

former. The owner cannot commit a trespass on the servient tenement beyond the limits fixed by the grant or use."⁹

Similarly, the owner of a profit a prendre has the right to enter and use the surface to the extent that it is necessary for the use of the profit, but that is the limit of the right of entry onto the surface.¹⁰

Injury to the servient tenement. The owner of the easement is liable for any damages suffered by the owner of the servient tenement by any wrongful or unreasonable acts on the servient tenement.¹¹

The owner of the easement was held liable for damages resulting from the unnecessary cutting of trees on the servient tenement.¹²

If the public owns the easement, it may be liable in inverse condemnation for the injuries caused to the servient tenement.¹³

Use by persons with a future estate in the dominant tenement. Although a dominant tenement may be occupied by another, the owner of a future estate in the dominant tenement may, for certain purposes, such as inspecting for waste, demanding rent, or removing obstructions, use existing easements appurtenant to the dominant tenement.¹⁴

§ 15:67 Maintenance and repair

The owner of the servient tenement has no duty to maintain. The owner of the servient tenement has no obligation to maintain or

⁹*Wright v. Austin* (1904) 143 Cal. 236, 239 [76 P. 1023].

To the same effect, see *North Fork Water Co. v. Edwards* (1898) 121 Cal. 662, 665, 666 [54 P. 69]; *Oliver v. Agasse* (1901) 132 Cal. 297, 299 [64 P. 401]; *City of Los Angeles v. Howard* (1966) 244 Cal.App.2d 538, 543 [53 Cal.Rptr. 274]; *Haley v. Los Angeles County Flood Control Dist.* (1959) 172 Cal.App.2d 285, 290 [342 P.2d 476]; *Smith v. Rock Creek Water Corp.* (1949) 93 Cal.App.2d 49, 53 [208 P.2d 705]; *Felsenthal v. Warring* (1919) 40 Cal.App. 119, 127, 128 [180 P. 67].

¹⁰*North Fork Water Co. v. Edwards* (1898) 121 Cal. 662, 665, 666 [54 P. 69]; *Fletcher v. Stapleton* (1932) 123 Cal. App. 133, 137 [10 P.2d 1019].

See § 15:1 (profits distinguished), § 15:67 (maintenance and repair).

¹¹*Locklin v. City of Lafayette* (1994) 7

Cal.4th 327, 356 [27 Cal.Rptr.2d 613, 867 P.2d 724]; *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 867 [274 Cal.Rptr. 678, 799 P.2d 758]; *Marin v. City of San Rafael* (1980) 111 Cal.App.3d 591 [168 Cal.Rptr. 750]; *Baker v. Pierce* (1950) 100 Cal.App.2d 224, 226 [223 P.2d 286].

¹²*Baker v. Pierce* (1950) 100 Cal. App.2d 224, 226 [223 P.2d 286].

See Extent and reasonableness of use of private way in exercise of easement granted in general terms, 3 A.L.R. 3d 1256.

¹³*Marin v. City of San Rafael* (1980) 111 Cal.App.3d 591 [168 Cal.Rptr. 750] (overflow of drainage pipe within an easement on servient tenement).

See §§ 30:5-30:10 (inverse condemnation; invasion or interference with property rights).

¹⁴Civ. Code, § 808.

repair the easement¹ unless the parties enter into an agreement that alters their legal responsibilities and imposes an obligation of maintenance on the servient tenement owner.²

The easement owner has a duty to maintain. The owner of an easement not only has the *right* to maintain and repair the easement,³ he or she also has the *duty* to keep the easement in a safe condition to prevent injury to third persons and to the servient tenement.⁴

The owner of a right-of-way easement has the duty to maintain and repair the easement. Unless there is an express provision to the contrary, an agreement to maintain a right-of-way easement includes the duty to remove snow if it is necessary to provide access to the properties serviced by the easement and is approved in advance by

¹*Herzog v. Grosso* (1953) 41 Cal.2d 219, 228 [259 P.2d 429]; *Whalen v. Ruiz* (1953) 40 Cal.2d 294, 299, 300 [253 P.2d 457]; *Renden v. Geneva Development Corp.* (1967) 253 Cal.App.2d 578, 588 [61 Cal.Rptr. 463]; *Reinsch v. City of Los Angeles* (1966) 243 Cal.App.2d 737, 747, 748 [52 Cal.Rptr. 613]; *Conklin v. Goodson* (1954) 125 Cal.App.2d 823, 825 [271 P.2d 147]; *Greiner v. Kirkpatrick* (1952) 109 Cal.App.2d 798, 803 [241 P.2d 564].

