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Property Law—To Merge or not to Merge: Determining the Scope of Mortgage; The Mortgage Exception to the Merger Doctrine

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I. INTRODUCTION

At first glance, the concept of easements may seem basic and easy to comprehend. An easement is generally defined as the right...
to use another’s land for a limited purpose that is not inconsistent with the landowner’s interest in that land.\(^1\) However, much litigation occurs over the subtleties that exist in easement law, causing confusion and ultimately making the law concerning easements difficult to apply.\(^2\) Particularly susceptible to confusion are the different ways in which easements can be created and destroyed.\(^3\) This case note examines the current state of the law in Minnesota regarding the termination of easements by merger and the rights maintained or destroyed by those who hold an outstanding interest in the easement by focusing on the recent Minnesota Supreme Court decision *Pergament v. Loring Properties Limited.*\(^4\)

It is well established that easements terminate when the dominant and servient estates come under common ownership and possession.\(^5\) This is commonly known as the merger doctrine.\(^6\) However, when there lies an outstanding possessory interest in the easement,\(^7\) no merger can take place.\(^8\) Of particular concern, is whether a mortgage qualifies as an outstanding possessory interest so as to prevent termination of an easement by merger. In *Pergament*, the supreme court concluded that the mortgage exception to the merger doctrine is intended to protect only those mortgagees and their successors in interest and does not work to prevent ter-

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2. Elliot L. Epstein & Ronald L. Bissonnette, *Easements Ain’t So Easy*, 15 ME. B.J. 52, 52 (2000); see also John W. Weaver, *Easements are Nuisances*, 25 REAL PROP. PROB. & TR. J. 103, 106 (1990). “Because an easement is a privilege to make a use of another’s land, there are problems at the margins of the concept.” *Id.*
3. Epstein & Bissonnette, *supra* note 2, at 52-57 (describing the different ways easements can be created and terminated). Easements may arise through express grant or reservation, and in some cases may be implied by law. *Id.* at 52. Easements may be extinguished by release, misuse, abandonment, expiration, mortgage foreclosure, and upon merger of the dominant and servient estates. *Id.* at 57; see also Weaver, *supra* note 2, at 106 (theorizing that most problems with easements concern the creation and scope of easements).
4. 599 N.W.2d 146 (Minn. 1999).
6. 28A C.J.S. *Easements* § 123 (1996) (defining the merger doctrine generally). “Where ownership in, or title to, the dominant and servient estates becomes united in one person an easement is extinguished by merger.” *Id.*
7. BLACK’S LAW DICTIONARY 527 (7th ed. 1999) (defining easement). “An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose.” *Id.*
8. Hermansen & Richards, *supra* note 5 (stating that in order for an easement to terminate by merger, “the title to the dominant and servient estates must be co-extensive, equal in validity, quality and all other circumstances”).

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mination of an easement as to the owners in fee. 9

This note begins by examining the evolution of easement law and provides a general background for understanding the rights belonging to an easement holder. 10 Next, this note gives a brief introduction to the merger doctrine, the mortgage exception, and how both have been received by Minnesota law. 11 Part III examines the facts of the Pergament case and discusses the analysis of the case as it moved through the courts. Part IV discusses the court’s analysis and reasoning for its decision. Finally, this note concludes that the Supreme court’s decision in the Pergament case is consistent with case law from other states and is supported by the policy to uphold the value of the mortgagee’s security investment.

II. BACKGROUND

A. The Evolution Of Easements

Although servitudes 12 have been recognized at common law since medieval times, 13 easements did not gain importance until the Industrial Revolution when railroads and other industry needed access to, or, use of a particular piece of land. 14 Right-of-ways, water, drainage, sewage, gas and other utilities are just some of the ways in which easements are used today. 15 More recently, easements have been used for conservation purposes, 16 as well as for fi-

9. Pergament, 599 N.W.2d at 151.
10. Infra Parts II, A-E.
11. Infra Parts II, F & G.
12. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.1 cmt. a (1998) (de-
   fining a servitude as a generic term used to describe the legal devices used to create
certain rights and obligations that run with the land at law); see also BLACK’S
   LAW DICTIONARY 1373 (7th ed. 1999) (defining the three different types of servi-
tudes as profits, easements, and licenses).
13. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES, ch. 1, introductory note
   (1998). Roman law recognized a variety of servitudes, including the “right to dig
   and burn lime, pasture cattle, draw and transport water, encroach on a neighbor’s
   airspace, and rights to light, view, and support.” Id. “Easements, both the idea
   and the word were known to the medieval common law, but an easement was only
   one of a variety of incorporeal hereditaments.” Weaver, supra note 2. Easements
   and profit categories emerged in the Nineteenth century. RESTATEMENT (THIRD)
14. Weaver, supra note 2, at 106-07 (illustrating the modern day need for
   easements).
15. Epstein & Bissonnette, supra note 2, at 53 (stating the different purposes
   for which easements are used including utility, telephone and cable lines).
16. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2 cmt. h (1998) (de-
   scribing conservation easements as the most common form of negative easements
   used in modern law); see generally Katherine S. Anderson & Marybeth K. Jones,
ber optic cable and television lines. Due to the prolific changes in technology over the past century, many of the old doctrines concerning easements have become outmoded and have yet to be re-examined in light of modern day needs.

B. Easement Rights In A Modern World

Although the use of easements has increased in the last century, the rights belonging to an easement holder have remained virtually the same. As defined earlier, an easement is a property interest which allows the owner of such interest the limited use and enjoyment of land, which is in the possession of another. Essentially, it is the right to use another's land, known as the servient estate, for a specific purpose and "does not displace the general possession of the land by its owner."

It is important to note that "[a]n easement is not and cannot become a possessory interest." To get a better understanding of just where easement rights are placed on the continuum of property rights, courts often rely on the analogy of property rights as a bundle of sticks. Fee simple title represents the whole bundle,
whereas easement rights represent just a few sticks. Because the owner of a servient estate retains his interest in the land, he may continue to use the portion of his land that is subject to an easement for any purpose, so long as it does not unreasonably interfere with the rights of the easement holder. At the same time, an easement holder’s use of the easement is generally limited to a particular purpose. If the dominant owner’s use of the easement is beyond the scope of its use, it is said to “overburden” the easement and may become actionable as a nuisance.

