduly burden the use made by the easement owner.[14] And if several different parties have easement rights over the same premises, each must use the premises in a way that is reasonable as regards the others.[15] As a result, a court must balance the equities and take into consideration the advantage of one owner's use and the disadvantage to the other owner caused by that use.[16]

This, of course, concedes that there may be an increase in the volume and a change in the kind of use in the course of enjoyment of the easement.[17] In other words, a progression from ox teams to tractors is normal[18] and a change as drastic as one from farm-crossing to serving a new hospital has been approved.[19] Also, an easement for access to a private dwelling could later be used as a means of access to a hotel erected on the dominant tenement.[20] The parties, it is assumed, contemplated the normal development of the dominant

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10. Heritage Standard Bank v. Trustees of Schools, 84 Ill. App. 3d 653, 405 N.E. 2d 1196, 1199 (1980).

11. *See supra* note 2.

12. RESTATEMENT PROPERTY (SERVITUDES) § 486 (1944).

13. Peterson v. Oxford, 189 Conn. 740, 459 A.2d 100, 102 (1983); Long v. Sendelbach, 56 Or. App. 158, 641 P.2d 1136 (1981); Annot., 3 A.L.R.3d 1256, (1965).

14. Lindhorst v. Wright, 616 P.2d 450 (Okla. Ct. App. 1980).

15. Cox v. Glenbrook Co., 78 Nev. 254, 371 P.2d 647, 653 (1962).

16. Farmer v. Kentucky Utilities Co., 642 S.W.2d 579 (1982); Delaney v. Gurrieri, 122 N.H. 819, 451 A.2d 394 (1982).

17. Long v. Sendelbach, 56 Or. App. 158, 641 P.2d 1136 (1981) (citing 25 AM. JUR. 2D *Easements and Licenses* § 74 (1966)).

18. Glenn v. Poole, 12 Mass. App. Ct. 292, 423 N.E. 2d 1030 (1981).

19. Inter Community Memorial Hospital Building Fund, Inc. v. Brown, 9 Misc. 2d 202, 168 N.Y.S.2d 535 (1957).

20. White v. Grand Hotel [1912] 1 Ch. 113.

tenement.[21]

Commonly, the permitted increase in use of the dominant tenement is referred to in terms of "increase of burden." The use of the dominant tenement may not be so substantially enlarged or materially changed that an increased burden on the servient estate results.[22] However, a reading of the decisions reveals that the phrase "increase of burden" has no precise significance.[23] Basically, the test is one of reasonableness.

When the dominant land is divided into parts, whether by deed or will, each part enjoys the benefit of the easement provided the burden on the servient estate is not thereby increased.[24] Again, the courts do not hesitate to address the task of determining whether an unreasonable increase of burden has occurred. The decisions, however, do not always agree as to what constitutes an unreasonable increase of burden.

In *Bang v. Foreman*,[25] plaintiffs purchased certain lots granting an easement right to use a nearby beach, which was to be for the exclusive use of the lot owners. The defendants purchased three lots and subdivided them into twenty-six smaller lots. At the same time, they constructed a paved roadway through the lots to the beach and sold the subdivided lots with "beach privileges to all owners." On appeal, the court granted a decree enjoining use of the beach in this manner.[26] In *Henkle v. Goldenson*,[27] defendant, who owned a lot that enjoyed the benefit of an easement for access to a lake, conveyed the north half of his lot to five individuals. The servient owner challenged the right of the five grantees to use the easement, alleging increase of burden. The court, however, upheld, their right to use the way.[28] While the increase in burden did not differ substantially in the two cases, the holdings are diametrically opposed.

Perhaps the most dramatic expression of the rule that gives unusually harsh treatment to the use of an easement to service non-

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21. RESTATEMENT PROPERTY (SERVITUDES) § 484 (1944).

22. Smith v. Rock Creek Water Corp., 9 Cal. App. 2d 49, 208 P.2d 705 (1949); Reid v. Washington Gas Light Co., 232 Md. 545, 194 A.2d 636 (1963); Shammel v. Vogl, 144 Mont. 354, 396 P.2d 103 (1964); Conrad v. Strickler, 215 Va. 454, 211 S.E.2d 248 (1975).

