easement A right or privilege that the owner of one area of land enjoys over land owned by another for a particular purpose that does not amount to taking anything off the land. The owner of the one parcel derives a benefit from the use of other land, such as a **right of way**, **right of light** or a **right of support.** The land that has the benefit of this right is called the dominant land or 'dominant tenement' and the land that is subjected to the burden is called the servient land or 'servient tenement'. The owner of the servient tenement retains full dominion over his land, subject only to the limitation imposed by the easement. The right to use the other person's land does not grant a right to retain possession, or a right to take any profit from the land. Normally an easement is enjoyed for a specific purpose, is a permanent interest over the land of the other, but is not inconsistent with the ownership of the servient tenement. It is not a right that is personal to the owner of the land, but is said to be **appurtenant** or incidental to the land affected.

An easement is an **incorporeal hereditament**, i.e. it creates no **estate** in land because the dominant tenement does not derive any right of ownership over the servient tenement. It does not confer any right to possession, as with a **lease**, but is merely a right to impose proprietary restrictions. However, it is an **interest** in land and an easement may continue even if there is a change in the ownership of the land; it is said to 'run with the land', although it is extinguished if both tenements come into the same hands.

In common law, the essential requirements of an easement may be summarised as follows: (i) there must be an identifiable

dominant and servient tenement; (ii) the easement must accommodate or benefit the dominant tenement and there must be a *nexus* between the right enjoyed and the user of the dominant land (it must do more than simply benefit the owner of that land as a personal right); (iii) the owners or occupiers of the dominant and servient tenements must be different parties (an easement is a right *in alieno solo* – 'against another's land'); (iv) the easement must be capable of forming the subject matter of a **grant**, whether express, implied or presumed, i.e. it is a right that is sufficiently definite (both as to the parties and the subject land) that it is capable of being (although it need not be) set down in a **deed** (*Re Ellenborough Park* [1956] Ch 131 (CA); *Canadian Pacific Ltd v Paul* (1988) 53 DLR (4th) 487 (Can)). The dominant and servient lands need not be contiguous, although they frequently are, but they must be proximate so as to enable the dominant land to derive benefit from the easement. The right should not amount to the exclusive use or possession of the servient tenement (or a joint use with the owner of the servient tenement). The right to exclude others from the servient tenement extends only so far as it permits the owner of the dominant tenement from preventing an interference with the permitted right that is enjoyed over the servient tenement.

An easement may be classified as 'continuous' or 'discontinuous'. A continuous easement does not require the interference of man for its existence, as with a right of light; whereas a discontinuous easement requires the intervention of man, as by the exercise of a right of way.

In the US, many jurisdictions do not consider that the existence of the dominant tenement is an essential element to an

easement, and a similar irrevocable right, which does not benefit another parcel of land, is considered to be a valid easement and is called an **easement in gross** (3 Tiffany on Real Property (3rd ed. 1939), § 758, p. 204).

An easement may be distinguished from a **profit à prendre** as the latter allows someone to take something physically from the land or benefit from the profits of the soil, whereas an easement does not. Also, a profit à prendre may and usually does exist 'in gross', i.e. it does not need to benefit another parcel of land. It may be distinguished from a **licence**, which as such does not create any interest in land but is merely a privilege that is personal to the parties. On the other hand, a licensee may be granted a right to occupy land, or may be granted a right that is combined with an easement. An easement may be distinguished from a **customary right**, which may be used by a specific class of persons and benefits no defined area of land.

An easement may be granted as an indefinite right, or it may be limited for a period of time, or even for a life. It can be created by statute (as by appropriation by a public authority); by an **express grant**, i.e. a written agreement (the most common way); by express **reservation** or by **implied reservation**; by **implied grant** based on the intention of the parties, especially when it arises out of the existence of a **quasi-easement**; by 'presumed grant' or **prescription**; or even by **estoppel** when it would be unconscionable to deny that such a right exists. An easement may arise as 'of necessity' (an **easement of necessity**), as when a parcel of land is 'landlocked'. However, whether created expressly or by implication, an easement is always granted; it cannot arise purely as an amenity or privilege, enjoyed by virtue of an informal

understanding or custom.

An easement may be extinguished by an express **release**, usually by deed (but not by unilateral revocation); by an implied and clear intention on the part of the dominant owner not to resume his right, i.e. **abandonment**; by the **merger** of the dominant and servient tenements into common ownership and possession (called 'unity of seisin'); by expiration of a period of time, or purpose, stipulated in the original grant; by an alteration in the dominant tenement in such a way that the easement is unnecessary, as when the dominant tenement is a building that is destroyed; by losing it to another by prescription; or by statute, as when a statutory authority uses its powers to extinguish a right of way (effectively by expropriation). An easement may be temporarily suspended if there is merely **unity of possession** between the holders of the dominant and servient tenements.

An easement can be 'positive' or 'affirmative', or it can be 'negative'. A positive easement is a right to do something positive on the servient land, but not a right to demand anything from the owner of that land; it is enjoyed for a specific purpose. Examples of positive easements are: a right of way; a right of support; a right to share a **party wall**; a right to water, i.e. to enter land to extract it; a right of access for the purpose of facilitating repair to a building; a right to run utilities across land; or even a right to use a letter box on another's land. A **negative easement** is a privilege by which the servient owner may be obligated to refrain from certain uses, or actions, on the servient tenement for the benefit of the dominant owner, e.g. not to build above a given height so as to obstruct the access of light to a house on the dominant

tenement. cf. **servitude**. See also **apparent easement**, **conservation easement**(US), **conveyance**, **easement appurtenant**(US), **equitable easement**, **general words**, ***jus spatiandi***, **legal easement**(Eng), **natural rights**, **overburdening**(US), **right of light**(BrE)**/right to light**(AmE), **right to air**, **right to view**, **riparian rights**, **scenic easement**(US), **water rights**, **wayleave**(BrE), **writing**.

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