The Problem of Hidden Easements and the Subsequent Purchaser without Notice

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THE PROBLEM OF HIDDEN EASEMENTS AND THE SUBSEQUENT PURCHASER WITHOUT NOTICE

JOEL EICHENGRUN

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THE PROBLEM OF HIDDEN EASEMENTS AND
THE SUBSEQUENT PURCHASER
WITHOUT NOTICE

JOEL EICHENGRUN*

Introduction

The prospective home buyer signs a contract to purchase a new home. The land and house are inspected, and nothing unusual is found. Title is examined, and no undisclosed easements are reported. The deal is closed, the buyer moves in and lives happily until the day he discovers the basement filled with water that smells like sewage. An underground sewer serving one or more neighbors turns out to be the source of the problem. Can the homeowner plug the offending pipe or block its use? Perhaps the sewer was discovered during excavation in preparation for building a house or commercial structure. Can the landowner remove it, or must he learn to live with the problem? The answer to all of these questions is “it depends.”

First, it depends on the rights asserted by those using the sewer, the buyer’s neighbors. If the neighbors rest their rights in an easement expressly granted but unrecorded, those rights are usually extinguished by a sale of the servient estate to a bona fide purchaser. If this type of easement exists, the buyer can remove or plug the pipe with impunity. But an implied easement,1 an easement by necessity or by estoppel, and a prescriptive easement often are not extinguished in the same circumstances, and the homeowner may find himself bound by a previously unknown and hidden easement. A court might find any of the last mentioned easements binding on a bona fide purchaser under one of two rules. One possibility in implied easement cases is an odd application of the rule that an implied easement is binding on the bona fide purchaser when it is “apparent.” Courts regularly find hidden pipelines “apparent” when they are not, offering the dubious explanation that the pipeline is discoverable upon a reasonable inspection of the servient estate. An expert might discover some of these pipelines, but not the buyer in the course of a

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1. The term “implied easement” is used here as a shorthand for an easement from a prior use. Other easements that arise by implication (rather than from an express conveyance) are referred to as “easements by necessity” or “easements by estoppel.” Broadly speaking, easements by implication include easements implied from map references, from necessity, from a prior use, or from application of the doctrine of estoppel. See generally 3 R. Powell, Powell on Real Property ¶ 409-411 (rev. ed. 1984).
usual and diligent examination. Another possibility is the rule that nonwritten easements are not extinguished by a sale to a bona fide purchaser because they exist outside of the recording acts.

Sometimes these nonextinguishment rules are applied and sometimes they are not; courts usually offer little explanation for the choice. The ability of the buyer to plug or remove the sewer, then, also depends on whether a court will hold a bona fide purchaser subject to a nonwritten and hidden pipeline easement. Some courts ignore technicalities and apply the recording acts to extinguish nonwritten easements upon sale of the servient estate to a bona fide purchaser, but many do not.

The decision whether to hold a hidden pipeline easement extinguished is an economic one. Courts generally hold such easements binding on a bona fide purchaser only when the existence of the easement causes no harm, or where the harm from the easement is significantly outweighed by the harm the dominant owner would suffer if deprived of the easement. This economic rationale is rarely articulated, though it can be observed from an examination of the facts of the cases and from a close textual reading of the court opinions. Most, but not all, of the nonextinguishment decisions can be explained on economic grounds.

The following discussion is organized into three parts. Part I is descriptive, defining the several different types of hidden easements that are not discoverable by the subsequent purchaser. These include not only underground pipelines, but also nonwritten easements to maintain encroaching structures where the encroachment is minor and unknown to the subsequent purchaser, and nonwritten roadway easements where no use is visible to the subsequent purchaser. Courts sometimes protect the dominant owner for economic reasons in the case of encroaching structures, but almost universally protect the bona fide purchaser in the case of nonapparent roadway easements. Part II is also descriptive, analyzing the courts' response to each of these hidden easement problems. Part III is prescriptive, suggesting that consistency, fairness, and efficiency can be best achieved in hidden easement cases by protecting the bona fide purchaser but limiting his remedy to damages. Thus, a bona fide purchaser would take subject to a hidden easement, but he would recover damages measured by the diminished value of the servient estate.

2. In the case of the buyer with a flooded basement, a court will likely find the easement binding, though as servient owner he should be entitled to damages if the dominant owner is responsible for the mess because of misuse of the easement or failure to maintain it. Here the existence of the easement causes no harm, and in such circumstances courts are reluctant to impose on the dominant owner the cost of an alternate pipeline. Most of the hidden pipeline cases holding the easement valid are "no harm" cases, either flooding cases where the easement itself causes no harm or spite cases where the servient owner severs the pipeline out of dislike for the dominant owner. However, in the case of stymied building plans the buyer fares better. Where the easement causes real harm, courts are usually responsive and protect the servient owner who is a bona fide purchaser. If he can show that he wants to remove the pipeline because the easement interferes with his plans, rather than out of spite or a dispute with a neighbor, courts are more willing to hold the easement extinguished.
I. The Problem of Hidden Easements

Hidden easement problems arise because of a gap in applicable legal doctrine when an easement is both nonwritten and nonobservable. Existing doctrine uses an all or nothing approach. A court must choose between protecting either the bona fide purchaser of the servient estate (under the recording acts), or the dominant owner (under a nonextinguishment rule), in a situation where neither can realistically act beforehand to prevent the loss. The question of where the loss should fall has received little attention. Some of the treatises ignore it entirely, others dismiss it as of little practical importance, and still others state that one or another rule applies without recognizing the conflicting policies involved. In fact, there are a number of recurring hidden easement problems that courts deal with regularly. This section identifies those problems, examines the inadequacies of existing doctrine, and concludes by observing that in practice courts usually seek to minimize the unexpected loss upon discovery of a hidden easement.

A. Fact Patterns

Hidden pipelines account for the majority of hidden easement cases. Typically, an individual owner of several lots or a developer lays out interconnecting water or sewer lines serving the entire parcel and later sells the lots without disclosing the water supply or drainage scheme. A finding of an easement implied from prior use is supported if it can be said that the prior use was continuous, reasonably necessary, and “apparent.” This question of fact is usually raised in the context of determining whether a subsequent bona fide purchaser of the servient estate is bound by the implied easement. A rarer pipeline problem occurs when a pipe system is installed outside of a granted easement, or without any claim of an easement, in such an open and notorious manner that there may be a prescriptive easement. If the servient estate is later sold to a bona fide purchaser unaware of the easement, the question arises whether such a purchaser is bound by the prescriptive easement.


4. See, e.g., Otero v. Pacheco, 94 N.M. 524, 612 P.2d 1335 (Ct. App. 1980) (bona fide purchaser bound by same); Renner v. Johnson, 2 Ohio St. 2d 195, 207 N.E.2d 751 (1965) (bona fide purchaser not bound by underground pipeline easement). The cases are considered in detail in Part II infra, text accompanying notes 51-93.

5. Prescriptive easements require more than open and notorious use of another's land; the elements are generally a use that is adverse, open and notorious, continuous, and uninterrupted for the prescriptive period. See RESTATEMENT OF PROPERTY, §§ 457-58 (1944); 2 AMERICAN LAW OF PROPERTY §§ 8.53-8.58 (1952) [hereinafter A.L.P.]. The particular problem addressed here arises when the use (constructing and maintaining an underground pipeline) satisfies the requirements so that a prescriptive easement arises, but it is neither known or visible to a later purchaser.

Similar difficulties arise in cases of minor building encroachments and neglected roadways. Encroaching structures present a hidden easement problem when the owner of two adjoining lots erects a building on what is believed to be lot A, but instead the building straddles the boundary line and a negligible portion sits upon, or overhangs, lot B. Both lots pass into the hands of bona fide purchasers. The encroachment is discovered before title could be acquired by adverse possession, and the dominant owner claims an easement implied from prior use. The question is whether the prior use (a minor encroachment) was sufficiently "apparent" for an implied easement to arise, and/or whether the easement is valid against a bona fide purchaser of the servient estate.

Finally, roadway easements present two hidden easement problems. A nonwritten roadway easement is created by implication from prior use, necessity, estoppel, or prescription. After the passage of time, the roadway falls into such disrepair that there is no evidence of its existence, and then a bona fide purchaser acquires the servient estate. Later, the dominant owner reasserts his rights and claims the easement. The question is whether the bona fide purchaser takes the servient estate subject to the nonobservable easement. The other, related roadway problem is created by an incroach or unopened roadway that is necessary to reach the dominant estate. A landlocked tract is sold in circumstances that support the finding of an easement by necessity over other lands then owned by the common grantor. The dominant estate either lies unused for a period of time or, if used, is reached by permissive access over lands of a stranger. After the common grantor has

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easement extinguished); Oppold v. Erickson, 267 N.W.2d 570 (S.D. 1978) (prescriptive easement survived). The cases are considered in detail in Part II infra, text accompanying notes 94-121.

7. The claim of an easement in the encroaching structure cases is a bit unusual because occupying a strip of land seems to be possession rather than "use of another's land," which in part defines an easement. See Restatement of Property, supra note 5, § 450, comment b. Presumably, the implied easement theory is used in situations where the occupancy has not lasted long enough to claim a possessory title by adverse possession. Claiming the lesser of the two interests, the easement, seems unobjectionable, although one wonders about the scope of the easement and the use rights of the servient owner. Id. § 486 (Servient owner "is privileged to make such uses of the servient tenement as are not inconsistent with the provisions of the creating conveyance").

8. See, e.g., Bennett v. Evans, 161 Neb. 807, 74 N.W.2d 728 (1956) (no implied easement created because two foot garage encroachment not apparent); Tangner v. Brannin, 381 P.2d 321 (Okla. 1963) (implied easement to maintain eave of roof encroaching over boundary line binding on bona fide purchaser). The cases are considered in detail in Part II infra, text accompanying notes 122-126.


10. An easement by necessity arises where an owner of land conveys an inner portion of it entirely surrounded by other lands owned by the grantor, or by grantor plus strangers, and an easement over the nonconveyed portion of the land is "necessary" for access to a public roadway. 3 R. Powell, supra note 1, ¶ 410. The essential elements are usually listed as (1) a conveyance, (2) of a physical part only of the grantor's land, and (3) after severance of the two parcels, it is "necessary" to pass over one of them to reach a public thoroughfare. Cunningham, et al., supra note 3, § 8.5.
sold all of the original parcel, the then dominant owner claims an easement over servient lands held by a subsequent purchaser. The question is whether an easement by necessity survives against a bona fide purchaser of the ser-
vient estate.  

B.  Doctrinal Inadequacies

All of the situations just described present the same legal issue: is a non-
written easement, involving no observable use, extinguished upon sale of the
servient estate to a bona fide purchaser?