23. Kratovil, *Easement Draftsmanship and Conveyancing*, 38 CALIF. L. REV. 426, 443 (1950).

24. Wood v. Woodley, 160 N.C. 4, 75 S.E. 719, 720 (1912) (citing E. WASHBURN, A TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES (1873)); Annot., 10 A.L.R.3d 960, (1966).

25. 244 Mich. 571, 222 N.W. 96 (1928).

26. *Id.*

27. Henkle v. Goldenson, 263 Mich. 140, 248 N.W. 574 (1933).

28. *Id.*

dominant land occurred in *Crimmins v. Gould.*[29] There the court stated:

> However, here the question is not the propriety of an injunction but rather the propriety of an extinguishment. There do not seem to be any California cases on extinguishment for excessive use by non-dominant property where the right given to the dominant estate was by grant. But there are a number of out-of state cases. The general rule is that misuse or excessive use is not sufficient for abandonment or forfeiture, but an injunction is the proper remedy. But where the burden of the servient estate is increased through changes in the dominant estate which increase the use and subject it to use of non-dominant property, a forfeiture will be justified if the unauthorized use may not be severed and prohibited.[30]

In *McCullough v. Broad Exchange Co.,*[31] the easement in question was one of ingress and egress. The dominant owner erected an office building twenty stories high partly upon the dominant land and partly on adjacent non-dominant land. Nothing in the decision suggests that the servient owner at any time uttered a word of protest while the construction was going forward. After construction was completed, however, the servient owner filed an action seeking to have the easement declared forfeited. The reviewing court reversed the lower court's forfeiture of the easement, but enjoined the building owner from using the easement until the structure could be altered to cut off access to the easement from the non-dominant portion of the building.[32]

The case is clearly wrong because whatever the rights of the plaintiff might have been had he acted promptly, they were certainly lost by laches. When a party having a right to block improvements stands idly by while material expenses are incurred in constructing such improvements, laches acts to deny the right to interfere with the improvements.[33] Presumably this court would have made the identical holding had the defendant constructed the Empire State Building straddling the dominant and the non-dominant land.[34]

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29. 149 Cal. App. 2d 383, 308 P.2d 786, (1957).

30. *Id.* at 391. *See also* Penn Bowling Recreation Center v. Hot Shoppes, 179 F.2d 64 (D.C. Cir. 1949).

31. 101 App. Div. 566, 92 N.Y.S. 533 (1905).

32. A dissenting judge thought the easement should be declared forfeited. *Id.* at 574.

33. Brandenburg v. Country Club Bldg. Corp., 332 Ill. 136, 148, 163 N.E. 440 (1928); Smith v. Spencer, 81 N.J. Eq. 389, 87 A. 158 (1913); 30A C.J.S. *Equity* § 113, (1965); 43A C.J.S. *Injunctions* § 103 (1978).

34. *See also* Knotts v. Summit Park Co., 146 Md. 234, 126 A. 280 (1924).

B. *Implied Easements*

Some illumination into the process by which courts often solve easement problems can be gleaned by looking at implied easements. This area of easement law probably generates more litigation than any other area. For example, assume A owned two adjoining parcels of land, each improved with a two-story building and joined by a party wall. There were stores on the first floor and living quarters on the second floor. A stairway to the second floor was located entirely on Parcel A, but at the head of the stairs there was a landing and a door opening through the party wall which afforded access to Parcel B. The owner conveyed Parcel A to B but made no mention of the stairway. When B threatened to close up the opening in the wall, *A* filed suit to enjoin. The court ruled for *A*, holding an implied easement had been created.[35] The philosophy underlying this rule is expressed in the Restatement of Property.[36]

Thus even where the parties gave no thought whatever to the

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35. Powers v. Heffernan, 233 Ill. 597, 84 N.E. 661 (1908). Modern decisions do not distinguish between implied reservation and implied grant. 3 R. POWELL, REAL PROPERTY § 411 at 34-90 (Rohan ed. 1981); *see also* 25 AM. JUR. 2D *Easements and Licenses* § 27 at 440 (1966); Annot., 34 A.L.R. 233, (1925 Supp. 100 A.L.R. 1321, 1936 & Supp. 164 A.L.R. 1001 1946); Annot., 94 A.L.R. 3d 502.