See Right of servient owner to maintain, improve, or repair easement of way at expense of dominant owner, 20 A.L.R. 3d 1026; Rights and duties of owners inter se with respect to upkeep and repair of water easement, 169 A.L.R. 1147.

²Civ. Code, § 845; *Whalen v. Ruiz* (1953) 40 Cal.2d 294, 300, 301 [253 P.2d 457]; *McManus v. Sequoyah Land Associates* (1966) 240 Cal.App.2d 348, 356, 357 [49 Cal.Rptr. 592, 20 A.L.R.3d 1015]; *Rose v. Peters* (1943) 59 Cal.App.2d 833, 835 [139 P.2d 983].

But see *Conner v. Lowery* (1928) 94 Cal.App. 323, 326 [271 P. 118].

³*Joseph v. Ager* (1895) 108 Cal. 517, 520 [41 P. 422]; *Burris v. People's Ditch Co.* (1894) 104 Cal. 248, 252 [37 P. 922].

See Witkin, 4 Summary of California L., Real Property § 460 (9th ed.).

Also see Right of servient owner to maintain, improve, or repair easement

of way at expense of dominant owner, 20 A.L.R. 3d 1026; Rights and duties of owners inter se with respect to upkeep and repair of water easement, 169 A.L.R. 1147; Right of owner of easement of way to make improvements or repairs thereon, 112 A.L.R. 1303; Mechanic's lien for labor or material for improvement of easement, 77 A.L.R. 817.

⁴Civ. Code, § 845: "The owner of any easement in the nature of a private right of way, or of any land to which any such easement is attached, shall maintain it in repair . . ."; *Dunn v. Pacific Gas & Elec. Co.* (1954) 43 Cal.2d 265, 275, 276 [272 P.2d 745]; *Abbott v. Pond* (1904) 142 Cal. 393, 397 [76 P. 60]; *Colvin v. Southern Cal. Edison Co.* (1987) 194 Cal.App.3d 1306, 1312 [240 Cal.Rptr. 142]; *Reinsch v. City of Los Angeles* (1966) 243 Cal.App.2d 737, 747 [52 Cal. Rptr. 613]; *McManus v. Sequoyah Land Associates* (1966) 240 Cal.App.2d 348, 356, 357 [49 Cal.Rptr. 592, 20 A.L.R.3d 1015]; *Conklin v. Goodson* (1954) 125 Cal.App.2d 823, 825 [271 P.2d 147]; *Lozano v. Pacific Gas & Elec. Co.* (1945) 70 Cal.App.2d 415, 422 [161 P.2d 74]; *Rose v. Peters* (1943) 59 Cal.App.2d 833, 835 [139 P.2d 983].

See § 15:68 (duty to third parties), § 22:48 (liability to persons injured off the premises).

the property owners as provided for in the agreement for repairs of the easement.⁵

Duty of a utility to maintain an easement on private property. A public utility with an easement on private property has the duty to maintain the easement according to the requirements of the city or county with jurisdiction. Merely because the utility is subject to the jurisdiction of the Public Utilities Commission does not exempt it from compliance with the local building and safety requirements that are binding on both private and public entities.⁶ Either the public agency or the servient tenement owner may enforce compliance by the utility.

Maintenance of public easements. The duty to maintain an easement also extends to the city or other public agency on a public easement that has been accepted as a public street or has been constructed on public property.⁸

Duty to maintain a sidewalk. The owner of property adjacent to a public street is obligated to maintain the sidewalk in front of his or her property,⁹ but he or she is only liable to persons injured by defective conditions in the sidewalk in limited circumstances.¹⁰

The easement owner has an implied right of entry. In exercising the right to maintain the easement, the owner of the easement has an implied right of entry on the servient tenement to the extent that it is necessary to perform acts of repair,¹¹ and the owner of the servient tenement cannot obstruct or hinder, or install obstructions

⁵Civ. Code, § 845.

⁶*Leslie v. Superior Court* (1999) 73 Cal.App.4th 1042, 1047 [87 Cal.Rptr.2d 313].

⁷*Leslie v. Superior Court* (1999) 73 Cal.App.4th 1042, 1048-1049 [87 Cal.Rptr.2d 313].

⁸See § 26:32 (public roads; in general; duty to maintain).

⁹Sts. & Hy. Code, § 5610.