C. Understanding Easements: Appurtenant vs. In Gross

Easement rights are either attached to the land, in which case they are considered appurtenant, or are attached to a particular person, in which case they are considered in gross. In the case of an appurtenant easement, the land which is benefited is referred to as the dominant estate while the land that is burdened is referred to as the servient estate.

24. Pearson, supra note 17, at 1773-74 (illustrating how fee simple represents all of the sticks while an easement represents just a few sticks of the bundle); see also Consolidated Sch. Dist. No. 102 of Washington County v. Walter, 243 Minn. 159, 161, 66 N.W.2d 881, 883 (1954) (stating that when an easement is given by a grantor under a conveyance, no estate passes but only a right of use); Romans v. Nadler, 217 Minn. 174, 181, 14 N.W.2d 482, 486 (1944) (holding that an easement does not carry with it title to or right of possession of the land itself).

25. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2 (1998) (restating the rule that the possessor of the servient estate may not do anything to interfere with the uses authorized by the easement); see also Wilson v. Palmer, 229 A.D.2d 647, 644 N.Y.S.2d 872, 872 (3d Dep’t 1996) (holding that placing a speed bump on a right of way was not unreasonable).

26. RESTATEMENT (THIRD) OF PROPERTY, SERVITUDES, § 1.2 cmt. d (1998) (stating that the holder of an easement may make any use reasonably necessary for a specified purpose); see also Minneapolis Athletic Club v. Cohler, 287 Minn. 254, 258, 177 N.W.2d 786, 789 (1970) (stating that every easement gives privilege to the owner thereof to make particular uses of the servient tenement and the sum total of those particular uses make up the extent of the easement).

27. Epstein & Bissonnette, supra note 2, at 54.

28. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.5 (1998). “‘Appurtenant’ means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land.” Id.

29. Id. “‘In gross’ means that the benefit or burden of a servitude is not tied to ownership or occupancy of a particular unit or parcel of land.” Id.

30. RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES § 453 (1944) (stating that an easement is “appurtenant to land when the easement is created to benefit and does benefit the possessor of land in his use of the land.”).

31. Burnquist v. Cook, 220 Minn. 48, 56, 19 N.W.2d 394, 398 (1945). “[T]he term ‘servient tenement’ signifies that the possessor of the land to which it is ap-
Easements appurtenant to the land are created to add value to the dominant estate and benefit the dominant tenant in his use of the land. For example, the parking easement at issue in the Pergament case was considered an appurtenant easement and would belong to whomever owned the adjacent apartment property.

Easement rights attached to a particular person can be easily confused with licenses, which are generally non-transferable and more limited in scope than easements attached to the land. For this reason, the courts disfavor easements in gross.

When the terms of an easement are ambiguous, the court presumes the easement to be appurtenant. The law's impartiality towards appurtenant easements is rooted in English law where rights in land were historically considered more important than personal rights.

Even today, easements appurtenant are considered to be an inseparable part of the dominant estate and continue to be freely

plained is subject to an easement. The term 'dominant tenement' denotes that the possessor of the land to which it is applied has, as appurtenant thereto, an easement over the land.” Id. (quoting RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES §§ 455-56 (1944)).

32. Id. at 55-6, 19 N.W.2d at 398 (quoting RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES § 453).

33. Pergament v. Loring Props., Ltd., 599 N.W.2d 146, 149 (Minn. 1999) (describing the office property/parking lot as the servient estate and the apartment property as the dominant estate).

34. 4 POWELL, supra note 19, at § 34.24 (distinguishing easements in gross from licenses). Licenses are “revocable relationships” whereas easements are “irrevocable relationships” in land. Thus an irrevocable license is essentially an easement. Id. But see Dance v. Tatum, 629 So. 2d 127, 129 (Fla. 1993) (stating that an irrevocable license is not an easement, does not run with the land, and is not governed by the merger doctrine). But see Alan David Hegi, The Easement in Gross Revisited: Transferability and Divisibility Since 1945, 39 VAND. L. REV. 109-10 (1986) (stating that the difference between licenses and easements in gross is one of terminology and not of substance); see also RESTATEMENT (FIRST) OF PROPERTY § 512 (1944).

35. Hegi, supra note 34, at 113. Traditionally, courts held that easements in gross were neither transferable nor divisible because the easement rights were considered personal to the easement holder. Id.

36. Id.

37. John Pendergrass, Sustainable Redevelopment of Brownfields: Using Institutional Controls to Protect Public Health, 29 ENVTL. L. REP. 10243, (1999) (describing how common law disfavored easements in gross because personal rights were considered a limited interest in land); see also Hegi, supra note 34, at 113 (1986) (describing how the American courts adopted the English rule that easements in gross could not be assigned); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.5 (1998) (restating that easements in gross cannot be transferred and do not run with the land).
transferable, whereas easements in gross are generally non-transferable.\footnote{Hegi, \textit{supra} note 34, at 114.} Because the law prefers land to be freely transferable, the law favors easements appurtenant.\footnote{Id. at 120. \textit{But see} Miller v. Lutheran Conference & Camp Ass’n., 200 A. 646, 651 (Pa. 1938) (holding that easements in gross are transferable when used for commercial purposes).} Thus, if there is any possibility that an easement could be said to be related to some land, the courts presume the easement to be appurtenant.\footnote{Id. at 120 (illustrating how the presumption against easements in gross is so strong that some courts have labeled easements appurtenant when they were unambiguously in gross); Pendergrass, \textit{supra} note 37.}