36. The Restatement of Property states:

> In determining whether the circumstances under which a conveyance of land is made imply an easement, the following factors are important
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> (a) whether the claimant is the conveyor or the conveyee,
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> (b) the terms of the conveyance,
>
> (c) the consideration given for it,
>
> (d) whether the claim is made against a simultaneous conveyee,
>
> (e) the extent of necessity of the easement to the claimant,
>
> (f) whether reciprocal benefits result to the conveyor and the conveyee,
>
> (g) the manner in which the land was used prior to its conveyance, and
>
> (h) the extent to which the manner of prior use was or might have been known to the parties.
>
> *Comment*:
>
> *a. Rationale.* An easement created by implication arises as an inference of the intention of the parties to a conveyance of land. The inference is drawn from the circumstances under which the conveyance was made rather than from the language of the conveyance. To draw an inference of intention from such circumstances, they must be or must be assumed to be within the knowledge of the parties. The inference drawn represents an attempt to ascribe an intention to parties who had not thought or had not bothered to put the intention into words, or perhaps more often, to parties who actually had formed no intention conscious to themselves. In the latter aspect, the implication approaches in fact, if not in theory, crediting the parties with an intention which they did not have, but which they probably would have had had they actually foreseen what they might have foreseen from information available at the time of the conveyance. RESTATEMENT PROPERTY (SERVITUDES) § 476 and Comment a; 3 R. POWELL, REAL PROPERTY § 411 at 34-82. (Rohan ed. 1981).

creation of an easement, the court infers sufficient facts from the circumstances to create an easement. Manifestly, the references to "intention" are no more than resort to an obvious legal fiction.

There is an unspoken philosophy that can be deduced by careful study of the factual situations presented. Where the easement is so apparent and so necessary that the parties must have intended to continue its use beyond the severance of ownership, there is only one explanation for the litigation that later occurs. The servient owner, perceiving that the documents make no mention of the easement, decides to extract a few extra dollars from his neighbor. The courts read the situation correctly and refuse to permit extortion.

It is evident that one cannot hope to understand easement law unless, in analyzing the facts of each case, one looks for the extortion situation and asks whether the courts will permit it.

The equitable principle requiring that attempts at extortion must be blocked by the courts is one of broad application. For example, where a plaintiff seeks a mandatory injunction to compel removal of an encroachment by his neighbor and the encroachment is slight, the court will refuse to grant the injunction, for to grant the injunction "might make the court a party to extortion."[37] Indeed, where a court of equity, in balancing the equities, refuses to grant the relief prayed for, one can often discern an attempt at extortion. Where the benefit to the plaintiff would be relatively small, and the harm to the defendant relatively great, it is a reasonable inference that in many such cases the plaintiff is seeking to exact tribute from the defendant. Equity will not lend its aid to an oppressive penalizing of the defendant.[38]

III. BALANCING—TRIVIAL EXTENSIONS TO NON-DOMINANT LAND

Where use of the easement is extended to non-dominant land, but the extension is trivial, no injunction will be granted.[39] The doctrine of balancing the equities is therefore obviously applicable to the non-dominant land rule, and this brings into question whether the

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37. RESTATEMENT (SECOND) OF TORTS § 941, Comment c; 43 C.J.S. *Injunctions* § 35, at 841; 43A C.J.S. *Injunctions*, § 81 at 93 (1978).