Nonwritten easements belong to a class of interests that arise without a
writing. Priorities as among competing claims might be governed by the same
rules presently applied to other nonwritten titles, such as those acquired by
oral gift, estoppel, and adverse possession, all of which arise by operation of
law. These interests exist outside of the recording acts, which determine
priorities only between conflicting written interests.  
Priority as between the
holder of a nonwritten easement and a subsequent purchaser of the same
land would be determined either by a first-in-time, first-in-right rule, or by
the equitable doctrine of bona fide purchaser, which effectively applies the
same rule so long as the prior unwritten interest is a legal one. Either way,
the dominant owner would prevail over the subsequent purchaser of the ser-
vient estate.  
The problem with applying this rule is that the subsequent pur-
chaser has no means to discover the existence of the prior hidden interest and
protect himself.

Alternatively, a court might apply the recording acts to nonwritten
easements, either overlooking the theoretical problem or, in the case of im-
plied easements, relying on the theory that the easement is implied as part
of a written conveyance and thereafter subject to the recording acts.

11.  See, e.g., Pencader Assoc., Inc. v. Glasgow Trust, 446 A.2d 1097 (Del. 1982) (easement
by necessity may be dormant and be enforceable against bona fide purchaser); Tiller v. Hinton,
19 Ohio St. 3d 66, 482 N.E.2d 946 (1983) (even if easement by necessity arose, it is ineffective
against bona fide purchaser). The cases are considered in detail in Part II infra, at text accompa-
nying notes 129-131.

12.  4 A.L.P., supra note 5, § 17.8, at 553 ("[I]n all these cases where the first transfer is
other than by a written conveyance, the conflicting rights cannot be determined by the present
types of recording acts.").

13.  Id. § 17.1.

14.  With but one exception nonwritten easements are legal interests, so the dominant owner
prevails over the subsequent bona fide purchaser under the rule that the earlier legal interest
takes priority over a later equitable interest. Id. Easements by estoppel are equitable interests,
and a later legal interest acquired for value and without notice should take priority. Id. Still,
some courts say that easements by estoppel are not extinguished by sale to a bona fide purchaser,
see infra cases cited note 118, although this appears to be only dicta in cases involving hidden
easements. See infra cases cited notes 119-120.

15.  See 3 H. TITAFNY, REAL PROPERTY § 828, at 399-400 (3d ed. 1939); Ferrier, The Record-
ing Acts and Titles by Adverse Possession and Prescription, 14 CALIF. L. REV. 287, 295-96
(1926).

Priorities would turn on whether the subsequent purchaser acquired the servient estate with or without notice of the easement. Here, the bona fide purchaser of the servient estate would prevail over the dominant owner.17

The problem with applying the recording acts to hidden easements is that usually both parties are unaware of the easement. Even if the dominant owner knows of the easement, he probably has no means of protecting it. Consequently, the rule allowing a bona fide purchaser to win allocates the loss to the dominant owner without explanation. Several theories are possible, but none adequately justifies throwing the loss on the dominant owner. It has been suggested that a dominant owner can better protect against hidden easement problems, either by insisting on an express written conveyance of the easement or by bringing a quiet title action to establish an implied easement,18 but neither seems to be a workable solution. In the frequent case where neither party knows of the hidden easement prior to its discovery,19 the dominant owner has no reason to ask for a deed that includes the easement. Assuming knowledge is later acquired, the cost of a quiet title action likely far exceeds that of an alternative easement, and the dominant owner given this choice effectively ends up bearing the loss.

Nonwritten easements might be brought within the recording acts on the ground that the dominant owner can protect by recording a notice of the easement,20 but this seems equally unworkable. Notice might be attempted by filing an informational affidavit which is allowed in some jurisdictions,21 or by effecting and recording a conveyance and an immediate reconveyance expressly describing both the dominant estate and the appurtenant easement.22

17. 4 A.L.P., supra note 5, § 17.10; 5 H. Tiffany, supra note 15, §§ 1262, 1276.
19. See infra cases cited notes 57, 85, 87, 97, 98, 124, 128, 130, 131.
20. Cf. Straw, Off Record Risks For Bona Fide Purchasers of Interests in Real Property, 72 Dick. L. Rev. 35, 66-67 (1967). The author suggests that prescriptive and implied easements should be brought within recording acts and claims, without citation, that some states have done so. The problem of the mechanics for giving notice is not discussed.
21. See L. Simes, Improvement of Conveyancing by Legislation 55-59 (1960). A weakness in the informational affidavit approach is that the ability to make such filings is subject to the discretion of county recording officers and may require a lawsuit. See Proctor v. Garrett, 378 N.W.2d 298 (Iowa 1985); New Castle v. Rand, 102 N.H. 16, 148 A.2d 658 (1959); Fleming v. Mann, 23 N.C. App. 418, 209 S.E.2d 366 (1974); Turrentine v. Lasane, 389 S.W.2d 336 (Tex. Civ. App. 1965). If suit is required, once again the loss is effectively placed on the dominant owner, who is unlikely to find this a realistic alternative from an economic standpoint. Further, even if such affidavits are recorded without litigation there remains a problem of their legal effect, which may require a lawsuit. There is a rule that an instrument not entitled to be recorded does not impart constructive notice even when placed upon the public record, though usually it does operate to give actual notice if seen by the title examiner. 4 A.L.P., supra note 5, §§ 17.27, 17.31. The dominant owner cannot safely conclude his easement is protected under the recording system until a court has held that the affidavit is indeed a recordable instrument.
22. See G. Nelson & D. Whitman, Real Estate Finance Law § 3.34, at 123 (2d ed. 1985). The authors suggest the technique of recording a transfer to a straw party and a reassignment back as a method of recording an installment land sale contract in jurisdictions that do not permit recordation of affidavits. The same technique could be employed to record an express wrt-
However, it is doubtful whether either recording would be effective to give constructive notice to a subsequent purchaser of the servient estate. Any affidavit or conveyance recorded by the dominant owner will be outside the customary chain of title to the servient estate, and it is extremely unlikely that a court will require an extended search in these circumstances. Ultimately one returns to the conclusion that the dominant owner cannot protect a hidden easement and should not lose it under the recording acts, unless there is some other reason to view the servient owner's claim as more compelling.

Nonwritten, hidden easements thus present the hard question: will the courts apply the technically correct rule that a nonwritten easement remains valid upon a sale of the servient estate to a bona fide purchaser, or will they instead apply the recording acts and hold the easement extinguished, thereby protecting the bona fide purchaser? An element of the "hard question" is the fact that usually both parties are blameless, and the situation is one where loss to someone appears unavoidable. The legal doctrines essentially dump loss on one side or the other without rationalization other than that loss must occur to someone. This is a particularly good reason to adopt the loss minimization approach proposed below.

A perusal of the major treatises finds disagreement over when a nonwritten easement is extinguished by a sale of the servient estate to a bona fide pur-

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23. The normal chain of title to a given parcel runs back through prior owners of that parcel. See generally R. PATTON & C. PATTON, PATTON ON TITLES § 67 (2d ed. 1957). Assuming the usual case where the dominant owner is not a prior owner of the servient estate in any fashion, there would be no reason to examine deeds to the dominant estate in searching title to the servient estate.

24. In some circumstances an extended title search is required, as where the purchaser must examine all deeds out of a common grantor because the purchaser is charged with constructive notice of recorded restriction to one parcel (the servient estate) contained in the deed to another parcel (the dominant estate) given by the once common owner. See Guillette v. Daly Dry Wall, Inc., 367 Mass. 355, 325 N.E.2d 572 (1975); 4 A.L.P., supra note 5, § 17.24. However, it is unlikely that a court would require an extended search in a hidden easement case for two reasons. First, the expense and burden of search described above (restrictions on lot A contained in deed to lot B) is probably justifiable only where the restrictions are part of a residential scheme and necessary to preserve the land values paid for and relied on by the benefited owners (dominant estates). Imposing upon a servient owner the expense of making an extended search to preserve an easement for one lot does not achieve the same saving. (If the servient estate is located in a subdivision, the question may be closer.) Second, in some instances it would be extremely costly to find this affidavit (or deed) and in others impossible. The servient owner would have to search up to a common grantor (which would exist in the case of an implied easement or an easement by necessity) and then search not only other conveyances from that grantor but search them all the way to the present time. The search would be impossible if the easement arises by prescription or estoppel, since then there is no common grantor. Cf. Sabo v. Horvath, 539 P.2d 1038, 1044 (Alaska 1976) (extended search not required): "As a general rule, requiring title checks beyond the chain of title could add a significant burden as well as uncertainty to real estate purchasers. To a certain extent . . . [this] would thus defeat the purpose of the recording system."

25. See Part III infra text accompanying notes 132 to end.
chaser. Further, one can find no clear statement of what modern courts do when confronted with the competing claims of a holder of a nonwritten, hidden easement and a bona fide purchaser of the servient estate. There is authority that implied easements and easements by necessity are within the recording acts, and authority that they are not. All writers agree that prescriptive easements arise outside the recording acts, but there is disagreement as to what extent courts actually hold such easements valid against a subsequent purchaser without notice. The particular problem of hidden easements is generally ignored.

The Restatement of Property avoids these questions entirely, specifically declining to consider when an easement may be extinguished by operation of the recording acts. The American Law of Property does little more. At one point that text states only that "[a]uthority is divided on the question of whether a purchaser from the owner of the servient tenement is bound by the burden of an easement by necessity solely by reason of record notice," but goes on to dismiss the problem with the assertion that "[t]he matter is seldom of importance in that if the easement exists inquiry notice is usually afforded by visible evidence of its use." The current supplement, without citation of authority or discussion, takes the position that all unrecordable interests should be governed not by the recording acts but instead by a modified doctrine of bona fide purchaser, under which such a purchaser prevails over an

26. 3 H. Tiffany, supra note 15, § 793, at 293; § 828, at 399; § 780, at 254.
27. 3 R. Powell, supra note 1, ¶ 406, at 34-30.
29. Compare 3 H. Tiffany, supra note 15, § 828, at 400 ("occasional decisions" that bona fide purchaser takes free of prescriptive easement) with 3 R. Powell, supra note 1, ¶ 406, at 34-30 (prescriptive easement "usually" regarded as exception to recording acts, so bona fide purchaser "may take subject to them") and Ferrier, The Recording Acts and Title by Adverse Possession and Prescription, 14 Calif. L. Rev. 291-94 (1926) (authorities in conflict over whether recording acts apply to prescriptive easements). The research for this article finds the same judicial tendencies that Tiffany did, writing in 1939. Courts occasionally will apply the recording acts to hold a bona fide purchaser takes free of a prescriptive easement. See infra text accompanying notes 95-98.
30. See RESTATEMENT OF PROPERTY, supra note 5, ch. 41, Introductory Note, at 3061.
31. 4 A.L.P., supra note 5, § 17.24, at 603. Some early cases suggest that a purchaser of a servient estate may be chargeable with constructive record notice of an easement by necessity where examination of record title would reveal the prior common ownership of the servient estate and other lands, and the sale of an isolated lot with no highway access other than over the servient estate. E.g., Highbee Fishing Club v. Atlantic City Elec. Co., 78 N.J. Eq. 434, 79 A. 326 (1911). Yet the facts in Highbee reveal actual notice (the purchaser physically examined the servient estate and knew of the landlocked parcel), and later courts have refused to apply this theory to charge a purchaser with constructive notice of an easement by necessity from the record alone. E.g., Hawley v. McCabe, 117 Conn. 558, 169 A. 192 (1933); Backhausen v. Mayer, 204 Wis. 286, 234 N.W. 904 (1931).
32. 4 A.L.P., supra note 5, § 17.24, at 603.
33. Id. § 17.2, at 671; § 17.24, at 681 n.4 (Supp. 1976).
earlier claimant without regard to the legal or equitable nature of the respective interests.\textsuperscript{34}