\section*{D. Scope}

Intent of the parties, manifested in the words of the grant, regulates the extent or scope of an easement.\footnote{8 \textsc{THOMPSON ON REAL PROPERTY} \S 60.04(a) (1994) (quoting Commercial Wharf E. Condo. Ass’n v. Waterfront Parking Corp., 552 N.E.2d 66, 76 (Mass. 1990)).} If the intent of the parties cannot be construed from the language in the grant, the courts look to the surrounding circumstances to determine the intended nature of the easement.\footnote{Id. (stating that the court must look to the words in the deed as well as the situation of the parties and the surrounding circumstances to determine the nature of an easement).} Courts are fairly generous in their interpretation of easements and tend to give the easement holder a great deal of discretion in his or her use of the easement.\footnote{Id. “If the grant is not clear, the court will interpret the scope of the easement in favor of ‘free and untrammeled use of the land.” Id. (citing Gisler v. Allen, 693 S.W.2d 201, 206 (Mo. Ct. App. 1985).}

\section*{E. Duration}

Once an easement has been created, it may endure forever in the absence of any terms or conditions limiting its duration.\footnote{Brady v. Yodenza, 493 Pa. 186, 189, 425 A.2d 726, 727 (1981) (holding that “[a]n expressly created easement appurtenant can conceivably last forever”); \textit{see also} Pearson, \textit{supra} note 17, at 1777 (stating that whereas most easements can conceivably last forever in the absence of terms and conditions, railroad easements may terminate as soon as the purpose for which they were originally granted cease to exist).} Modern courts generally interpret easements appurtenant to last for an infinite duration unless the written instrument creating the

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\item \footnote{38. Hegi, \textit{supra} note 34, at 114. Examples of non-transferable easements in gross are hunting, fishing, camping, private rights of way and private rights of storage. \textit{Id.} at 120. \textit{But see} Miller v. Lutheran Conference & Camp Ass’n., 200 A. 646, 651 (Pa. 1938) (holding that easements in gross are transferable when used for commercial purposes).}
\item \footnote{39. Hegi, \textit{supra} note 34, at 115-116.}
\item \footnote{40. \textit{Id.} at 120 (illustrating how the presumption against easements in gross is so strong that some courts have labeled easements appurtenant when they were unambiguously in gross); Pendergrass, \textit{supra} note 37.}
\item \footnote{41. 8 \textsc{THOMPSON ON REAL PROPERTY} \S 60.04(a) (1994) (quoting Commercial Wharf E. Condo. Ass’n v. Waterfront Parking Corp., 552 N.E.2d 66, 76 (Mass. 1990)).}
\item \footnote{42. \textit{Id.} (stating that the court must look to the words in the deed as well as the situation of the parties and the surrounding circumstances to determine the nature of an easement).}
\item \footnote{43. \textit{Id.} “If the grant is not clear, the court will interpret the scope of the easement in favor of ‘free and untrammeled use of the land.” \textit{Id.} (citing Gisler v. Allen, 693 S.W.2d 201, 206 (Mo. Ct. App. 1985).}
\item \footnote{44. Brady v. Yodenza, 493 Pa. 186, 189, 425 A.2d 726, 727 (1981) (holding that “[a]n expressly created easement appurtenant can conceivably last forever”); \textit{see also} Pearson, \textit{supra} note 17, at 1777 (stating that whereas most easements can conceivably last forever in the absence of terms and conditions, railroad easements may terminate as soon as the purpose for which they were originally granted cease to exist).}
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An appurtenant easement may terminate according to the limitations inherent in its creation, or be extinguished by events subsequent to its creation. An easement's termination may be either partial or complete. The dominant tenant may terminate an easement by formally releasing his rights or by abandonment.

45. Steele v. Pfeifer, 310 N.W.2d 782, 786-787 (S.D. 1981) (stating that "when no such limitation exists, [an easement] has generally been held to be permanent in nature and would continue in operation forever, unless abandoned"); JOHN W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND ¶ 9.01 (1988) (stating that easements are almost always created without duration and may theoretically last in perpetuity).

46. RESTATEMENT (FIRST) OF PROPERTY ch. 41 cited in Burnquist v. Cook, 220 Minn. 48, 55, 19 N.W.2d 394 (1945). When an easement ceases to exist after a term prescribed in its creation, the "termination of the easement is due to limitations contained in its creation." Id.

47. See RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES ch. 41, introductory note. "Extinguishment...includes only termination by events which occur subsequent to the creation of an easement and which are not included within the limitation of its creation." Id.; POWELL, supra note 19, at § 34.18 (stating that an easement can expire according to the limitations inherent in its creation or be extinguished by events subsequent to its creation).

48. Burnquist, 220 Minn. at 55, 19 N.W.2d at 398 (citing RESTATEMENT (FIRST) OF PROPERTY ch. 41, introductory note); RESTATEMENT (FIRST) OF PROPERTY ch. 41, introductory note (suggesting that an easement may terminate in whole permanently, in whole for a time, in part permanently or in part for a time). See also RESTATEMENT (FIRST) OF PROPERTY § 503 (1944). "Whether the extinguishment of an easement accomplished by a formal release is complete or partial is determined by the particular language used construed in the light of the circumstances under which the release was made." Id.

49. Flaten v. City of Moorhead, 58 Minn. 324, 326, 59 N.W. 1044, 1044 (1894) (holding that a deed, without reservation, by a railroad company to the owner of an estate in the land, will release a right of way thereon); see also POWELL, supra note 19, at § 34.18 (citing Adams v. Battle, 125 N.C. 152, 152, 34 S.E. 245, 245 (1899)).

It was an old, ironclad maxim of the common law that an obligor would only be released by an instrument of as high dignity as that by which he was bound; that is, being obligated by seal, he could be released only by an instrument under seal. Technically this is the rule of modern times, unless changed by statute, but practically it is seldom enforced. To this rule the exceptions were and are so numerous that seldom can the rule be applied.

Id.

