**Brown v. Voss,**

**Scope**

May the owner of the dominant tenement extend the use of an easement to non-dominant land?

- Extension of appurtenant easement is **misuse.**
- But no injunction because servient tenement was not **overburdened.**
- Court changes **bright line rule into discretionary rule.**
- Why not issue injunction and allow parties to **bargain?**
The U.S. Court of Appeals for The Federal Circuit

• Same level in the “hierarchy” as the regional circuit courts (appeals go directly to the U.S. Supreme Court).

• Twelve judges – all located in D.C. Court sits in panels of three.

• National subject matter, rather than regional, jurisdiction; 14 statutory “heads” of exclusive jurisdiction (28 U.S.C. 1295(a)).

The U.S. Court of Appeals for The Federal Circuit

• Hears almost all patent appeals from district courts and the U.S. Patent & Trademark Office (USPTO) (approx. 25-30% of the docket).

• Hears trademark appeals from the USPTO.

• Hears cases from the Court of Federal Claims, district courts, and from other courts in certain situations where a monetary judgment or other relief is sought against the government (e.g., tax, government contracting, and takings cases) (a substantial portion of the docket).
The U.S. Court of Appeals for The Federal Circuit

- Hears cases from the Court of International Trade (a sizable portion of the docket).
- Hears “labor” law cases from the Federal Merit Systems Protection Board, and hears cases on appeal from the Veterans Affairs system (a substantial portion of the docket).
- Hears cases from several other miscellaneous sources that do not produce a significant portion of the court’s docket.

Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996), Casebook p. 725.

Four Questions to Be Answered

1. Did the railroad have a fee simple or an easement?

2. If an easement, does the scope of the easement include using the easement for a public trail?

3. If we were to assume trail use were within the scope of the easement, was the easement abandoned by discontinuance of railroad use, relieving the servient tenement of the easement?

4. Is public use of the strip, authorized by the ICC, a taking of private property?
1. Did the railroad have a fee simple or an easement? (Continued)

   Answer: Easement

   • Over Parcel C, the railroad was granted a strip of land by warranty deed.

   • Although the deed appears to be the standard type for conveying fee simple, the court holds that under Vermont law, whether acquired by eminent domain or through voluntary conveyance, the railroad only acquired the estate necessary for its purposes. [Basically ignoring the words of the deed.]

   • The railroad had an EASEMENT not a fee simple over Parcel C.
2. If an easement, does the scope of the easement include using the easement for a public trail?  
   
   **Answer:** No.  
   
   • The test is whether this new use was reasonably foreseeable at the time of creation of the easement in 1899.  
   
   • The court concludes that it was not within the original bargain of the original parties. (Compare *Brown v. Voss*.)  
   
   • Moreover, use as a trail increased the burden on the servient estate.

3. If trail use were within the scope of the easement, was the easement abandoned in 1975?  
   
   **Answer:** Yes.  
   
   • Abandonment does not occur by mere nonuse.  
   
   • Abandonment requires an unequivocal act showing an intent to abandon. (*Abandonment +*)  
   
   • The court found the removal of all the equipment, including switches and tracks to be an unequivocal act (even though there were later acts inconsistent with an intent to abandon).
4. Is public use of the strip, authorized by the ICC, a taking of private property?

   **Answer: Yes.**

   - If the easement was in existence in 1986, there was a taking of the servient owner’s property right because trail use was not within the **scope** of the easement.
   - If the easement was abandoned in 1975, then the order permitting public use was a **taking** because the government opened up private property to public use.
   - Public use was, in effect, the **taking** of a **new** easement.

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**Negative Easements**

- Four in England
- Expansion in United States
  - Unobstructed views
  - Not blocking solar panels
  - Conservation Easements
    - State and federal tax provisions
    - Recent IRS crackdown – “conservation purposes” test

[http://www.tpwd.state.tx.us/conserve/tltc/](http://www.tpwd.state.tx.us/conserve/tltc/)
Covenants and Privity

A

Privity between original parties in context of a transfer of estate in land (known as “horizontal privity”) (e.g., B sells to A)

B

A sells to D

Privity between promisee and assignee (known as “vertical privity”)

D

B sells to C

Privity between promisor and assignee (known as “vertical privity”)

C

Real Covenants

1. Must be in **writing** to satisfy the Statute of Frauds.

2. Must be what the parties **intended**.
Real Covenants

3. Must **touch and concern** (T&C) the land with which it runs, that is—
   - it must have a logical connection to the use and enjoyment of land, **or**
   - it must physically affect the use and enjoyment of the land, **or**
   - the promisor’s legal interest as an owner must be rendered less valuable by the promise and the promisee’s legal interest as an owner must be made more valuable by the promise.

Real Covenants Cont’d

4. Must have **horizontal privity of estate**: the relationship among—
   - (a) the original promisor (owner of burdened land),
   - (b) the original promisee (owner of benefited land), and
   - (c) the affected estate in land.
Real Covenants Cont’d

5. Must have *vertical privity of estate*: the relationship among—
   (a) the original promisor or promisee under a covenant,
   (b) the promisor’s or promisee’s successor in interest, and
   (c) the affected estate in land.

Equitable Servitudes

- To be enforceable against a successor in interest—
  - Intent
  - Notice (unless successor gave no consideration)
  - T&C