The editors of \textit{Powell on Real Property} address the issues but offer little analysis of the problem. They indicate that easements “by implication” and prescriptive easements are usually regarded as exceptions to the recording acts, so “a party purchasing the servient lot may take subject to them although there is no reference to them in the land records.”\textsuperscript{35} But the point seems to be contradicted in a later section, where the editors declare the rule to be that a bona fide purchaser of the servient estate takes free of an unrecorded easement implied from prior existing use,\textsuperscript{36} although subject to an easement implied by necessity or a prescriptive easement.\textsuperscript{37}

A different view emerges from Tiffany’s \textit{Real Property}, which claims that a bona fide purchaser acquires the servient estate free of a prior easement by necessity\textsuperscript{38} or an easement implied from prior use,\textsuperscript{39} but subject to a prescriptive easement.\textsuperscript{40} According to Tiffany, implied easements arise as a result of the parties’ presumed intention in executing a conveyance, so they “[exist], properly speaking, by reason of an expressed rather than an implied grant.”\textsuperscript{41} Extending the theory that implied easements arise from a written conveyance, the author concludes that the recording acts extinguish implied easements as against a subsequent purchaser without notice.\textsuperscript{42} In the case of prescriptive easements, the author accepts the doctrine that the recording acts are inapplicable, but finds “occasional decisions that the purchaser in such cases takes free of the easement, the courts ignoring the consideration that the doctrine of notice, in this connection, is based primarily upon the recording acts.”\textsuperscript{43}

Other writers follow the same pattern, finding that nonwritten easements are or are not subject to the recording acts, but without considering when or why one or the other rule is or should be applied.\textsuperscript{44}

\textsuperscript{34} Under the existing doctrine of bona fide purchaser, as applied to interests not covered by the recording acts, the bona fide purchaser prevails over an earlier unrecorded interest \textit{only} when the earlier interest is equitable \textit{and} the later interest legal. A prior legal claim prevails over any later claim under the first-in-time, first-in-right rule, and the prior of two equitable claims prevails under the same rule. \textit{Id.} \textsection 17.1, at 523-25. The practical result of applying the existing doctrine to nonwritten easements is not helpful, for it would protect only against an easement by estoppel, which is equitable. Implied easements, easements by necessity, and prescriptive easements usually are regarded as legal interests, so the earlier unrecorded easement still prevails over any subsequent claim.

\textsuperscript{35} 3 R. Powell, \textit{supra} note 1, \textsection 406, at 34-30.
\textsuperscript{36} Id. \textsection 424, at 34-263.
\textsuperscript{37} Id. \textsection 424, at 34-263 to 34-264.
\textsuperscript{38} 3 H. Tiffany, \textit{supra} note 15, \textsection 793, at 293.
\textsuperscript{39} Id. \textsection section 780, at 254; 828, at 399.
\textsuperscript{40} Id. \textsection 828, at 399-400; 4 id. \textsection 1209, at 1042.
\textsuperscript{41} Id. \textsection 780, at 254.
\textsuperscript{42} Id. \textsection 828, at 399.
\textsuperscript{43} Id. at 399-400.
\textsuperscript{44} See 2 G. Thompson, \textit{Real Property} \textsection section 433-34 (1980); Ferrier, \textit{The Recording Acts and Titles by Adverse Possession and Prescription}, 14 Calif. L. Rev. 295-96 (1926); Reichman,
In fact, courts are much more responsive to hidden easement problems than suggested by commentators. Courts usually select a rule that minimizes the loss upon discovery of a hidden easement.

C. The Choice of Rules

The rule to be applied in hidden easement cases depends on which of the recurring fact patterns is involved. In the underground pipeline cases, courts may be seen as acting to minimize loss, in effect choosing a rule that maintains the easement or extinguishes it based on which party’s use appears more valuable. This pattern is clearest in cases protecting the dominant owner (hidden easement survives), but it is also observable to a lesser degree in decisions protecting the servient owner (hidden easement extinguished). The encroaching structure cases are inconsistent. Sometimes courts choose a rule that minimizes loss, while on other occasions they ignore economic considerations and apply the recording acts to protect the bona fide purchaser. In the roadway cases, the courts apply the recording acts to protect the bona fide purchaser against a claimed easement that has fallen into disrepair or an inchoate way of necessity. One may speculate that the courts are unwilling to consider the relative economic hardships in roadway cases because of the greater potential interference with use of the servient estate. A hidden pipeline may have little impact on the servient owner’s use of his property, but an unexpected roadway almost invariably will be a significant burden.

To summarize, no one rule is uniformly applied in all hidden easement cases. The courts have been inconsistent in deciding whether a nonwritten, nonobservable easement is extinguished by a sale of the servient estate to a bona fide purchaser. The underground pipeline decisions are generally reconcilable on the ground that courts act to minimize loss, sometimes protecting the dominant owner and sometimes protecting the servient owner. This is not true of easements to maintain encroaching structures or hidden roadway easements.

II. The Courts’ Response

This section analyzes the decisions upon which the conclusions previously

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46. See Part II infra text accompanying notes 57-84 (implied easements) and 95-115 (prescriptive easements).
47. See Part II infra text accompanying notes 86-87 (implied easements).
48. See Part II infra text accompanying note 128.
49. See Part II infra text accompanying notes 129-131.
50. Aside from the obvious interference with the servient owner’s use of his land, an unexpected roadway involves the physical presence of others on the servient estate and also interferes with rights of privacy and exclusive control usually associated with the ownership of land.
offered are based. The factual situations in which hidden easement problems arise and the courts' responses cut across doctrinal lines, so it seems useful to consider the cases in functional rather than doctrinal categories. The pipeline cases, by far the most numerous, are considered first, followed by the fewer encroaching structure cases and the very few neglected roadway cases.

A. Hidden Easements to Maintain Underground Pipelines

Underground pipeline easements present problems of the sort considered here when they exist as implied easements, prescriptive easements, and easements by estoppel. Functionally, the courts' response is the same in each case, but the doctrine used to explain the result differs according to the type of easement involved.

1. Easements Implied From Prior Use

The most common pipeline problem involves an easement implied from prior use. This arises when there is a conveyance of a portion of a tract of land upon which there is a prior existing use of one part for the benefit of another, and the prior use is apparent, continuous, and more or less necessary for the beneficial enjoyment of the other part. A use is "apparent" when it is either visible or "discoverable on a careful inspection of the premises by one conversant with potential uses of the property." The requirement that the use be apparent serves both the function of demonstrating intent and of providing notice. Traditionally, it fulfills the expectations of the grantee of the dominant estate who, having seen the prior use, presumably expects it to continue. In practice, it assures notice to the grantee of the servient estate who may be fairly burdened with an easement corresponding to the prior use as observed.54

51. Cunningham, et al., supra note 3, § 8.4. Accord, 2 A.L.P., supra note 5, §§ 8.32, 8.37-8.42; 3 R. Powell, supra note 1, ¶ 411[2]; 3 H. Tiffany, supra note 15, § 781. An older requirement that the prior use also be "continuous" or "permanent" is criticized as too restrictive and seems to be disappearing in the decisions. 2 A.L.P., supra note 5, § 8.41; 3 R. Powell, supra note 1, ¶ 411[2] at 34-94.

52. 3 Powell, supra note 1, ¶ 411[2][a], at 34-94 to 34-95. Accord, 3 H. Tiffany, supra note 15, § 784, at 263; 2 A.L.P., supra note 5, § 8.42, at 262; Restatement of Property, supra note 5, § 476 comment j. The Restatement does not distinguish between easements implied from prior use and those implied from necessity, instead taking the position that a variety of factors are important in determining whether an easement is implied upon the conveyance of land. One such factor is "the extent to which the manner of prior use was or might have been known to the parties." Where such use is reasonably necessary and "apparent upon a reasonably prudent investigation," the Restatement position is that an easement should be implied. Id.

53. See, e.g., Dressler v. Isacs, 214 Or. 586, 343 P.2d 714 (1959) (no implied easement when purchaser could not reasonably expect to acquire easement with purchaser of tract); 3 R. Powell, supra note 1, ¶ 411[2][a], at 34-94; 3 H. Tiffany, supra note 15, § 874, at 265; 2 A.L.P., supra note 5, § 8.42.

54. See, e.g., Pilar, Inc. v. Lister Corp., 22 N.J. 75, 123 A.2d 536 (1956) (Brennan, Jr., J.). The Pilar court refused to hold a roadway easement impliedly reserved by the grantor in the face of ambiguous evidence of a prior use. A surveyor examined the alleged servient estate for visible
Some courts apply the "apparent" requirement not only to the grantee of the servient estate but also to the subsequent purchaser. Often, such courts apply the "discoverable upon a careful (or reasonable) inspection" test to find that an underground pipeline easement is apparent and not extinguished by a sale to a bona fide purchaser. The decisions are unexceptional where the purchaser in fact has knowledge or fair notice of the pipeline, but many courts go farther and hold underground pipelines "discoverable" on facts that are insufficient to give a purchaser inquiry notice. Such decisions effectively hold a hidden easement valid against a bona fide purchaser, but they are best understood as decisions balancing relative economic hardships, finding either no harm to the servient owner or greater harm to the dominant owner than to the servient owner.

The idea that a hidden pipeline may be found "discoverable" in order to sustain a useful easement is traceable to a nineteenth-century English decision, Pyer v. Carter.65 There the Court of Exchequer held that an implied easement to maintain a hidden drain serving two adjoining houses remained valid after a sale of one house to a purchaser unaware of its existence, for "otherwise the inconveniences and nuisances in towns would be very great. Where the owner of several adjoining houses conveyed them separately, it would enable the vendee of any one house to stop up the system of drainage made for the benefit and necessary occupation of the whole."66 Justifying its decision in doctrinal terms, the court offered a view of "apparent" easements that is repeated often in the modern cases: "[B]y 'apparent signs' must be understood not only those which must necessarily be seen, but those

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69. Id. at 1472-73.
70. Id. at 1474.
which may be seen or known on a careful inspection by a person ordinarily conversant with the subject."

The court's decision is prodevelopment, recognizing the benefit and convenience of common sewers in adjoining houses in a case where the existence of the drain does not appear to interfere with the servient owner's use of his house or put him to any additional expense. The court made a policy choice to sustain an easement that benefited the dominant estate and did not harm the servient estate. Indeed, this seems to be a spite case, one where ill-will between adjoining landowners leads the servient owner to block the easement. A decision one way or the other in this particular case was inconsequential, since the dominant owner could have constructed an alternative drain at what appeared to be minimal cost, and perhaps the court was more concerned with establishing a clear rule to avoid future problems. It failed in this regard.