38. McKean, *The Balance of Convenience Doctrine*, 39 DICK. L. REV. 211, 216 (1934); Annot., 40 A.L.R. 3d 606, 611, 615.

39. Wetmore v. Ladies of Loretto Wheaton, 73 Ill. App. 2d 454, 220 N.E. 2d 491, 497 (1966); Beeman v. Pawelek, 96 N.Y.S. 2d 204, 214 (Sup. Ct. 1949); Chapin v. Gay Coal & Coke Co., 156 S.E. 49 (W. Va. 1930); 28 C.J.S. *Easements* § 92 at 773; 25 AM. JUR. 2D *Easements* § 107 at 511.

strict majority rule forbidding any extension can be justified.

As previously indicated, the rule is simply one member of a family of rules dealing with increase of burden.[40] Thus in *Adams v. Winnett*, it was said:

> A fundamental principle is that an easement for the benefit of a particular piece of land cannot be enlarged and extended to other parcels of land, whether adjoining or distinct tracts, to which the right is not attached. In other words, an easement appurtenant to a dominant tenement can be used only for the purposes of that tenement; it is not a personal right, and cannot be used, even by the dominant owner, for any purpose unconnected with the enjoyment of his estate. *The purpose of this rule is to prevent an increase of the burden upon the servient estate*, and it applies whether the easement is created by grant, reservation, prescription, or implication . . . .[41](emphasis added)

And in another decision, quoting from Jones on Easements, section 360 the court said:

> One having a right of way appurtenant to certain land cannot use it for the benefit of other land to which the right is not attached, although such other land is within the same enclosure with that to which the easement belongs. Except for this rule, *the burden upon the servient estate might be increased* at the pleasure of the owner of the dominant estate. This rule is therefore applicable, whether the way was created by grant, reservation, prescription, or as a way of necessity. In either case the way is created by grant, either express, presumed or applied. The way is granted for the benefit of the particular land, and its use is limited to such land. Its use cannot be extended to other land, nor can the way be converted into a public way without the consent of the owner of the servient estate.[42](emphasis added)

Since the rule falls within the ambit of the increase of burden rule, it should be treated like other rules in this area. The court determines, on a case-by-case basis, whether the increase in burden is reasonable or unreasonable. And whether the dominant structure expands vertically or horizontally is of little economic consequence to the servient owner.

Those who would oppose such an expansion of the increase-of-burden rule will undoubtedly ask where the court derives power to

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40. *See supra* note 4.
41. 25 Tenn. App. 276, 156 S.W. 353, 357 (1941).
42. Wood v. Woodley, 160 N.C. 17, 75 S.E. 719, 720 (1912).

extend the benefit of the easement to non-dominant land. The answer is that in most cases this will lead to a practical and just solution of the problem. If the dominant owner of a spur track easement sends one box car a week over the spur track, sending another box car a week to service an addition to his industrial plant obviously places no unreasonably increased burden on the spur track. And if the builder of a high-rise apartment puts a parking lot for his tenants on adjoining non-dominant land instead of going to the expense of excavating down several stories into dominant land for an underground garage, there is no increase of burden whatever. But some may not be content with a merely sensible solution.

To resolve such a problem then, one must look at how the court can use its powers in various controversies. As we have seen, the court, in an implied easement situation, takes a case where the parties have given no thought whatever to easements and out of the whole cloth manufactures an easement so that justice will be served. If a court has the power to so create an easement, surely it has the power to extend an existing easement so that it services additional land. This power extends far beyond the law of easements. In a situation where a party, perhaps injured and unconscious, received first aid, the court will *create a contract* and impose upon this person a duty to pay for services rendered.[43] A formal contract may lack an explicit promise, and yet the court will create and insert such a promise into the contract because the contract is "instinct" with such an obligation.[44] Where a contract for sale of chattels is totally silent on the subject, the court will read into it a warranty that the product sold is fit for use and of merchantable quality.[45] Under the law of reformation, a court of equity will take Blackacre from A and bestow it upon B.[46] Where a contract for the sale of land is silent concerning the quality of the title to be conveyed, the court reads into the contract a requirement of "marketable title free from encumbrances."[47]

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43. Cotnam v. Wisdom, 83 Ark. 601, 104 S.W. 164 (1907).

44. Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917).