50. United Parking Stations, Inc. v. Calvary Temple, 257 Minn. 273, 278, 101 N.W.2d 208, 212 (1960) (stating that an easement may be lost by abandonment where the owner of the dominant estate has made no use of the easement and his conduct is such as to evidence an intention to abandon); see also Desotell v. Szczepanek.
An easement may also be terminated by the servient tenant, usually through prescription or by conveying the easement to a bona fide purchaser. Termination by merger and estoppel require the participation of both the dominant and servient tenant for an

giel, 338 Mass. 153, 159, 154 N.E.2d 698, 702 (1958) (holding that mere nonuse of an easement is not sufficient to establish an intent to abandon unless nonuse is accompanied by affirmative and unequivocal acts which are inconsistent with continued existence of the easement); Great Cove Boat Club v. Bureau of Pub. Lands, 672 A.2d 91, 94 (Me. 1996) (finding abandonment of an easement, given that the leasehold rights were inconsistent with an intention to maintain those previously enjoyed under the easement); Richards Asphalt Co. v. Bunge Corp., 399 N.W.2d 188, 192 (Minn. Ct. App. 1987) (holding that mere nonuse of an easement does not necessarily evidence an intent to abandon); Simms v. William Simms Hardware, 216 Minn. 283, 291, 12 N.W.2d 783, 787 (1943) (recognizing that an easement may be lost by abandonment but mere nonuse will not extinguish it).


The extinguishment of an easement by prescription may be compared with the acquisition of an easement by that method. It is true that a person cannot own an easement in his own property the interests become merged, but where he is so using his land that the elements of adverse possession prevail as to the easement owned by another, he is in a sense acquiring that easement—having it merge with his fee interest—eliminating that interest of another in his land.

52. Smith v. Lockwood, 100 Minn. 221, 223, 110 N.W. 980, 980 (1907) (holding that when the original owner, who is in possession of the whole, thereafter sells the second tract to a bona fide purchaser admittedly without actual knowledge, such purchaser takes the premises free from the implied easement).

53. 3 TIFFANY REAL PROPERTY § 822 (3d ed. 1939). "An easement is ordinarily extinguished if one person acquires an estate in fee simple in possession in both the dominant and servient tenements." Id.; see also RESTATEMENT (FIRST) OF PROPERTY § 497 cmts. b & h (1944) (illustrating the merger doctrine).

54. Davidson v. Kretz, 127 Minn. 313, 313, 149 N.W. 652, 652 (1914) (holding that an easement may be extinguished or modified by a fully executed parol agreement, and an oral agreement that the fee owner may erect a permanent building over part of one side of the way, extinguishes the old easement to the extent of the obstruction, and gives a right to use the new way as a substitute for the old, at least as long as the obstruction continues); see also 3 TIFFANY, REAL PROPERTY § 826 (3d ed. 1939).

It has been decided that if one who has an easement in another's land gives a license to the owner of the servient tenement to do something thereon, the effect of which is to obstruct the exercise of the easement, and the licensee, on the faith of the license, makes expenditures for improvements obstructive of the easement, the easement is extinguished.

Id.; RESTATEMENT (FIRST) OF PROPERTY § 505(c) (1944) (stating that termination of an easement by estoppel happens when "the restoration of the privilege of use authorized by the easement would cause unreasonable harm to the owner of the servient tenement").
easement to terminate. Mortgage foreclosures, \textsuperscript{55} eminent domain \textsuperscript{56} and tax sales \textsuperscript{57} are examples of ways in which an easement may be extinguished by outside entities. \textsuperscript{58}

\textbf{G. Termination Of Easements By Merger}

Minnesota has long recognized the rule that easements are extinguished when the dominant and servient estates come under common ownership. \textsuperscript{59} Minnesota adopted the merger doctrine in \textit{Burnquist v. Cook}. \textsuperscript{60} Other states follow the general rule regarding

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\item \textsuperscript{55} \textit{Infra} Part III(B).
\item \textsuperscript{56} \textit{In re} Appeal of Sowers, 175 Minn. 168, 220 N.W. 419 (1928) (holding that when a right of way is not exclusive, owners are not entitled to compensation by the state for taking the property); \textit{RESTATEMENT (FIRST) OF PROPERTY} § 507 cmt. a (1944) (illustrating extinguishment of an easement by the state through eminent domain).
\item \textsuperscript{57} Extinction of an easement by tax sale is the minority rule. \textit{E.g.} Wolfson v. Heins, 6 So. 2d 858, 861 (Fla. 1942) ("in this State...an easement is destroyed by the tax sale of the servient estate); Nedderman v. City of Des Moines, 268 N.W. 36, 38 (Iowa 1936) (stating that a covenant running with the title was extinguished by a tax sale and deed); Magnolia Petroleum Co. v. Moyle, 175 P.2d 133, 144 (Kan. 1947) (overruled on other grounds by Phillips Petroleum Co. v. Moore, 297 P.2d 188 (Kan. 1956)); City of Jackson v. Ashley, 189 Miss. 818, 199 So. 91 (1940). \textit{But see} Alvin v. Johnson, 241 Minn. 257, 260, 63 N.W.2d 22, 24 (1974) (expressing the majority rule). "An easement appurtenant is not extinguished by a sale and conveyance of the land subject to it for nonpayment of a tax assessed against such land." \textit{Id.}; \textit{see also} Schlafy v. Bauman, 108 S.W.2d 363, 368 (Mo. 1937) (following the majority rule that an appurtenant easement is not extinguished by tax sale); Northwestern Improvement Co. v. Lowry, 289, 66 P.2d 792, 796 (Mont. 1937); Doherty v. Rice, 3 N.W.2d 734, 740 (Wis. 1942); Engel v. Catucci, 197 F.2d 597, 599 (D.C. Cir. 1952); 3 \textit{COOLEY, TAXATION} § 1494 (4 ed.). "Ordinarily, a tax sale does not divest easements charged on the property sold. Thus, private easements of light, air and access of adjoining owners over the land sold are not extinguished by the tax-sale." \textit{Id.}; \textit{see also} \textit{RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES} § 509 (1944). In the absence of a separate tax upon it, an easement in gross is extinguished by a sale and conveyance of the land subject to it for nonpayment of a tax assessed against such land while an easement appurtenant is not extinguished by a sale and conveyance of the land subject to it for nonpayment of a tax assessed against such land. \textit{Id.}
\item \textsuperscript{58} \textit{RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES} § 507 (1944). "Easements are property rights and when ownership of them is in private hands they are subject to extinguishment as other property rights are through the exercise of this power." \textit{Id.}; \textit{see also} \textit{RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES} § 509 (stating that an easement can be extinguished for failure to pay taxes on such land).
\item \textsuperscript{59} Sorkil v. Strom, 156 Minn. 155, 158, 194 N.W. 333, 334 (1923) (stating that when an owner of the dominant estate acquires title to the servient estate, the easement is extinguished).
\item \textsuperscript{60} \textit{Burnquist v. Cook}, 220 Minn. 48, 56, 19 N.W.2d 394, 398 (1945). "To assume the existence of an easement appurtenant to land there must be presupposed two tracts of land in separate ownerships, a dominant and a servient tene-
\end{itemize}
the termination of easements due to the merging of estates as well.\textsuperscript{61}