An examination of those American cases holding that a hidden easement survives a sale of the servient estate to a bona fide purchaser usually, but not always, reveals the same economic balancing in favor of the dominant owner. The courts rely on the fiction that a hidden pipeline easement is "discoverable" to explain why a purchaser without notice is bound by the easement. Several illustrations follow.

In Van Sandt v. Royster, the Kansas Supreme Court held the servient owner subject to a buried pipeline easement that was not discovered until the basement of a house on the servient estate was flooded with sewage. The case is an example of a court preserving a hidden easement that does not seem to be objectionable. The original owner of three adjoining lots constructed an underground sewer from the street to a house on the farthest lot, at a time when no other sewer connection was available. The aggrieved landowner was a later purchaser of a house on the middle lot, connected to the common sewer. The then dominant owner refused to cease using the

61. Id. at 1475. The Pyer court attributed this test to C. Gale and T. Whatley, The Law of Easements (1839), the first English treatise on easements. However, the court applied the test to circumstances not considered by its creator. Gale and Whatley do not address the question of hidden but socially useful easements in formulating the test of whether an easement "may be seen or known on a careful inspection by a person ordinarily conversant with the subject." See C. GALE & T. WHATLEY, supra, at 40 (Am. ed. 1840).
62. The dominant owner could have avoided using the easement under the servient estate by constructing a drain of his own leading into the sewer at a cost of six pounds sterling. 156 Eng. Rep. at 1474.
63. See supra cases cited note 57, with the exception of Wiesel v. Smira, 49 R.I. 246, 146 A. 148 (1928).
64. Wiesel v. Smira, 49 R.I. 246, 142 A. 148 (1928).
67. Id. at 496, 83 P.2d at 698.
68. Id.
sewer, and the owner of the middle lot sued contending no easement existed under his land, but that if it did, he took free of the easement as a bona fide purchaser without notice.\textsuperscript{69} 

The court's explanation of why the easement arose upon the original sale of the servient estate by the common grantor equally well explains the decision that it remained valid:

The easement was necessary to the comfortable enjoyment of the grantor's property. If land may be used without an easement, but cannot be used without disproportionate effort and expense, an easement may still be implied in favor of either the grantor or the grantee on the basis of necessity alone.\textsuperscript{70}

The finding that the easement was "apparent" because "discoverable" can be read in light of the balance of economic hardships weighing more heavily upon the dominant owner, since as a practical matter the court's reasoning rings hollow:

Neither can it be claimed that plaintiff purchased without notice. At the time plaintiff purchased the property he and his wife made a careful and thorough inspection of the property. They knew the house was equipped with modern plumbing and that the plumbing had to drain into a sewer. Under the facts as found by the court, we think the purchaser was charged with notice of the lateral sewer. It was an apparent easement as that term is used in the books.\textsuperscript{71}

Here the existence of the easement caused plaintiff no harm. Rather, the problem seems to have been one of misuse by the dominant owner, or perhaps a case of failure to maintain, either of which are actionable without extinguishing the easement.\textsuperscript{72} A decision extinguishing the easement would have put the two adjoining landowners to the expense of constructing alternative sewer connections; the court can be seen as declining to consider either the availability or cost of an alternative easement when no harm to the servient owner is shown.\textsuperscript{73}

\textsuperscript{69} Id. at 498, 83 P.2d at 700.

\textsuperscript{70} Id. at 502, 83 P.2d at 702.

\textsuperscript{71} Id.

\textsuperscript{72} 2 A.L.P., supra note 5, § 8.66, at 278; Restatement of Property, supra note 5, § 485 comment c, at 3025-26.

\textsuperscript{73} Two other decisions that apply the same economic balancing, and do not consider the dominant owner's cost of an alternative easement when there is no harm to the servient owner, are Romanchuk v. Plotkin, 215 Minn. 156, 9 N.W.2d 421 (1943) and Otero v. Pacheco, 94 N.M. 524, 612 P.2d 1335 (Ct. App. 1980). In Romanchuk, the Minnesota Supreme Court held that a servient owner who constructed a sewer serving two parcels could not later avoid the easement on the ground that it was not apparent to the dominant owner. The court affirmed a decision below enjoining interference with the sewer. The court found that there was an implied sewer easement across Plotkin's servient estate, subject to the requirement that Romanchuk, the domi-
Kirma v. Norton is a close case that illustrates economic considerations tipping the balance in favor of preserving a hidden easement. A prospective purchaser of the servient estate observed a pipe protruding eight inches through a seawall, inquired, and was told by his grantor that it was a sewage

nant owner, pay his proportionate share of the cost of repairs and maintenance. 215 Minn. at 159, 9 N.W.2d at 424. The decision is unexceptional but unfortunately the court explains it by describing a hidden pipeline as “discoverable.” Plotkin, the common grantor and servient owner, made the technical argument there was no easement because it was not “apparent” to Romanchuk, the later purchaser of the dominant estate. id. at 161-62, 9 N.W.2d at 424-25. Here the easement arose by an implied grant from the original owner of both parcels, Plotkin, who installed and knew of the sewer, and who still owned the servient estate. There was no question of the necessary intent to grant the easement, nor of notice to the servient owner. Rather than responding that both the original buyer of the servient estate, and Romanchuk (the later buyer), relied on usable plumbing that required a sewer known to Plotkin, the court answered with the fiction that this easement was discoverable:

“Apparent” does not necessarily mean “visible.” The weight of authority sustains the rule that “apparent” means that indicia of the easement, a careful inspection of which by a person ordinarily conversant with the subject would have disclosed the use, must be plainly visible. An underground drainpipe, even though it is buried and invisible, connected with and forming the only means of draining waste from plumbing fixtures and appliances of a dwelling house, is apparent, because a plumber could see the fixtures and appliances and readily determine the location and course of the sewer drain.

id. at 162, 9 N.W.2d at 425.

In Otero, the New Mexico Court of Appeals recently sustained a hidden sewer easement that caused no harm to a subsequent bona fide purchaser of the servient estate. Pacheco, the owner of two building lots, constructed his house on the lot farther from the public road and installed an underground sewer across the nearer (vacant) lot to a sewer in the road. An ordinance required connection to a city sewer; no other connection was then possible. The vacant lot was sold and a house built. Some years later Otero bought it. Otero (the servient owner) learned of the easement when the sewer backed up into his basement and brought an action for damages. 94 N.M. at 525, 612 P.2d at 1335-36. The court’s opinion deals primarily with the validity of the easement, holding that an easement was impliedly reserved when Pacheco sold the vacant lot, and that Otero was chargeable with inquiry notice of the easement because it was “apparent”:

While there is some conflict of authority as to whether existing drains, pipes, and sewers may be properly characterized as apparent, within the rule as to apparent or visible easements the majority of cases which have considered the question have taken the view that appearance and visibility are not synonymous, and that the fact that the pipe, sewer, or drain may be hidden underground does not negative its character as an apparent condition; at least, where the appliances connected with and leading to it are obvious. The circumstances in this situation were such that a reasonably prudent person would have inquired.

id. at 527, 612 P.2d at 1338 (citations omitted).

A dissent observed the absence of any factual support for the finding of notice, id., and indeed the decision is more readily explained on other grounds. This is a case where the existence of the easement caused the servient owner no harm; yet a decision of no easement might be quite costly to the dominant owner. The feasibility and cost of an alternative sewer connection do not appear, but perhaps the court assumed that the situation remained as it was when this sewer was installed, no other connection being possible. The majority said that in New Mexico an easement may be impliedly reserved upon a showing of “reasonable necessity which continues to exist,” id. at 527, 612 P.2d at 1337, suggesting that it struck a balance in favor of the dominant owner.

pipe.\textsuperscript{75} When it was later discovered that this was the outlet pipe for a common sewer serving other homes in a seaside development,\textsuperscript{14} the Florida Court of Appeals enjoined interference with its use, holding that an implied easement was created and was binding on the subsequent purchaser. The protruding pipe was found to be sufficiently "apparent" to give rise to the easement\textsuperscript{77} and to put the purchaser on inquiry notice.\textsuperscript{78} This is a close case for inquiry notice, as one might question whether being told of the sewer would put a reasonable man on notice to ask whose sewer it was.\textsuperscript{79} But if the case for inquiry notice is weak, the economic argument for preserving the easement is strong. The existence of the easement was not shown to harm the servient owner, and the decision preserved the expectations and property values of other lot owners in the subdivision, where the developer advertised the installation of sewers.\textsuperscript{80}

Finally, \textit{Westbrook v. Wright}\textsuperscript{81} illustrates the spite case, where the servient owner discovers a hidden easement and disconnects it, not because of harm to the servient estate but apparently because of ill-will toward the dominant owner.\textsuperscript{82} The Texas Court of Appeals held an implied easement was created and binding upon the current owner of the servient estate because it was "apparent."\textsuperscript{83} Yet the opinion reveals a more plausible economic rationale when the court explains that because of a lack of alternative routes to a public sewer, "[t]he use of the easement was essential to the use of the dominant estate at the time of the conveyance and necessary after the severance."\textsuperscript{84} There are occasional decisions protecting the dominant owner over the bona fide servient purchaser that do not fit the observed pattern of no harm or relatively little harm to the servient owner.\textsuperscript{85} This is not unexpected and does not detract from the overall picture.

There is, however, another line of cases involving implied pipeline

\textsuperscript{75} Id. at 655.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 657.
\textsuperscript{78} Id.
\textsuperscript{79} Perhaps plaintiff would have been better off pursuing a misrepresentation claim against his grantor, the original developer.
\textsuperscript{80} 102 So. 2d at 657.
\textsuperscript{81} 477 S.W.2d 663 (Tex. Civ. App. 1972).
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 666. The court, in determining that the easement was apparent, reasoned as follows:

It was in existence at the time of the conveyance by Whitaker [the original common grantor and developer] and had been for an extended number of years. . . . "Apparent" in instances involving sub-surface installations that are installed to avoid being seen cannot be considered to be synonymous with "visibility." It may be considered to be apparent if its existence is indicated by signs which might be seen or known on a careful inspection by a person ordinarily conversant with the subject.

\textit{Id.} (citations omitted).
\textsuperscript{84} Id. at 666-67.
\textsuperscript{85} \textit{E.g.,} Wiesel v. Smira, 49 R.I. 246, 142 A. 148 (1928). The decision holds a hidden sewer easement valid against a bona fide purchaser of the servient estate. It seems to impose un-
EASEMENTS that does not as readily fit the economic pattern. An examination of the decisions protecting the servient owner against a hidden pipeline easement (easement extinguished) reveals that while some fit the economic pattern, others ignore the economic consequences and seem to protect the servient owner out of solicitude for his status as a bona fide purchaser. The most that can be said is that while many courts act to minimize loss in hidden pipeline cases, there remains some tendency to protect the bona fide purchaser without regard to the losses involved. The decisions offer no clue as to why some courts consider the economic situation while others do not. In some jurisdictions perhaps the rule that a bona fide purchaser takes free of a nonwritten easement is so well established that courts simply accept it without question.