The local public agency can construct sidewalks, gutters, pavement, driveways, curbs, storm and sanitary drainage facilities, water mains, pipes, conduits, tunnels, hydrants, parkway trees, and street lighting facilities in front of certain properties and levy an assessment against the adjacent properties to pay the cost thereof. However, it cannot assess the properties for such

improvements where the improvements are adjacent to an arterial or collector street, which are streets of more than one traffic lane or where more than 70 percent of the traffic does not originate in the assessment district, except for the construction of sidewalks, curbs, gutters, and a parking lane. This assessment also does not apply to the repair, resurfacing, or maintenance of streets. Sts. & Hy. Code, § 5871.

¹⁰See § 22:48 (liability to persons injured off of the premises).

¹¹*Durfee v. Garvey* (1889) 78 Cal. 546, 551 [21 P. 302]; *Ware v. Walker* (1886) 70 Cal. 591, 595 [12 P. 475]; *City of Gilroy v. Kell* (1924) 67 Cal.App. 734, 743 [228 P. 400].

Also see § 15:64 (servient tenement owners), § 15:60 (easement owners).

that hinder, the easement owner's right of access for the purpose of maintaining the easement.¹²

Easement owner can improve the easement. The owner of the easement can improve the easement or construct improvements on the easement, such as grading, paving, installing guardrails, and so on,¹³ which are reasonably required to make the use of the easement safe and convenient.¹⁴ However, in doing so he or she may not increase the burden on, or unreasonably interfere with, the use of the servient tenement by the owner of the underlying fee.¹⁵

◆ **Case Example:** A person had used an open earth ditch to transport water from the Stanislaus River to a reservoir since 1866. There was a water loss from seepage, and to correct this condition the user proposed to line the ditch with gunite, an impervious material that would preclude seepage. The owner of the servient tenement brought an action to enjoin the lining of the ditch, and the court granted the injunction.

The court held that the seepage supported vegetation on the servient tenement, which was a benefit to the servient tenement. Although there can be no prescriptive rights to seepage,¹⁶ and thus the owner of the easement could abandon the easement, but as long as the easement was used he could not do so in such a way that would increase the burden on the servient tenement. The seepage was a benefit to the servient tenement, and the removal of a benefit is a detriment. Therefore, in exercising the rights to maintain and repair the easement, the owner of the easement could not change its nature or scope if it would produce a detriment to the servient tenement owner. By lining the earthen ditch with gunite under the guise of repair and maintenance, the owner was precluding the seepage and thereby changing the nature and scope of the easement to the detriment of the servient owner.¹⁷

Maintenance duty apportioned for a nonexclusive easement. When the easement is nonexclusive and used by more than one person, each has a duty to repair and maintain the easement.¹⁸ Unless there is an express provision to the contrary, an agreement to maintain a right-of-way easement includes the duty to remove snow

¹²*City of Los Angeles v. Jameson* (1958) 165 Cal.App.2d 351, 357 [331 P.2d 1014].

¹³See § 15:59 (use of roadway or other surface easement).

¹⁴See § 15:68 (duty to third parties).

¹⁵*Noel v. Capobianco* (1933) 218 Cal. 481, 483 [23 P.2d 511]; *Wright v. Austin* (1904) 143 Cal. 236, 239 [76 P. 1023]; *Krieger v. Pacific Gas & Electric Co.* (1981) 119 Cal.App.3d 137, 145-147 [173

Cal.Rptr. 751]; *People v. Olsen* (1930) 109 Cal.App. 523, 532 [293 P. 645].

¹⁶See § 15:17 (visible, open, and notorious).

¹⁷*Krieger v. Pacific Gas & Electric Co.* (1981) 119 Cal.App.3d 137, 145-147 [173 Cal.Rptr. 751].

See § 15:55 (increased or changed use).

¹⁸*Healy v. Onstott* (1987) 192 Cal. App.3d 612, 617 [237 Cal.Rptr. 540];

if it is necessary to provide access to the properties serviced by the easement and is approved in advance by the property owners as provided for in the agreement for repairs of the easement.¹⁹

However, each owner must perform his or her maintenance and improvement activities in such a manner that they do not unreasonably interfere with the use of the easement by others.²⁰ The cost of maintaining and repairing the easement must be shared by the owners who use the right of way either pursuant to an agreement between them²¹ or, if there is no agreement, in proportion to the use of the easement by each.²²

Contribution among owners. When there is an agreement between the owners, and one party refuses to perform after written demand to pay his or her share, the other owner or owners may bring an action against the defaulting owner for specific performance or contribution, either jointly or severally.²³

Apportionment by arbitration. When there is no agreement between co-owners of an easement allocating the costs of repair, a nonconsenting owner cannot be compelled to pay his or her share until an arbitrator has been appointed and the proportionate shares determined.²⁴