Once an easement has been extinguished by the merging of dominant and servient estates, transfer of a previously benefited or burdened parcel into separate ownership does not revive an easement.\textsuperscript{62} Because an easement terminates when the dominant and servient estates are merged, the easement does not arise on its own and must be created anew.\textsuperscript{63} This is the law in other states as well.\textsuperscript{64}
H. The Mortgage Exception To The Merger Doctrine

The merger doctrine becomes more complicated when there is an outstanding interest in the dominant estate (e.g. mortgage interest). The mortgage exception to the merger doctrine is designed to protect the mortgagee's interest in the dominant estate from being extinguished when the dominant and servient estates are merged under common ownership. The mortgage exception was an issue of first impression for the Minnesota Supreme Court in Pergament v. Loring Props., and Minnesota was forced to look at other jurisdictions for guidance.

65. E.g., Hermitage Cmtns. of N.C., Inc. v. Powers, Inc., 272 S.E.2d 399, 401 (N.C. 1980) (stating the doctrine of merger will not be applied where there is an outstanding deed of trust on the easement); see also Will v. Gates, 658 N.Y.S.2d 900, 903 (N.Y. 1997) (stating that where only a portion of dominant or servient estate is acquired by one person and there remain other dominant owners whose rights are inviolate, the merger doctrine will not terminate the easement); Tower Dev. Partners v. Zell, 461 S.E.2d 17, 22 (N.C. Ct. App. 1995) (holding that a development company's attempt to create driveway easements through express grant failed ab initio where legal title to the tracts had merely been divided between different trustees, and no intermediate estate existed between company's legal and equitable titles to prevent operation of the merger doctrine).

66. MINN. STAT. § 559.17, subd. 1 (2000) (stating that a mortgage in Minnesota is a lien on property and not a conveyance so that a mortgagee is unable to recover possession without foreclosure and sale); see also Hatlestad v. Mut. Trust Life Ins. Co., 197 Minn. 640, 643, 268 N.W. 665, 666-67 (1936) (holding that mortgages are no longer a conveyance but are instead a lien on property).

67. RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES § 497 cmt. d (1944). If either a dominant or servient tenement held in fee is subject to a power of termination or to an executory interest, and the fee ownership in the dominant tenement is united with the fee ownership in the servient tenement, the power of termination or the executory interest remains unaffected by such unity. Accordingly, if the power of termination or the executory interest becomes possessory, the possessory estate is entitled to the benefit, or remains subject to the burden, of the easement.

Id.

68. BLACK'S LAW DICTIONARY 207 (7th ed. 1999). "A case that presents the court with issues of law that have not previously been decided in that jurisdiction."

Id.

69. Duval v. Becker, 32 A. 308, 309-10 (Md. 1895) (stating that allowing the extinguishment of the mortgagee's interest "would jeopardize, if not wholly destroy, the stability of every mortgage as security"); see also Salazar v. Terry, 911 P.2d 1086, 1091-92 (Colo. 1996) (distinguishing the meaning of merger as it relates to easements instead of mortgages); Riger v. Parker, 8 Cush. 145, 54 Am. Dec. 744, 744 (Mass. 1851) (holding that an easement "is not extinguished by the vesting of both estates in the same person as mortgagee, under separate mortgages, until both mortgages are foreclosed"); Schwoyer v. Smith, 131 A.2d 385, 387-88 (Pa. 1957) (relying on Duval and the RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES § 497 to hold that a mortgagee's interest in an easement prevented extinguishment of an easement by merger).
III. THE PERGAMENT DECISION

A. The Facts

In 1986, Willow Street Properties (hereinafter “Willow”), the fee owner of adjacent office and apartment properties, entered into a contract for deed with BSR Properties (hereinafter “BSR”) to sell the aforementioned properties to BSR. In 1987, BSR paid for the portion of the deed relating to the apartment property by mortgaging the apartment property to Midwest Federal Savings and Loan (hereinafter “Midwest”). As a condition to provide financing, Midwest required that BSR and Willow create a parking easement on the office property for the benefit of the apartment property.

In 1988, BSR paid the balance owed on the contract for deed to obtain fee title to the office property. The office property was mortgaged to Canada Life Assurance Company (hereinafter “Canada Life”). BSR owned and operated both the apartment and office properties for two years. On December 20, 1990, BSR sold the office property to Canada Life. Canada Life, in turn, sold the office property to Loring Properties (hereinafter “Loring”) in 1993. In 1997, BSR paid off its mortgage on the apartment property to Midwest and then sold the apartment property to Brian A. Pergament (hereinafter “Pergament”).

When Pergament bought the apartment property, he was ig-

70. Pergament v. Loring Props., Ltd., 599 N.W.2d 146, 148 (Minn. 1999). On November 20, 1987, the City of Minneapolis approved a plan to subdivide the office and apartment properties into two separate parcels so that BSR was able to divide payment. Id.; see also Appellant’s Brief and Appendix at 2 n.2, Pergament v. Loring Props., Ltd., 599 N.W.2d 146 (Minn. 1999) (No. CX-98-1031) (describing the apartment and office properties in detail).