Illustrative of the decisions under discussion is Mitchell v. Houstel, involving the owners of two contiguous lots in Baltimore, Maryland. The lots

necessary and avoidable loss. The court sustained an easement that stymied commercial development of the servient estate, Id. at 248, 142 A. at 149, in circumstances where the dominant owners could have "readily" obtained alternative easements. Id. at 250, 142 A. at 150. The court said that preserving the existing easement "admittedly . . . is a hardship on the servient owner." Id. at 254, 142 A. at 151. But it felt obliged to apply the rule that nonwritten easements are outside the recording acts and survive a sale of the servient estate to a bona fide purchaser:

Once conceding the existence of an easement by severance of the quasi dominant and quasi servient tenements, we see no way by which the owner of the latter can convey it, even to an innocent purchaser, freed from said easement without the knowledge or approval of the owner of the dominant tenement. Rights in real property cannot be thus divested. Admittedly there is a hardship upon the servient owner in a case like the present one, but by reason thereof the court is not warranted in destroying the dominant owners' settled property rights and saying to them that they can secure as good results by a different use of their property which they are under no obligation to make. So to do would be an arbitrary exercise of power which is not warranted, however desirable and simple the making of new connections may be.

Id.

86. Heatherdell Farms, Inc. v. Huntley Estates, Inc., 130 N.Y.S.2d 335 (Sup. Ct. 1954) (easement extinguished where servient owner acquired an undeveloped 120-acre parcel for development and dominant owner could relocate septic tank system to its own property); Campbell v. Great Miami Aerie, 15 Ohio St. 3d 79, 472 N.E.2d 711 (1984) (sewage easement extinguished in suit by a servient owner intending to use property as storage facility or residence, but facts indicate dominant owner could obtain alternate easement by hooking into city sewer line a reasonable distance from property); Vanderwerff v. Consumers Gas Co., 166 Pa. Super. 358, 71 A.2d 809 (1950) (sewer easement blocking development of servient estate extinguished, but dominant estate abutted new road opened by developer, which road presumably contained a sewer available to dominant owner as well as owners of new houses along it).


88. For example, New York established such a rule in 1931 in Goldstein v. Hunter, 257 N.Y. 401, 178 N.E. 675 (1931).

89. 217 Md. 259, 142 A.2d 556 (1958).
lay on a hillside, with a city sewer line running under a street at the bottom of the hill. The lot on the high ground was improved with a house and connected to the city sewer below via a pipe running under the lower lot. The only visible signs of the sewer on the lower lot were two clean-out pipes about five inches in diameter extending out of the ground eight to ten inches. The purchaser of the lower lot failed to discover these pipes before the purchase because the lower lot was completely covered by weeds and brush. In an action by the upper lot owner to enjoin interference with the sewer line, the court held that the lower lot owner was a subsequent purchaser without notice and not subject to the easement.

Such facts present a difficult case, and the court seems more concerned with doctrine than with the economic realities of the situation. The decision leaves the dominant owner high on a hillside with no means of sewage disposal, and it seriously diminishes the value of his house. The court seems more concerned with protecting the value paid by the purchaser of the lower, unimproved lot, without any consideration of the relative economic hardships or of who could have more easily avoided the loss. If, for example, the dominant owner knew the location of the sewer and could have filed for record an affidavit reciting the claim to an easement, the decision placing the risk of loss on the party who failed to act to avoid it would be understandable.

2. Prescriptive Easements

The problem of prescriptive pipeline easements arises where an underground use once was open or known, but is no longer, so that a subsequent purchaser of the servient estate has no notice of the hidden easement. As in the case of implied pipeline easements, the courts generally hold such easements binding on a bona fide purchaser only where they cause no harm.

A prescriptive easement, like a title by adverse possession, is said to be unaffected by a sale of the servient estate. The traditional rule is that a

90. Id. at 253, 142 A.2d at 557.
91. Id. at 253-64, 142 A.2d at 558.
92. Id. at 255-66, 152 A.2d at 559.
93. Id. at 266, 142 A.2d at 559. The court believed the prior use was not sufficiently "apparent" to create an implied easement unless it was visible, for any other rule "would create chaos in the field of land purchases, and work hardships never contemplated by the law." Id., 142 A.2d at 558-59.
94. A prescriptive easement is acquired by actual use, adverse or hostile to the owner, which is open, notorious, and continues for the prescriptive period. RESTATEMENT OF PROPERTY, supra note 5, §§ 457-458; 2 A.L.P., supra note 5, §§ 8.53-8.58. In most cases, the "open and notorious" requirement effectively prevents an underground use from ripening into a prescriptive easement. See City of Corpus Christi v. Krause, 584 S.W.2d 325 (Tex. Civ. App. 1979); Annotation, Easement by Prescription in Artificial Drains, Pipes, or Sewers, 55 A.L.R.2d 1144 (1957). Prescription is analogous to adverse possession, the main difference being that prescription involves a use rather than a possession adverse to the owner. See CUNNINGHAM, et al., supra note 3, § 807, at 451.
prescriptive easement once acquired is not divested by a subsequent transfer of the servient estate.\textsuperscript{95} Most courts apply this rule to underground pipeline easements, sometimes in cases involving a purchaser with notice,\textsuperscript{96} but more often in cases involving a bona fide purchaser.\textsuperscript{97} A few courts find that a prescriptive pipeline easement is extinguished upon a sale to the bona fide purchaser.\textsuperscript{98} The courts applying the nonextinguishment rule can be seen as weighing the relative hardships and concluding that continued existence of the easement is more beneficial to the dominant owner than extinguishing it would be to the servient owner. Again, the economic balancing is implicit rather than explicit.

Illustrative is a recent Nebraska case, Beach v. City of Fairbury.\textsuperscript{99} One day the Beaches discovered a large hole in their backyard, and investigation revealed that a collector line for a hitherto unknown city storm sewer ran beneath their land and had collapsed. The City refused to pay for all of the repairs, and the Beaches sued for the balance.\textsuperscript{100} The Nebraska Supreme Court held that a prescriptive easement arose because the City used the sewer for the prescriptive period with the knowledge of prior owners.\textsuperscript{101} Then it held that the easement remained valid under the rule that a prescriptive easement is not extinguished by a sale of the servient estate.\textsuperscript{102} The existence of the sewer easement caused the Beaches no harm, and the decision refusing to require removal avoids significant cost to the City. The real problem was the damage done by the collapse of the sewer, and the Nebraska court, unlike most others, addressed this issue and awarded the Beaches damages resulting from the City's failure to repair.\textsuperscript{103}

A recent Montana case that imposes a significant loss on the servient

\textsuperscript{95} 3 H. Tiffany, supra note 15, § 828, at 399-400; 4 H. Tiffany, supra note 15, § 1209, at 1042; 3 R. Powell, supra note 1, ¶ 424, at 34-263 to 34-264. This rule is traceable to a nineteenth-century Pennsylvania case, Wissler v. Hershey, 23 Pa. 333 (1854), where the court opined that "[w]hen land, over which there is a right of way in another, is sold, the purchaser takes it subject to the easement, though he had no actual notice of it." Id. at 338. Whether the rule was actually applied in Wissler is unclear, since the Pennsylvania Supreme Court reversed for a new trial to allow the dominant owner to present evidence of the purchaser's actual knowledge of a roadway easement.


\textsuperscript{97} McKeon v. Brammer, 238 Iowa 113, 29 N.W. 2d 518 (1947); Riggs v. Ketner, 299 Ky. 754, 187 S.W.2d 287 (1945); Shaughnessy v. Leary, 162 Mass. 108, 38 N.E. 197 (1894); Riddle v. City of Helena, 687 P.2d 1386 (Mont. 1984); Beach v. City of Fairbury, 207 Neb. 836, 301 N.W.2d 584 (1981).


\textsuperscript{99} 207 Neb. 836, 301 N.W.2d 584 (1984).

\textsuperscript{100} Id. at 837, 301 N.W.2d at 586.

\textsuperscript{101} Id. at 838, 301 N.W.2d at 587.

\textsuperscript{102} Id. at 838-39, 301 N.W.2d at 587.

\textsuperscript{103} Id. at 839, 301 N.W.2d at 587.
owner is also illustrative. In Riddock v. City of Helena, the City of Helena constructed a water supply line from the Missouri River to the City, obtaining easements from property owners as needed. In some instances the line was laid outside the granted easements, and this occurred on several parcels of land. One such parcel was subsequently acquired by Riddock, a land developer and speculator, who purchased the land intending to hold it for subdivision and resale unaware that the pipeline crossed the land. The Montana Supreme Court denied an inverse condemnation claim and then held that "the City's prescriptive easement ripened before Riddock acquired title to the land crossed by the City's pipeline. Riddock's lack of knowledge of the pipeline is immaterial to this action." The decision can be explained on economic grounds if one assumes that the harm to Riddock is less than the cost to the City of relocating the pipeline. Another economic explanation takes account of a sometime policy of protecting the public fisc against inverse condemnation claims. The City made a mistake, and the court insulated it from the expense of paying for a new easement, perhaps with an eye toward the total number of such claims that might be brought.

Where a purchaser of the servient estate is charged with inquiry notice of a prescriptive pipeline easement, the facts may present a close case. To the extent that the visible evidence relied on by the court is too slim to fairly give notice, an economic balance strongly in favor of the dominant owners can be observed. This was the situation in Jones v. Harmon, where the California Court of Appeal held that a landowner who plugged an underground pipeline essential to an irrigation system was liable for damages when her actions caused substantial crop losses. Cloisea Harmon, the servient owner, discovered the pipeline when her backyard flooded and later plugged it because of an ongoing dispute with the dominant owners concerning repairs to her property beyond fixing the leaking pipeline. The result was the loss of crops on adjoining lands where there were substantial small vineyards, fruit trees, and truck gardens. The portion of the pipeline under Cloisea's land was entirely buried and could not be discovered by an examination of the property, although fifty feet away on the immediately adjacent property

104. 687 P.2d 1386 (Mont. 1984).
105. Id. at 1387.
106. Id. at 1389.
107. Id. at 1390.
110. Id. at 870, 1 Cal. Rptr. at 193.
111. Id. at 871, 1 Cal. Rptr. at 194.
there were above-ground water control devices characteristic of an irrigation system. The court held that a prescriptive easement arose because the irrigation system was well known to area residents for more than thirty years. It acknowledged the rule that prescriptive easements exist outside of the recording acts, but held that the servient owner, Cloisea, could not avoid the easement even if the recording acts applied because she was properly chargeable with notice of the pipeline.

If one questions the court's conclusion that the easement was reasonably discoverable, the economic balance helps to explain the decision. It was a failure to maintain and repair the pipeline, not its existence, that caused harm to the servient owner, and for this she could have maintained an action. Termination of the easement would have interfered with an established irrigation system supporting farms on adjoining lands, which apparently had no other water supply.