Any owner of the easement, or any owner of the servient tenement, can bring an action for the appointment of an arbitrator to apportion the costs of repair either before or after the work is performed. If the arbitrator's award is not accepted by all of the owners, the court may enter a judgment determining the proportionate liability of each owner, which judgment can be enforced as any other money judgment.²⁵

When the arbitrator makes an award, any party is entitled to a trial de novo by the court, but or she he is not entitled to a jury.²⁶

Criteria for allocation. The costs are allocated in "proportion to the use made" of the easement, which limits an owner's obligation to repair only that portion of the easement between his or her property and the public right of way. Whether the dominant tenement is improved or unimproved should be considered in determining the proportion to be paid, but the owner of an unimproved lot must

Edgar v. Pensinger (1946) 73 Cal.App.2d 405, 413, 414 [166 P.2d 354].

¹⁹Civ. Code, § 845.

²⁰*Greiner v. Kirkpatrick* (1952) 109 Cal.App.2d 798, 803 [241 P.2d 564].

See § 15:65 (nonexclusive easements).

²¹Civ. Code, § 845, subd. (b).

²²Civ. Code, § 845, subd. (c).

²³Civ. Code, § 845, subd. (b).

²⁴*Whitson v. Goudeseune* (1955) 137 Cal.App.2d 445, 448-454 [290 P.2d 590].

²⁵Civ. Code, § 845, subd. (c).

²⁶*Healy v. Onstott* (1987) 192 Cal. App.3d 612, 615, 616 [237 Cal.Rptr. 540].

make some contribution because he or she benefits from the maintenance of the common easement.²⁷

No obligation to pay costs to improve. The only mutual obligation of the co-owners is to keep the easement in repair, which merely means that it is to be preserved in its original condition; they are not obligated to pay for major improvements.

◆ **Case Example:** A private access easement to a public street was owned and used by 13 property owners. The city re-graded the public street to such an extent that use of the private easement was impossible unless it was also re-graded. Over the objections of four of the property owners, the court permitted nine of the property owners to raise the grade and to reconstruct the private easement at their own expense because the reconstruction did not impose any additional burden or hardship on the other owners of the easement where it crossed their land.²⁸

◆ **Case Example:** A right of way served as access to 12 lots; three lots were improved with homes and nine lots remained unimproved. There was no agreement among the lot owners regarding the maintenance of the easement. The easement traversed a bridge that was destroyed by a severe storm, but some of the lot owners refused to contribute to the cost of replacing the bridge. An action was filed and an arbitrator was appointed. The arbitrator determined the proportionate liability of each of the owners of the 12 lots after consideration of whether the owner's lot was improved, whether an improved lot was used as a full-time home or a part-time vacation residence, and the distance of each lot from the public roadway.

On a petition, the court held that the costs are allocated in proportion to the use made of the easement, which limits an owner's obligation to repair only that portion of the easement between the owner's property and the public right of way.²⁹

◆ **Case Example:** A private road used by several abutting owners was in great need of repair and it was necessary that it be improved substantially before one abutting property owner could obtain a building permit. Several of the owners improved the road by widening it, removing trees, changing the grade, and installing storm drains and an asphalt surface. The court held that the nonconsenting owners were not required to contribute to the cost of these improvements because the costs exceeded their obligation to merely keep the easement in repair.³⁰

²⁷*Healy v. Onstott* (1987) 192 Cal. App.3d 612, 616 [237 Cal.Rptr. 540].

²⁸*Noel v. Capobianco* (1933) 218 Cal. 481, 483 [23 P.2d 511].

²⁹*Healy v. Onstott* (1987) 192 Cal. App.3d 612, 616 [237 Cal.Rptr. 540].

³⁰*Holland v. Braun* (1956) 139 Cal. App.2d 626, 629-633 [294 P.2d 51].

Modification of obligations. Once several owners have acquired an easement, their legal responsibilities for maintenance cannot be altered by an agreement between only part of the easement owners, nor can an agreement impose penalties for the failure to contribute to the cost of maintenance unless all of the owners of the easement consent.³¹

§ 15:68 Duty to third parties

Liability to third persons injured on the easement. An easement owner has an interest in real estate¹ and has the same duty and responsibilities to third persons who enter the premises as has any other property owner.² Because the owner of an easement has a duty to maintain and repair the easement,³ he or she also must keep it free from any dangerous condition that might injure third persons who rightfully come on the easement. With the possible exception of those engaged in wrongful or criminal conduct,⁴ if anyone is injured on the easement because of a dangerous condition, the owner of the easement is liable for the resulting damages.⁵ Because of this responsibility, the easement owner has the right to prevent others from creating a dangerous condition on the easement.⁶