71. Pergament, 599 N.W.2d at 148.

72. Id. See also Pergament v. Loring Props., Ltd., 586 N.W.2d 778, 780 (Minn. Ct. App. 1998) rev’d 599 Minn. N.W.2d 146 (Minn. 1999) (referencing sections 1 and four of the easement which provided for the right of access and use of eight parking spaces for the benefit of the apartment property on the office lot).

73. Pergament, 599 N.W.2d at 148.

74. Id.

75. Id.

76. Id. BSR conveyed the office property to “Canada Life in lieu of foreclosure.” Id.

77. Id.

78. Id. Pergament obtained title from BSR (mortgagor), and not from Midwest (mortgagee). Id.
norant of the parking easement. In fact, the parking spaces assigned in the easement had never been used by the apartment tenants. Upon learning of the easement, Pergament commenced an action against Loring to enforce the terms of the parking easement created by BSR and Willow for the benefit of the apartment property.

The trial court granted Pergament’s motion for summary judgment and Loring appealed. The Minnesota Court of Appeals affirmed the trial court’s holding and found that despite the unity of title in the dominant and servient estates, the parking easement had not been extinguished by merger because the apartment property was encumbered by a separate security interest throughout BSR’s unity of title. The court of appeals relied upon the reasoning in the Pennsylvania case, Schwoyer v. Smith, where the dominant estate had been acquired from the mortgagee, and the easement was held not to have been extinguished by merger. Because the Minnesota Court of Appeals found there was no merger, it was of no consequence that Pergament took his title from BSR (the mortgagor) instead of Midwest (the mortgagee).

Loring filed a Petition for Further Review of the appellate court’s decision. The supreme court granted Loring’s request for further review because the applicability of the mortgage exception to the merger doctrine was an issue of first impression, which had not been previously considered by the Minnesota Supreme Court.

79. Id. “Although the deed from BSR to Pergament mentioned of the easement, Pergament admitted that he was unaware of it when he purchased the apartment building.” Id.
80. Id.
81. Id.
82. Id.
83. Pergament, 586 N.W.2d at 782 (Minn. Ct. App. 1998) (holding that an easement cannot be terminated by the merger doctrine when a mortgagee holds an outstanding interest in the dominant estate), rev’d, 599 N.W.2d 146 (Minn. 1999).
84. Id.
85. Id.

While Schwoyer involved a plaintiff who acquired interest through a mortgagee, the [Pennsylvania] court held that an easement will continue to exist, despite one having title in both the dominant and servient estates, when at least one of the properties is encumbered by a security interest, such as a mortgage.

Id. (relying on Schwoyer v. Smith, 388 Pa. 637, 131 A.2d 385 (1957)).
86. Id.
B. The Supreme Court’s Analysis

The supreme court reversed the appellate court’s decision and found that the parking easement was extinguished as to BSR and those who took title from BSR, when BSR acquired common ownership of both the Apartment and office properties.\(^7\) In addition, the supreme court held that despite the merging of the dominant and servient estates, Midwest’s mortgage interest in the easement remained viable for Midwest, and anyone who may have taken title from Midwest, had Midwest’s interest become possessory upon foreclosure.\(^8\)

The merger doctrine worked to extinguish the easement to BSR and BSR’s successors in interest.\(^9\) Pergament acquired title from BSR and not Midwest. Because BSR’s interest in the parking easement had been extinguished before BSR conveyed the apartment property to Pergament, Pergament acquired no interest in the parking easement from BSR.\(^9\)

The supreme court narrowed the appellate court’s holding by limiting the mortgage exception to apply only to those mortgagees on February 18, 1999. Id.

\(^7\) Pergament, 599 N.W.2d at 149. The supreme court applied the merger doctrine to establish that when BSR obtained fee title to both the apartment and office properties in 1998, the easement was effectively terminated as to BSR and its successors in interest. Id. (relying on Burnquist v. Cook, 220 Minn. 48, 56, 19 N.W.2d 394, 398 (1945)). E.g., Sorkil v. Strom, 156 Minn. 155, 158-59, 194 N.W. 333, 334 (1923); RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES § 497 (1944).

\(^8\) Pergament, 599 N.W.2d at 150.

If either a dominant or servient tenement held in fee is subject to a power of termination or to an executory interest, and the fee ownership in the dominant tenement is united with the fee ownership in the servient tenement, the power of termination or the executory interest remains unaffected by such unity. Accordingly, if the power of termination or the executory interest becomes possessory, the possessory estate is entitled to the benefit, or remains subject to the burden, of the easement. Id. at n.2 (relying on RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES § 497 cmt. d. (1944)); see also Mut. Benefit Life Ins. Co. v. Franz Klodt & Son, 306 Minn. 244, 247, 237 N.W.2d 350, 353 (1975) (holding that a mortgage interest is not a possessory interest in land but merely a lien on the property).

\(^9\) Pergament, 599 N.W.2d at 151 (stating the majority’s conclusion).
who have a possessory interest in the property. 91 Although the dissenting opinion agreed with the majority's discussion of the mortgage exception, it argued that the merger doctrine is based in equity; therefore, the case needed to be remanded to the trial court to give consideration to the intent of the parties. 92

IV. ANALYSIS OF THE PERGAMENT DECISION

Even though the doctrine of merger is well established in Minnesota, the mortgage exception remained virtually untouched until the Pergament decision. 93 The Pergament case is important because it forced the supreme court to determine the scope of the mortgage exception as it applied to mortgagees who hold an interest in a dominant estate. 94

The effect of the Pergament decision effectively narrowed the mortgage exception to protect only those mortgagees of the dominant estate whose interests become possessory. 95 If the dominant and servient estates are merged under one mortgagor, the mortgagor's interest in the easement terminates, whereas the mortgagee's interest in the easement remains suspended until it becomes possessory upon foreclosure or until the mortgagor completes payment. 96

Because the crux of the Pergament decision relied on the status of a mortgagee's interest in an easement during the merging of the dominant and servient estates, it is necessary to examine the type of interest a mortgagee holds in an easement. 97 This section analyses

91. Id. at 151. "By concluding that an easement may never be extinguished while there is a mortgage on the dominant estate, the lower court decisions have distorted the mortgage exception to the merger doctrine." Id. The mortgage exception is intended to protect the mortgagee of the dominant estate whose interests become possessory. Midwest's interest in the dominant estate never became possessory and remained merely a lien on the property until BSR paid off the mortgage. Id.