3. Oral Easements

Underground pipeline easements that are created orally raise the same problems as implied and prescriptive pipeline easements. Presumably the courts treat the former like the latter, although the decided cases do not establish this for certain. Oral agreements for the use of another's land are usually enforced as easements by estoppel (representation of an easement plus detrimental reliance), but sometimes the courts use the theory of equitable part performance (improvements are tangible evidence of claimed oral interest). Whatever the theory, oral pipeline easements raise the same problem as other nonwritten easements when a purchaser unaware of the agreement and unable to see any evidence of the pipeline acquires the servient estate.

Although there is an occasional suggestion that easements by estoppel are not extinguished by a sale of the servient estate, the few reported decisions

112. Id. at 872, 1 Cal. Rptr. at 195.
113. Id. at 875, 1 Cal. Rptr. at 196-97.
114. Id., 1 Cal. Rptr. at 198.
115. Id.
116. 3 R. POWELL, supra note 1, ¶ 411[4], at 34-102.3 to 34-102.7; 3 H. TIFFANY, supra note 15, § 801.
117. CUNNINGHAM, et al., supra note 3, § 8.8.
118. See Riehnbaw v. Kraus, 157 Neb. 723, 728, 61 N.W.2d 350, 355 (1953) (easement created by oral "gentlemen's agreement" between original dominant and servient owners is binding on subsequent purchaser because "the sounder rule" is that "an existing easement to use an underground pipeline obtained by implication or by prescription is not extinguished by a subsequent sale of the servient estate to a bona fide purchaser without knowledge or actual or constructive notice."); Nohowel v. Hall, 218 Md. 160, 146 A.2d 187 (1958) (seller is not liable for breach of a covenant against encumbrances when it is later learned that a prior owner granted the county an oral easement for a public sewer that interferes with the present grantee's building plans). The court reached this result by reasoning that the seller was himself a bona fide purchaser and so not bound by the oral easement. Id. at 167, 146 A.2d at 191. The dominant owner (the county) was not a party to the action, and the court specifically noted that its decision did not affect the dominant owner. Id. at 168, 146 A.2d at 191. This article suggests that were the
involving hidden pipelines reveal either a purchaser fairly chargeable with notice,\textsuperscript{119} or one with knowledge of the easement.\textsuperscript{120} In cases involving open space or recreational easement by estoppel, some courts appear to favor the party facing the greater economic loss,\textsuperscript{121} and it seems a fair guess that others will act similarly in pipeline cases involving a bona fide purchaser.

Summarizing the underground pipeline cases, the pattern that emerges is one in which the courts do not always protect the bona fide purchaser against the burden of a nonwritten and nonobservable easement. Where the existence of the easement causes little or no harm, and obtaining an alternative easement would be costly, many courts hold the hidden easement valid and protect the interest of the dominant owner over that of the servient owner.

B. Hidden Easements to Maintain Encroaching Structures

The owner of two lots erects a building on one of them but mistakenly locates it in a way that there results a minor encroachment over the boundary line onto the other lot. Both lots are later sold to different purchasers, and the encroachment is discovered short of the time when title could be acquired by adverse possession. An ejectment action follows, the defendant claiming an implied easement to use a strip of the plaintiff's land upon which the trespassing structure stands.\textsuperscript{122} In the few cases to raise this problem, courts have assumed that the recording acts apply; however, the cases are split on the question of whether the encroachment is sufficiently apparent to create an

\textsuperscript{119} Although the \textit{Ricenbaw} court said the easement survived because implied easements are not extinguished by a sale of the servient estate, 157 Neb. at 728, 61 N.W.2d at 355, it might have rested on narrower grounds. The 350-foot drain in question was visible for its entire length, 160 to 250 feet of which were on the servient estate, \textit{id.} at 726, 61 N.W.2d at 354, surely sufficient to charge the purchaser with inquiry notice.

\textsuperscript{120} Lake Meredith Dev. Co. v. City of French, 564 S.W.2d 427, 431 (Tex. Civ. App. 1978).


\textsuperscript{122} The claim of an easement in these cases is a novel approach to the more general problem of the landowner who innocently mislocates a structure on his neighbor's land. Typically the encroacher's only defenses to an action to remove his structure are a claim of title by adverse possession, \textit{see} Ceragosian v. Union Realty Co., 289 Mass. 104, 193 N.E. 726 (1935); 3 A.L.P., \textit{supra} note 5, \S 18.87, at 821-23, or an argument that the landowner's remedy should be limited to damages because an injunction to remove would be inequitable, \textit{see} D. DOBBS, REMEDIES \S 5.6 (1973); H. McCLINTOCK, PRINCIPLES OF EQUITY \S 144, at 384-85 (2d ed. 1948). In the unique fact situation where both parcels of land were once held by a common owner who erected the encroaching structure, the rule that upon severance an easement may be implied from a prior existing use provides another defense that sometimes succeeds. \textit{See} cases cited \textit{infra} note 123. The encroacher might go further and claim a fee simple to the disputed strip. His argument would be that the original common owner must have intended to retain (or grant) title to the strip upon which he built the encroachment, and that the deed to the servient estate should be construed with reference to the physical situation existing on the land.
implied easement, or to put the subsequent purchaser of the servient estate on notice. Some decisions find notice,123 while others do not on essentially the same facts.124

The pattern observable here mirrors that of the pipeline cases, with some courts automatically protecting the bona fide purchaser and others looking to the economic impact of an extinguishment or nonextinguishment decision. As a practical matter, although literally visible, a building one foot over the lot line123 or an overhanging eave126 does not give notice to the usual owner unaware of the exact location of a boundary line. The decisions protecting the dominant owner seem more readily understood in terms of a finding of greater economic hardships on the dominant owner if forced to remove the structure.

C. Neglected and Inchoate Roadway Easements

The final hidden easement problem to be considered is that of the "hidden" roadway easement. Sometimes a nonwritten roadway easement may arise from a use that is visible, but the roadway falls into such disrepair that a subsequent purchaser of the servient estate claims to have no notice of it. This can be the case with an easement implied from prior use, an easement by necessity or estoppel, or a prescriptive easement. Alternatively, there may be a severance of a commonly owned parcel in circumstances sufficient to create an easement by necessity, but no dominant owner has yet attempted access over the servient estate (an inchoate easement by necessity). Each scenario poses the same type of hidden easement problem.

Most of the neglected roadway cases hold the subsequent purchaser bound by the easement, yet the circumstances reveal either knowledge or sufficient remaining evidence of use to charge fair inquiry notice.127 In the few cases where there is no remaining evidence of use, courts hold the easement ex-

124. Smith v. Lockwood, 100 Minn. 221, 110 N.W. 980 (1907); Bennet v. Evans, 161 Neb. 807, 74 N.W.2d 728 (1956).
125. Sprenzel v. Windmueller, 286 Ill. 411, 121 N.E. 805 (1919) (easement created and binding on subsequent purchaser).
tungished.\textsuperscript{128} If the land has reverted to its natural state, a court may be understandably reluctant to hold for the dominant owner whatever the economic balance, since an unexpected roadway easement is potentially far more of an obstacle to the use and development of the servient estate than an unexpected pipeline easement. In this situation the dominant owner could avoid the unexpected loss simply by using or maintaining the roadway.

The few reported cases of inchoate roadway easements by necessity likewise suggest that courts are unwilling to subject a bona fide purchaser to an unexpected roadway, however harsh the economic consequences on the dominant owner.\textsuperscript{129} With the exception of a few old and ambiguous lower court decisions,\textsuperscript{130} inchoate ways by necessity are held extinguished upon a sale of the servient estate to a bona fide purchaser.\textsuperscript{131}

III. \textit{An Assessment and a Proposal}

The courts seem to apply a rough, intuitive economic analysis in deciding cases where a bona fide purchaser claims to have acquired the servient estate free of a nonwritten, nonobservable pipeline easement. Presently, courts take an all or nothing approach: either the easement is extinguished and the servient owner protected by enjoining its continued use, or the easement survives and the dominant owner is protected by enjoining interference with the easement. Sometimes one or the other party suffers a loss, either the domi-


\textsuperscript{129} In several cases the courts have refused to find an easement by necessity where the dominant owner used both the claimed easement and an alternative route over other lands to reach his landlocked tract. Sometimes this is explained on the ground that there was no "necessity," e.g., Othen v. Rosier, 148 Tex. 485, 491, 226 S.W.2d 622, 628 (1950), and sometimes on the alternative ground that there is insufficient notice to a bona fide purchaser of the servient estate, e.g., Mesmer v. Uharrriet, 174 Cal. 110, 116, 162 P. 104, 105 (1916); Backhausen v. Mayer, 204 Wis. 286, 234 N.W. 934, 906 (1931). Some courts use both explanations, e.g., Tiller v. Hinton, 19 Ohio St. 3d 66, 482 N.E.2d 946, 951 (1985). This seems to be an unnecessarily narrow view, for it strikes the economic balance in favor of protecting the bona fide purchaser who has some degree of warning while forcing the dominant owner to purchase his way into a landlocked tract. A dissent in the \textit{Tiller} case would have found an easement by necessity because of the economic hardship to the landlocked owner. \textit{Id.} at 71-72, 482 N.E.2d at 954.

\textsuperscript{130} See Thomas v. McCoy, 48 Ind. App. 403, 96 N.E. 14 (1911); Falcone v. Benjamin, 129 Misc. 143, 221 N.Y.S. 190 (Sup. Ct. 1926).

\textsuperscript{131} Mesmer v. Uharrriet, 184 Cal. 110, 162 P. 104 (1916); Blake v. Boyle, 38 Colo. 55, 88 P. 479 (1907); Hawley v. McCabe, 117 Conn. 558, 169 A. 192 (1933); Schmidt v. Hilly-Forster Lumber Co., 239 Wis. 514, 1 N.W. 2d 154 (1942). See also Tiller v. Hinton, 19 Ohio St. 3d 66, 482 N.E.2d 946 (1985). \textit{But see} Pencader Assocs. v. Glasgow Trust, 446 A.2d 1097 (Del. 1982), where the court held that an easement by necessity is not automatically extinguished by 170 years of nonuse; it is a question of fact whether an easement was created and whether the easement was extinguished by abandonment, adverse possession, or estoppel. The court said that "a right to a way-of-necessity can lie dormant and be activated by a remote grantee." \textit{Id.} at 1100.
nant owner who must replace the easement or the servient owner who is not compensated for the easement imposed.\textsuperscript{132}

Explicit recognition of the economic problem could lead to a more frequent use of the damage remedy, which would minimize the loss and lead to a more efficient resource allocation in such cases.\textsuperscript{133} The servient owner can be adequately protected, and harm to the dominant owner minimized, by adopting a rule that the easement survives but the dominant owner pays damages

\textsuperscript{132} Existing law offers the losing party only limited protection against loss when a hidden easement is discovered. Covenants of title in a deed and title insurance do not fully cover losses suffered by a dominant owner denied use of a nonwritten easement, or losses suffered by a servient owner subject to such an easement. A dominant owner's claim for breach of a covenant of warranty has been denied on the ground that a deed conveying the described premises "with appurtenances" does not warrant the existence of appurtenant easements essential to use and enjoyment of the property, and so does not render the grantor liable when a nonwritten sewage easement over adjoining property is extinguished. Potter v. Hill, 43 N.J. Super. 361, 128 A.2d 705 (1957). See Ouellette v. Bolduc, 440 A.2d 1042 (Me. 1982) (title marketable despite lack of appurtenant sewage easement). It is also uncertain whether loss of an easement fulfills the requirement of an eviction under a paramount title necessary to maintain an action for breach of a covenant of warranty. Potter v. Hill, supra. Nor is the dominant owner automatically protected by title insurance, for the standard title policy does not indemnify the insured's use of any easement outside of the property lines unless specifically included in the policy as appurtenant to the insured estate. See Curtis, \textit{Title Assurance in Sales of California Residential Realty: A Critique of Title Insurance and Title Covenants With Suggested Reforms}, 7 PAC. L.J. 1, 7 (1976). Extended coverage which includes this risk may be available at additional cost, but the typical dominant owner, unadvised by counsel and unaware of a hidden easement, has no reason to purchase it. See Ring, \textit{Title Insurance for the Owner—Or What You See Is Not Necessarily What You Get!}, 52 L.A.B.J. 20, 22-23 (1976).