◆ **Case Example:** As part of a project to widen a highway, the county planned to place 12 feet of fill on a subsurface gas line. Because of the increased pressure that would be placed on the pipe, the owner of the pipe relocated the gas line and brought an action against the county for the costs of relocation. The court held that because of the increased dangers and probability of leaks resulting from the added stress of the fill, the pipe had to be relocated to prevent possible injury to third persons, and the county had to pay the cost of relocation. "In the operation and maintenance of its gas main and as the owner of the easement, [plaintiff gas company] had the responsibility of exercising a degree of care

See dictum in *McManus v. Sequoyah Land Associates* (1966) 240 Cal. App.2d 348, 356, 357 [49 Cal.Rptr. 592, 20 A.L.R.3d 1015].

³¹*Crease v. Jarrell* (1924) 65 Cal.App. 554, 559 [224 P. 762].

¹See § 15:5 (definition and nature of an easement).

²See § 22:40 (landowner's or occupier's duty to third persons).

³See § 15:67 (maintenance and repair).

⁴See § 22:50 (liability of landowner for wrongful or criminal conduct of third persons).

⁵See § 22:40 (landowner's or occupier's duty to third person).

⁶*Pacific Gas & Elec. Co. v. San Mateo County* (1965) 233 Cal.App.2d 268, 273 [43 Cal.Rptr. 450]; *City of Los Angeles v. Jameson* (1958) 165 Cal.App.2d 351, 357 [331 P.2d 1014].

commensurate with the dangers reasonably to be apprehended from possible leaks in its main."⁷

§ 15:69 Private easement in a public street (abutter's rights)

Nonabutting owner has no special rights in public street.

An owner of property that does not abut on a public street or road has the same right of use as any member of the public in general, but he or she has no other rights in the public street.¹

An abutting owner has special rights in public streets. An owner of property that abuts a public street has two kinds of rights in the public thoroughfare. The owner has the same rights as the public in general for unobstructed passage over the public street and also has certain private rights as an owner of abutting property, including a right-of-way easement for access to the general system of public streets.² The general rule is that an abutting owner or occupant is not entitled access to his or her land at every point between it and the highway but only to reasonable and convenient access to his or her property and the improvements on it.³ He or she is only entitled to one such access.⁴

The two rights are distinct, and the abutting property owner's private easement in the public street remains after the street is vacated or abandoned.⁵

The owner is only entitled to cross the property boundary. The easement of an owner of property abutting a public street

¹*Pacific Gas & Elec. Co. v. San Mateo County* (1965) 233 Cal.App.2d 268, 273 [43 Cal.Rptr. 450].

²See § 15:83 (abandonment of public easements).

³*Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 663 [39 Cal.Rptr. 903, 394 P.2d 719]; *People v. Ricciardi* (1943) 23 Cal.2d 390, 397, 398 [144 P.2d 799]; *Rose v. State* (1942) 19 Cal.2d 713, 727 [123 P.2d 505]; *McCandless v. City of Los Angeles* (1931) 214 Cal. 67, 71 [4 P.2d 139]; *Lane v. San Diego Elec. Ry. Co.* (1929) 208 Cal. 29, 33 [280 P. 109]; *Cushing-Wetmore Co. v. Gray* (1907) 152 Cal. 118, 122, 123 [92 P. 70]; *Eachus v. Los Angeles Consolidated Elec. Ry. Co.* (1894) 103 Cal. 614, 617, 618 [37 P. 750]; *Schaufele v. Doyle* (1890) 86 Cal. 107, 109 [24 P. 834]; *Stevenson v. City of Downey* (1962) 205 Cal.App.2d 585, 590 [23 Cal.Rptr. 127]; *McKinney v. Ruder-*

man (1962) 203 Cal.App.2d 109, 119 [21 Cal.Rptr. 263]; *Strehlow v. Mothorn* (1929) 100 Cal.App. 692, 698, 699 [280 P. 1021].

See Conveyance of land as bounded by road, street, or other way as giving grantee rights in or to such way, 46 A.L.R. 2d 461.

⁴*Delta Rent-A-Car Systems, Inc. v. City of Beverly Hills* (1969) 1 Cal.App.3d 781, 786 [82 Cal.Rptr. 318] (access easement denied); *People ex rel. People By and Through Department of Public Works v. Murray* (1959) 172 Cal.App.2d 219, 225 [342 P.2d 485]; *Genazzi v. Marin County* (1928) 88 Cal.App. 545, 547 [263 P. 825].

⁵*Highland Development Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 169, 185, 186 [215 Cal.Rptr. 881].

⁶See § 15:83 (abandonment of public streets).