92. Id. at 151-53 (Gilbert, J., dissenting) (agreeing with the majority on the application of the mortgage exception, but arguing for remand of the case to the trial court to discuss the issue of intent which the dissent believes the majority failed to take into consideration).


94. Pergament, 599 N.W.2d at 147.

95. Id. at 151.

96. Id. at 150 n.2 (citing RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES § 497 cmt. d. (1944)).

97. Pergament, 599 N.W.2d at 149 (relying on the mortgage exception to the merger doctrine as spelled out in RESTATEMENT (FIRST) OF PROPERTY, SERVITUDES §
the nature of a mortgagee’s interest in an easement and what happens to a mortgagee’s interest after termination of an easement due to merger. Part A explains how a mortgagee’s interest can survive the merger doctrine while the easement is terminated as to the fee owners. Part B explains the policy behind protecting a mortgagee’s security investment. Part C explains why the court did not consider the issue of intent.

A. The Mortgagee’s Interest

The fact that separate interests in the same easement can terminate at different times for different parties, was a concept that the appellate court found difficult to apply. Thus, the issue of whether there can be a termination of different interests in the same easement at different times was central to the supreme court’s decision.

Appellant cited Cheever v. Graves, a Massachusetts case where the servient lot and several dominant subdivision lots came under common ownership. The Massachusetts Appellate Court held that the easement terminated with respect to the dominant lots under common ownership but not for dominant lots with no common ownership. The Minnesota Supreme Court used similar reasoning and held that a mortgage interest is a separate interest that can terminate independently of the mortgagor’s interest in an easement.

Respondent argued that allowing an easement to terminate by merger while a mortgagor holds an interest in the dominant estate would undermine the purpose of mortgages as security interests.
In response, the supreme court held that a mortgagee’s interest in an easement does not terminate automatically along with the mortgagor’s interest upon merger. Instead, a mortgagee’s interest in an easement remains suspended after a merger until foreclosure. The reason is a mortgagee’s interest remains a lien on property unless it becomes possessory through foreclosure.

The merger doctrine is intended to prevent a possessory owner from holding an easement on his or her own fee. A mortgagee holds a non-possessory interest in the easement. Thus, the merger doctrine does not work to extinguish the non-possessory interests held by a mortgagee. The mortgagee’s interest remains independent and viable even after the easement has terminated as to the fee owners.

B. The Mortgage Exception: The Policy Of Protecting Those With Non-Possessory Interests

As a matter of policy the supreme court limited the mortgage exception to apply only to those mortgagees and their successors whose interest in the dominant estate becomes possessory. The mortgage exception protects the value of the mortgagee’s security interest should the mortgagee acquire possession of the dominant estate through foreclosure. In effect, the mortgage exception in the case of easements extends only to protect a party who takes title to the dominant estate from the mortgagee.

105. Id. (relying on RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES § 497 cmt. d (1944)).
106. BLACK’S LAW DICTIONARY 933 (7th ed. 1999). A lien is a “legal right or interest that a creditor has in another’s property lasting...until a debt or duty that it secures is satisfied.” Id.
107. MINN. STAT. § 559.17, subd. 1 (2000). A security interest is not a possessory interest in land but is incident to the ownership of the secured obligation. RESTATEMENT (FIRST) OF PROPERTY § 497 cmt. g (1944).
108. POWELL, supra note 19, at § 34.22.
110. Pergament, 599 N.W.2d at 146, 151 (stating the holding).
111. Id.
112. Id. at 151. “This exception is intended only to protect the mortgagee of the dominant estate, should its interest become possessory, from losing the full value of its security interests, including the benefit of any easement.” Id.
113. Id.
114. Id. The Minnesota Supreme Court relied upon the Schwoyer case for its reasoning. Id. at 150. The Schwoyer case reasoned that if the mortgage of the dominant estate preceded the unity of ownership and possession of the dominant and servient estates, then “as to the mortgagee, and his successors in interest, the
The policy behind the mortgage exception works purely to protect the mortgagee's security interest in the property.\textsuperscript{115} It does not exist to act as a shield to defeat the merger doctrine.\textsuperscript{116} Essentially what the supreme court did in the \textit{Pergament} decision was to protect the mortgagee’s interest in the dominant estate by allowing the mortgagee to obtain the benefit of the dominant estate even after the easement had been extinguished by merger if that mortgagee’s interest later became possessory.\textsuperscript{117}

\textbf{C. The Effect Of The Pergament Decision On Recent Case Law}

The reasoning used in the \textit{Pergament} decision was later discussed by the Minnesota Court of Appeals in \textit{Ford Consumer Fin. Co., Inc. v. Carlson and Breese, Inc.}\textsuperscript{118} In \textit{Ford}, the appellant urged the court to adopt an exception to the doctrine of adverse possession, which would protect the interests of mortgagees and their successors, similar to the mortgage exception that exists for the merger doctrine.\textsuperscript{119}

The \textit{Ford} case dealt with a 1993 quiet title action which had previously extinguished the mortgagor’s right to assert an adverse possession claim over a disputed parcel of land. The mortgagee (Ford) was not bound by the 1993 judgment because Ford was not properly served.\textsuperscript{120} Appellant (hereinafter Johnson), the successor in interest to Ford, argues that because the mortgagee (Ford) was not bound by the 1993 quiet title action, Johnson should be able to bring an adverse possession by tacking onto Ford’s previous interest.\textsuperscript{121} Johnson used the \textit{Pergament} case in support of her argument to protect those with non-possessory interests.\textsuperscript{122}