The servient owner fares only a little better. Generally, nonwritten easements are held to breach a covenant against encumbrances even when unknown to the covenator, e.g., Spruce Hill Homes, Inc. v. Brieant, 288 N.Y. 309, 43 N.E.2d 56 (1942). But there are odd decisions denying recovery, such as one dismissing the servient owner's action against his grantor because the court believed that the dominant owner could not prevail in establishing the claimed easement. See Bullis v. Schmidt, 5 Wis. 2d 457, 93 N.W.2d 476 (1958). Title insurance does not help in this situation either. The standard policy does not protect the insured from losses from the existence of easements that are not shown by the public records. See Offenhartz v. Heinsohn, 30 Misc. 2d 693, 150 N.Y.S.2d 78 (1956); Curtis, supra, at 3; Johnstone, \textit{Title Insurance}, 66 YALE L.J. 492, 496 (1957). And, once again, the servient owner may not be aware of the need for, or the availability of, extended coverage.

\textsuperscript{133} In economic terms, the optimal or most efficient rule is achieved by choosing from among various possible rules the one that leaves someone better off without making anyone worse off. B. ACKERMAN, \textit{ECONOMIC FOUNDATIONS OF PROPERTY LAW}, intro. at xi-xii (1975). Value is measured by willingness to pay, and the most efficient rule is the one that maximizes the total value to all parties involved. R. POSNER, \textit{ECONOMIC ANALYSIS OF LAW} 12 (1986); A. POLINSKY, \textit{AN INTRODUCTION TO LAW AND ECONOMICS} 7-8 (1983). In hidden easement cases, value is maximized by maximizing the sum total of the value to the owners of all affected properties. In determining the total value of two (or many) parcels of land, value should include both objective (market) value and any additional subjective value that the landowner attributes to his land. If the market values Blackacre at $50,000 but its owner is unwilling to sell for less than $60,000, a rule that requires a sale at $50,000 fails to maximize value, since the owner will be better off under a rule that allows him to keep Blackacre which is worth more than $50,000 to him.
to compensate the servient owner for the resulting loss. The relief should be conditional, however, so that the dominant owner is free to acquire an alternative easement if less costly. A court might, for example, enter an injunction against continued use of the easement, to be vacated upon payment of damages fixed by the court. Damages traditionally are measured objectively by determining the loss of land value resulting from the easement, but subjective elements may be considered to avoid undercompensation in special circumstances discussed below. The burden of proof should rest on the servient owner to establish both the fact and amount of all losses.

The advantage of the proposal is that it minimizes the extent of unavoidable loss in a situation where neither party realistically could have avoided the loss. In the typical case, both parties are unaware of the hidden easement and neither has any reason to suspect it exists. The current approach is uneven, resulting in needless loss. In some cases courts protect the servient owner because he is a bona fide purchaser, without regard to the economic consequences. On occasion the easement is extinguished when it causes the servient owner no harm, but a replacement may be quite costly to the dominant owner. In other cases courts protect the dominant owner

134. The proposal follows the analytical framework of Calabresi and Melamed in Property Rules, Liability Rules and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972). Calabresi and Melamed describe rights as “entitlements” to be allocated by society and recognize that such rights can be protected by an injunction (“property rule”), by damages (“liability rule”), or by a partial or total prohibition or transfer (“rules of inalienability”). They offer an economic model for allocating the entitlement and for determining when it should be protected by a liability rule, a property rule, or a rule of inalienability. In particular, they suggest economic efficiency is a prime reason for preferring damages (a liability rule) to an injunction (a property rule): “[A] very common reason, perhaps the most common one, for employing a liability rule rather than a property rule to protect an entitlement is that market valuation of the entitlement is deemed inefficient, that is, it is either unavailable or too expensive compared to a collective valuation.” Id. at 1110.


137. Placing the burden of proving damages on the servient owner follows the usual rule that the injured party must prove the fact and amount of damage with reasonable certainty. See Dobbs, supra note 122, § 3.3, at 150-57; C. McCormick, supra note 136, § 26. It is also appropriate since the servient owner is most familiar with the evidence (particularly as to subjective value) and is the party who most wants a change. A factor in allocating the burden of proof may be a court’s intuitive assessment of probabilities, with the burden placed on the party who would benefit most by a departure from the supposed “norm” as observed in litigated cases. See Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5, 11-14 (1957). The probabilities in hidden easement cases are that the easement causes the servient owner no harm. If most servient owners are not harmed, then one claiming harm should be required to prove it.

138. E.g., Mitchell v. Houstle, 217 Md. 259, 142 A.2d 556 (1958), discussed supra text accompanying notes 89 to 93; Renner v. Johnson, 2 Ohio St. 2d 195, 207 N.E.2d 751 (1965). In Renner the Ohio Supreme Court held extinguished an implied pipeline easement that apparently did not harm the servient owner, yet replacement appeared to be costly to the dominant owner(s). A landowner in a subdivision found his yard flooded, and then discovered under his land sewer and water lines serving his neighbor. The lines were laid by the original common owner and sub-
without regard to the economic consequences. On occasion an easement is awarded to a dominant owner who could obtain a replacement at a modest cost, even though preserving the existing easement appears quite costly to the servient owner. The net result is that the total loss to all concerned is greater than necessary.

The proposed rule is more efficient than either of the present rules because it minimizes unavoidable loss and maximizes the combined value of the servient and dominant estates when a hidden easement is discovered. Starting with the presumption that no easement exists, it follows that the creation of one will alter the value to both parties. The increase in value of the dominant estate with an easement is not necessarily equal to the decrease in value of the servient estate burdened with one. There are three possible situations and in each the proposed rule maximizes value. Situation one is that there is a greater increase in value to the dominant estate than the decrease in value of the servient estate. Situation two is that the dominant estate increases in value by an amount equal to the decrease in value of the servient estate.

divider of the area some forty-five years previously. Id. at 406-07, 207 N.E.2d at 752. The court held that an implied easement arose, but that the servient owner took free of it since "such an equitable right should not be enforceable against a bona fide purchaser for value without notice of such easement." Id. at 407, 207 N.E.2d at 753.

The court's opinion is silent on the issue of loss or damage to either party, but one may make a few observations. If the lines served only the dominant estate, that owner should be liable for both repairs and damages from the flooding. See 2 A.L.P., supra note 5, §§ 8.66, 8.70; RESTATEMENT OF PROPERTY, supra note 5, § 485, comment b. If the sewer and water lines serve both dominant and servient estates, both owners should be responsible for repairs and should share the flood damage. 3 R. POWELL, supra note 1, § 417. It is unlikely that the existence of long-unknown and long-buried utility lines either interfered with the use of the servient estate or substantially diminished its value. On the contrary, such interconnections are probably beneficial because they facilitate residential development and use of land. This suggests that the servient owner, the bona fide purchaser, suffered no harm or damage from the existence of the easement. On the other hand, the dominant owner or owners (if others in the subdivision are connected to the same sewer and water lines) are put to an expense of uncertain amount in constructing new water and sewer connections. In some instances this might require purchasing new easement rights if an owner's property does not front on a street containing a public sewer or water main.

139. E.g., Wiesler v. Smira, 49 R.I. 246, 142 A. 148 (1928), discussed supra note 85.

140. The cases rarely provide full factual information on the cost or feasibility of an alternative easement, or on the diminution in value to the servient owner. In some decisions we are told, or can infer, that an alternative easement is obtainable by the dominant owner at a minimum sum. See Ricci v. Naples, 108 Conn. 19, 25, 142 A. 452, 454 (1928); Campbell v. Great Miami Aerie, 15 Ohio St. 3d 79, 82, 472 N.E.2d 711, 714 (1984); Wiesler v. Smira, 49 R.I. 246, 250, 142 A. 148, 150-51 (1928); Bulls v. Schmidt, 5 Wis. 2d 457, 462-63, 93 N.W.2d 476, 480 (1958).

But in other decisions the facts suggest a high cost of an alternative easement. See Otero v. Pacheco, 94 N.M. 524, 525, 612 P.2d 1335, 1336 (Ct. App. 1980) (dominant owner has no direct access to a public water main or sewer), discussed supra note 73. Likewise, the decisions rarely indicate the decrease in value to the servient estate from the existing easement. This may be high where the servient estate is being commercially developed or held for residential subdivision, see Riddock v. City of Helena, 687 P.2d 1386 (Mont. 1984), discussed supra text accompanying notes 104 to 108, but low where it is already subdivided and used for residential purposes, see Renner v. Johnson, 2 Ohio St. 2d 195, 207 N.E.2d 751 (1965), discussed supra note 138.
Situation three is that the dominant estate increases in value less than the
decrease in value of the servient estate. But whichever possibility occurs,
under the proposed rule the dominant owner always has available an eas-
ement that can be purchased for its value to the servient owner, the dimin-
ished value of the servient estate. As a result, the combined value of both estates
is maximized. A chart set out in a footnote illustrates these possibilities and
the conclusions reached.\footnote{141}

In the first situation, the purchase will take place because the dominant
owner can get more value than the dollars he has to spend. In the second
situation, the purchase will take place only where the dominant owner cannot
acquire a cheaper alternative easement. In the third situation, the purchase
of the existing easement will not take place because the dominant owner will not
get as much value as the dollars he has to spend. In all three situations, the
dominant owner is encouraged to search for an alternative easement that
costs less than the diminished value of the servient estate, because then he can
realize his increase in value for less than the cost of the "existing" easement.
When the alternative easement is cheaper, its acquisition maximizes the com-
bined value of both estates, for then the servient estate is valued at its max-

\footnote{141} The following hypothetical shows the possibilities if a hidden easement is enforced and shows
how the proposed rule maximizes value in each situation.

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<th>Value Without Easement</th>
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<td><strong>Dominant Estate</strong></td>
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<td><strong>Dominant Estate</strong></td>
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<tr>
<td>1. $300</td>
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<td>2. $300</td>
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<td>3. $300</td>
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The purchase price of the "existing" easement is $500 (diminished value of ser-
vient estate). If the dominant owner pays, he increases his value by $700, so he is
willing to buy. If he can acquire a cheaper alternative he will do so. At a
minimum, the combined value is increased from $1,300 (without easement) to
$1,500 (with easement).