45. Gardiner v. Gray, 4 Camp. 144 (1815), discussed by LORD DENNING, THE DISCIPLINE OF THE LAW 34 (1979). As in the case of implied easements, the implication of a term into a contract in the interest of justice is wholly independent of expressed intention and occurs where the parties had no ideas on the subject. 3A CORBIN, CONTRACTS § 565 (1960). *See also* Kratovil, *The Restatement (Second) of Contracts and the UCC: A Real Property Law Perspective*, 16 J. MAR. L. REV. 287, 293 (1983).

46. Anchor in Marina, Inc. v. Grundy County Nat. Bank, 35 Ill. 3d 855, 342 N.E. 2d 422 (1975).

47. I. G. WARVELLE, A TREATISE ON THE AMERICAN LAW OF VENDOR AND PURCHASER OF REAL PROPERTY 303 (1890). See, in general, Kratovil, *The Restatement (Second) of Contracts and the UCC: A Real Property Law Perspective*, 16 J. MAR. L. REV. 287, 299

Courts, it is clear, create and modify legal documents as the occasion requires. While this was true, especially in equity jurisprudence, long before the Uniform Commercial Code was conceived, adoption of the UCC and incorporation of the UCC unconscionability concept into Restatement (Second) Contracts has given added impetus to the process.[48]

Thus, one can conclude that use of an easement could be extended by the courts into non-dominant land owned by the dominant owner so long as such extension creates no unreasonable or unconscionable increase of burden. If such a rule were adopted it would bring all the increase of burden problems under one umbrella. Consistency may be the bane of petty minds, nevertheless it is a virtue. Such a rule would obviously make for a more efficient utilization of land, especially urban land. Additionally, it would put an end to the extortion suits common in this situation and it would protect many a lawyer from malpractice liability.[49]

While the drafting of easements presents problems more complex than might be supposed,[50] overcoming the non-dominant land rule presents little difficulty. One simply adds to the easement grant language similar to the following: *The easement appurtenant hereby created is appurtenant to Blackacre above described and also to any hereafter acquired land that may come into common ownership with Blackacre.*

It is, of course, possible and advisable to place some limitation on the area of the additional property that will be so benefited. Some drafters also add the phrase: "*Contiguity is required as between all parcels that are to enjoy the benefit of said easement.*" Others add provisions limiting the type, size and use of buildings that may enjoy

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(1983).

48. R. KRATOVIL and R. WERNER, MODERN MORTGAGE LAW AND PRACTICE § 1.2 (2d ed. 1981).

49. A lawyer will be found guilty of malpractice if his client suffers loss because the lawyer was ignorant of some settled proposition of law known to other lawyers in the vicinity engaged in a similar legal practice. MALLEN and LEVIT, LEGAL MALPRACTICE 282 (2d ed. 1981); R. KRATOVIL and R. WERNER, REAL ESTATE LAW 44 (8th ed. 1983). In short, it will not help a lawyer to plead ignorance of the rule. Yet it is obvious that in the many cases where an easement was extinguished for misuse or where a dominant owner was ordered to split a building, his attorney permitted him to embark upon the project because he was ignorant of the rule. *See, e.g.*, McCullough v. Broad Exchange Co., 101 App. Div. 566, 92 N.Y.S. 533 (1905). In the author's five decades in the field, he has encountered few lawyers who were aware of the rule.

50. Kratovil, *Easement Draftsmanship and Conveyancing*, 38 CALIF. L. REV. 426 (1950).

the benefit of the easement.[51]

IV. CONCLUSION

The inflexible rule that an appurtenant easement must not be used to service non-dominant land was never anything more than a mere ipse dixit. No reason has ever been advanced why this appurtenant easement rule should be accorded treatment different from the other increase of burden rules. Courts have experienced little difficulty in treating in a flexible and equitable manner the numerous increase of burden situations that arise almost daily. The inflexibility of the non-dominant land rule has obviously encouraged attempts at extortion. Today rigid rules are suspect. In this instance, the time for change has arrived. The rigid rule must go.

51. For a number of helpful suggestions, see R. KRATOVIL and R. WERNER, REAL ESTATE LAW 32-33 (8th ed. 1983).