\footnotesize
\begin{itemize}
  \item easement would continue to exist…” Schwoyer v. Smith, 131 A.2d 385, 388 (Pa. 1957).
  \item \textit{Pergament}, 599 N.W.2d at 149-50.
  \item \textit{Id.} at 150 (rebutting \textit{Pergament}'s argument).
  \item \textit{Id.; see also Ford Consumer Fin. Co. v. Carlson & Breese, Inc.}, 611 N.W.2d 75, 78 (Minn. Ct. App. 2000) (commenting on the \textit{Pergament} decision).
  \item 11 N.W.2d 75 (Minn. Ct. App. 2000).
  \item \textit{Id.} at 76-78.
  \item \textit{Id.} at 76-77. “The district court also ruled that the 1993 quiet title action placing title in Carlson was not binding on Ford because it was a known defendant that was not named or personally served.” \textit{Id.}
  \item \textit{Id.} (explaining the appellant’s argument). Appellant (Johnson) claims that a mortgagee’s adverse possession claim is not extinguished if the parties with possessory rights at the time of a quiet title action failed to contest the claim and default was entered against them. Johnson claims to have an adverse possession claim by tacking onto Ford’s interest. \textit{Id.}
  \item \textit{Id.} at 78.
\end{itemize}
The court rejected the Johnson’s argument because there was no indication that the mortgagee (Ford) actually had an interest in the disputed strip of property; and even if it had, Ford’s interest in the strip became possessory well after the 1993 quiet title action had already vested in Defendants. The court also stated that Johnson’s argument to protect the non-possessory interests of mortgagees was “inauthentic” since the mortgagee in this case did not stand to benefit from a decision in appellant’s favor.

D. Intent

The dissenting opinion stressed that the merger doctrine in the case of easements is an equitable doctrine, much like the merger doctrine in the case of mortgages, and equitable factors should have been taken into consideration as a condition to the merger. In contrast, Appellant argued that the merger doctrine in the case of easements, is different from the merger of mortgages and that no finding of intent is necessary for the merger to terminate the easement. The supreme court followed Minnesota case

123. Id. (pointing out that Appellant’s argument presupposes many factors which would be necessary to make a proper analogy to the mortgage exception as utilized in the Pergament decision).

[After the 1993 judgment extinguished the Nelsons’ claim for adverse possession, Ford could no longer claim that its interests were harmed or that the value of its security was impaired because Ford’s potential possessory interest in the disputed triangle was dependent upon the Nelson’s interest.]

124. Id. at 78. Ford had already foreclosed and conveyed the property to appellant “as is” and thus, had no interest in the property at the time of the judgment. Id. at 77. Although the value of Ford’s mortgage may have been diminished by the 1993 quiet title action, appellant’s adverse possession claim would not work to vindicate Ford’s interests since Ford no longer had an interest in the property. Id. at 78.

125. Pergament, 599 N.W.2d at 151-53 (Gilbert, J., dissenting) (relying on the issue of intent as applied to the merger of mortgages). When mortgages are merged, the circumstances of the particular case at issue are taken into consideration to protect against the mortgagee from receiving a windfall. Continental Mut. Life Ins. Co. v. King, 72 Minn. 287, 291, 75 N.W. 376, 378 (1898) (holding that the doctrine of merger in regard to mortgages is a flexible, equitable doctrine and that each case depends on its own circumstances); see also State ex rel. Interstate Iron Co. v. Wallace, 196 Minn. 212, 214-15, 264 N.W. 775, 776 (1936) (holding that no merger would be construed to take place where merger would be adverse to the lessee’s interest).

law regarding the merger doctrine as applied to easements and did not address the issue of intent when determining whether the parking easement was terminated by merger. The Pergament decision supports the notion that the merger doctrine as applied to easements does not require the element of intent as does the merger doctrine as applied to mortgages.

V. CONCLUSION

The Pergament case presented the Minnesota Supreme Court the first opportunity to consider the scope of a mortgagee's interest in an easement when the dominant and servient estates are merged under one owner. In order to reach its decision, the supreme court went through several steps. First, a mortgage is a lien on property and not a possessory interest; second, the merging of dominant and servient estates does not extinguish a mortgagee's inchoate interest in an easement; and finally, the mortgage exception only protects the mortgagee and the mortgagee's successors in interest. As a matter of policy, an easement can be extinguished as to a mortgagor, while at the same time, remain viable for a mortgagor with an inchoate interest in the easement.

127. Sorkil v. Strom, 155 Minn. 155, 158-159, 194 N.W. 333, 334 (1923) (recognizing the merger doctrine). "It is true enough that when an owner of an estate enjoys an easement over another estate and acquires title to the latter the easement is thereby extinguished." Id. Case law in other states also follows this rule. See also Salazar v. Terry, 911 P.2d 1086, 1091 (Colo. 1996) (holding that merger as it relates to easements does not require the element of intent); Witt v. Reavis, 587 P.2d 1005, 1008 (Or. 1978) (holding that the merger of dominant and servient estates automatically extinguishes easements); but cf. Smith v. Lytle, 6 N.W. 625, 626-27 (Minn. 1880) (holding that the doctrine of merger "has no application where it is clearly for the interest of the party holding the two estates that they be kept separate and distinct").

128. Pergament, 599 N.W.2d at 146, 150 n.4 (holding that the case need not be remanded to the trial court for consideration of the issue of intent).

129. Compare Thompson v. First Nat'l Bank, 180 Minn. 552, 555, 231 N.W. 234, 236 (1930) (holding that the merger doctrine as applied to mortgages takes into consideration the intention and well-being of the person in whom interests are united), with Sorkil v. Strom, 155 Minn. 155, 158-159, 194 N.W. 333, 334 (1923) (holding that an easement terminates at law the instant the dominant and servient estates are united under common ownership and possession).