The purchase price of the "existing" easement is $700 (diminished value of ser-
vient estate). The dominant owner may or may not pay this, depending on whether
he wants the easement. Combined value is the same if he does or does not make
the purchase. The only way value goes up is if the dominant owner can find a
cheaper alternative, and he should therefore be encouraged to search for one.

The purchase price of the "existing" easement is $900 (diminished value of ser-
vient estate), which the dominant owner will not pay because it only increases his
value by $700. He is encouraged to search for a cheaper alternative. If he finds one
he will purchase it, because he gets more value ($700) than the dollars he spends.
Combined value is maximized because dominant estate value at its maximum
($1,000) and servient estate valued at its maximum ($1,000).
imum (without an easement) and the dominant estate is also valued at its maximum (with an easement).

Limiting the remedy to damages furthers the goal of efficient resource allocation by eliminating transaction costs that exist when a right is protected by an injunction.142 This is because the party awarded an injunction may use it to "extort" a recovery in excess of his actual loss, or because strategic behavior between the parties may result in a failure to transfer the easement when that would be efficient.143 Extortion occurs when the servient owner is granted an injunction and uses it to insist on a price for the easement that is the greater of his loss resulting from the decrease in value of the servient estate or the dominant owner's cost of acquiring an alternative easement. The damage remedy limits the servient owner to his actual loss and sets the price of the easement at the lower of that loss or the dominant owner's replacement cost, effectively allowing the dominant owner to purchase the needed easement without paying a premium for the injunction. The damage remedy also eliminates the possibility that the dominant and servient owners negotiating for a sale of the injunction never reach agreement because each is more concerned with being a tough negotiator than with his own self-interest (strategic behavior). This can lead to a situation where the dominant owner acquires an alternative easement at a higher, inefficient price.144

142. According to the now famous Coase Theorem, where the costs of reallocating a resource from one party to another (transaction costs) are zero, the efficient outcome will result regardless of the initial allocation. But, where positive transaction costs exist, the most efficient rule is the one that minimizes transaction costs. Coase, The Problem of Social Cost, 3 J. L. & Econ. 1, 2-8, 15-16 (1960).

Traditional economic analysis holds that the damage remedy is preferable where transaction costs are high. R. Posner, supra note 133, at 51. But see Polinsky, Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies, 32 Stan. L. Rev. 1075, 1077-80 (1983) (neither remedy may be preferable in nuisance cases if courts lack complete information as to each party's damages or where income redistribution is an objective.)

143. The extortion problem is considered in Keeton & Morris, Notes on Balancing the Equities, 18 Tex. L. Rev. 412 (1940), and it is discussed in economic terms in various recent writings, e.g., Polinsky, Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies, 32 Stan. L. Rev. 1075, 1077-80 (1983); Demsetz, Wealth Distribution and the Ownership of Rights, 1 J. Leg. Stud. 223, 230-32 (1972); Note, Injunction Negotiations: An Economic, Moral and Legal Analysis, 27 Stan. L. Rev. 1563 (1975).

Strategic behavior occurs when two parties bargaining with each other are stubborn and do not reach an agreement, even though an agreement is possible and could leave both in a better position. This may result in enforcement of an injunction when that is an inefficient result. See Polinsky, supra, at 1078. (Professor Polinsky also discusses these problems in An Introduction to Law and Economics, supra note 133, at 18-20). This problem is alternatively described by Judge Posner as one of a "bilateral monopoly," which may impose high transaction costs that can be avoided by use of the damage remedy. R. Posner, supra note 133, at 54-55.

144. The results of extortion and strategic behavior can be illustrated as follows. Assume that the decrease in value of the servient estate (however measured) because of the easement is $1,000, and that it would cost the dominant owner $2,000 to construct or acquire a new easement. Presumably the servient owner ordinarily will sell the easement for something more than
The advantage of damages in eliminating extortion and strategic behavior requires full compensation to the servient owner, for otherwise overcompensation (extorted price) is replaced by undercompensation. The potential for undercompensation exists if damages are measured objectively by using market value, but the servient owner legitimately places a higher, subjective value on the easement. For example, if the value of the easement to the servient owner is $2,000, but the market values it at $1,000, objective damages undercompensate and efficiency is not achieved because the resource is not allocated to the party who values it most.

One way to avoid the undercompensation problem is to allow damages to include subjective losses in an appropriate case. Increasingly, damages for injuries to real property are measured subjectively when necessary to fully compensate an owner holding the land for personal use rather than as an investment. To the extent necessary to achieve full compensation, subjective damages may also be allowed when a hidden easement is preserved. For example, a servient owner holding the property for investment or as a rental property would be fully compensated by the objective loss measured by decline in market value because of the easement. Diminished value plus damages equals pre-easement value, and upon sale the servient owner is made whole. However, the same is not true for a servient owner holding the property for personal use. The servient owner living on the property may have a sympathetic claim to recover for subjective losses if the existence of the easement affects the land’s value to him beyond the loss of market value. Judicial judgment is involved in the decision to allow subjective damages, and in what amount, but these are judgments that can be made. In the close case where

its value of $1,000. But, armed with an injunction, he is in a position to hold out for a price just under $2,000, which the dominant owner presumably will agree to because it is cheaper than a new easement. If the damage remedy is the only remedy available, the servient owner will sell the easement for its value of $1,000, which is all he would get if successful in a lawsuit, and the dominant owner will buy it for that price because it is less than the $2,000 cost of a new easement. Were the facts changed so that the servient estate’s decrease in value is $1,000 but the cost of a new easement is $500, the dominant owner will not purchase the existing easement but instead will acquire a new one because it is cheaper. The resource, an easement, is acquired at the lowest, not the highest, cost. Strategic behavior can prevent transfer of the easement where the servient owner (with a $1,000 loss of value) holds out for a $1,700 settlement, while the dominant owner (with a $1,000 replacement cost) refused to pay more than $1,400. The result is that the replacement easement is acquired for $2,000 when the existing one could have been acquired for less.

146. Id.
147. The most efficient assignment of a right (here an easement) is said to be achieved by awarding it to the party who would pay the most for it (values it the most) if it were initially assigned to another. R. Posner, supra note 133, at 45.
148. See D. Dobbs, supra note 122, at 143-44, 147-48, 316-17.
149. Id.
the claim of subjective loss is questionable or the owner's continued use doubtful, a judge can weigh the risk of overcompensation (subjective damages allowed) and the comparable risk of undercompensation (no subjective damages). This is preferable to the current rule awarding an injunction, which allows the servient owner to use the injunction not only to bargain for subjective damages but also to extort a settlement price above what is necessary to compensate.

There are indications that subjective damages may be a significant factor in hidden easement litigation. If so, a rule that allows for such losses may eliminate the transaction cost of litigation currently necessary to acquire or avoid an easement. Under existing rules, the prospect of an injunction that can be traded for a monetary settlement probably encourages litigation. Much of the hidden easement litigation arises when the servient owner blocks an easement or sues to enjoin its use despite the apparent absence of objective loss (decreased market value resulting from the easement). Often one cannot know whether the decision to sue results from: (1) ill-will; (2) a desire to recover for the cost of repairs or harm from flooding; (3) objective loss that is unmentioned in the cases; or (4) a subjective perception of loss without any objective loss. Eliminating the injunction remedy should eliminate the incentive to litigate for the first reason, ill-will, since the spit value and settlement value of an injunction is removed. Focusing on damages should also reveal or eliminate the second and third reasons, loss from failure to repair or maintain the easement and objective loss of land value, both of which are usually overlooked by courts under current rules. If damages are

150. Use of either the objective or the subjective measure of damages involves risks. Once both are recognized, the chances for error can be evaluated. The decision to award only objective damages (diminished market value) risks undercompensating the servient owner holding his property for use. The decision to award subjective damages risks overcompensating the servient owner who declares that he intends to hold his property for use, but then turns around and sells it.

Allowing subjective damages also involves the added cost of judicial resources (time) necessary to hear additional evidence and decide which measure is needed to achieve full compensation. This expenditure has been justified on economic grounds, on the theory that it builds up a body of precedent that removes uncertainty, encourages settlement, and reduces future litigation. See R. Posner, supra note 133, at 509-12, 515.

151. In some cases the servient owner claims damages from flooding caused by a broken pipe and/or the cost of repair. E.g., Otero v. Pacheco, 94 N.M. 524, 612 P.2d 1335 (Ct. App. 1980), discussed supra note 73; Miller v. Skaggs, 79 W. Va. 645, 91 S.E. 536 (1917). But most often the issue discussed is whether the hidden easement was created, or is extinguished by a sale to a bona fide purchaser. Damages should have been claimed in many of the cases where the harm is not from the existence of the easement but instead from flooding or the need to make repairs. E.g., Van Sandt v. Royster, 148 Kan. 495, 83 P.2d 698 (1938), discussed supra text beginning at note 65. It is possible that a damage claim is made more often but overlooked when a court determines only that an easement survives. Such was the case in Otero, where the servient owner brought an action for damages after a sewer serving the dominant estate backed up and flooded the basement of his house. The dominant owner defended by claiming an implied easement to maintain the sewer. The court found such an easement existed and dismissed the action. An economic explanation for this part of the decision is discussed supra note 73. But once it was decided that the easement existed, the servient owner should have been awarded damages if the easement was misused or not kept in repair. However, the court never reached this issue.
also allowed for the fourth reason, subjective losses, this will be a source of litigation only when the servient owner values the easement above its market value and the parties cannot agree on the amount of that excess value.

The courts in many, but not all, hidden easement cases seem to recognize the economic consequences of a decision extinguishing or preserving a previously unknown easement. In many, but not all, such cases the courts achieve an economically efficient result. To date this has been implicit, yet the decisions fail to provide a clear rule governing when a nonwritten, nonobservable easement survives the sale of the servient estate. This article proposes such a rule, one that recognizes the economic problem and one that should lead to more efficient results in hidden easement cases.

Conclusion

Decisions involving nonwritten, nonobservable easements seem to be inconsistent, the courts sometimes applying the recording acts to protect a bona fide purchaser of the servient estate from the easement and sometimes not. One might postulate that all hidden easement cases can be reconciled on economic grounds, the courts protecting the bona fide purchaser except where extinguishment of the easement would work a greater hardship on the dominant owner. However, the cases do not fully bear this out. The suggested economic test does explain the results in most cases involving underground pipeline easements and some involving easements to maintain structural encroachments of a minor nature. However, the test does not hold up in cases of neglected and inchoate roadway easements, where the courts seem unwilling to abandon their traditional protection of the bona fide purchaser.

An explicit recognition of the economic test applied in practice is suggested, along with a modification to achieve more evenhanded and consistent results. Such cases might well be decided by applying a rule that a nonwritten easement survives upon the sale of the servient estate to a bona fide purchaser, provided the dominant owner pays damages measured by the decrease in value of the servient estate because of the easement.