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Prescriptive Acquisition of Easements in Wyoming

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stitution of the United States, it has never been given unequivocal Supreme Court cognizance.[61]

The trend today is for courts to give less strict construction to residence and settlement requirements.[62] It is conceivable that one day the Supreme Court of the United States will hold them unconstitutional as violative of the right to move freely. Also, exclusion features of many statutes will stand on infirm ground if the Supreme Court should declare an implied constitutional right to remain where one is. Presently, however, the Privileges and Immunities and Equal Protection Clauses furnish the greatest hope for ridding ourselves of settlement laws.

The residence requirement pertaining to election laws may serve a special purpose in preventing fraud in today's mechanized United States, but such laws have little place in determining the rights of people to assistance. Assistance should be given without discrimination. At the very least, states should repeal local residence requirements, but preferably the state requirment should be discarded as well. It is difficult to know what results would follow in the wake of a wholesale repeal of residence and settlement laws as pertaining to welfare, but certainly federal aid to general assistance as it is given to the "categorical" programs[63] would cushion much of the local financial strain on specific counties and towns when confronted with large groups of immigrants.

Education and counselling are all important in assuring that migration is not without purpose. Many relief dollars could be saved by a proportionally small investment in adequate guidance services.

The United States has become a great nation for a variety of reasons, not least among which has been individual sensitivity to the needs of our fellow man, based generally on fundameneal Christian concepts. However, this concern has not always been reflected in our statutory law, specifically our poor laws.

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61. tenBroek, The Constitution and the Right of Free Movement, National Travelers Aid Association, p. 13 (1955).
62. Mandelaker, Exclusion and Removal Legislation, 1 Wis. L. Rev. 57, 73 (1956).
63. Mandelaker, op. cit. supra note 8.

PRESCRIPTIVE ACQUISITION OF EASEMENTS IN WYOMING

It is generally stated that to establish an easement by prescription there must be an open, exclusive, continued and uninterrupted use or enjoyment of another's land under claim of right, adverse to and with the knowledge of the owner of the property.[1] The interpretation of the facts

1. Thompson, Real Property § 414 (perm. ed. 1939); 17 Am.Jur., Easements § 59; 4 Tiffany, Real Property §§ 1195-97, 1199, 1291, 1202 (3d ed. 1939).

required by the law in the acquisition of an easement by prescription, and the resort to fictions[2] in the historical development of the law on this subject have caused no little trouble in the solution of easement problems.[3] The cases concerning prescriptive acquisition of easements in Wyoming through relatively few in number provide a foundation upon which can be rested several conclusions as to the present state of the law in Wyoming on this subject.

One of the earliest references to the acquisition of easements by prescription in this state was made in *Metcalf v. Hart*,[4] when an easement was defined as a liberty, privilege, or advantage in land, without profit and existing distinct from the ownership of the soil. It was also stated that a claim for an easement must be founded upon a deed or writing or upon prescription which supposes one. A few years later the court stated that the use of another's land under claim of right for the period of limitations will create the presumption of a grant.[5]

In a recent decision on the subject of acquisition of easements by prescription, the court stated that in Wyoming the acquisition of a private right of way by prescription is governed by the common law.[6] The Wyoming view that a prescriptive right is founded upon the presumption of a fictitious grant has been repudiated in some jurisdictions in which the enjoyment of incorporeal rights for a required period is regarded as conferring title solely by analogy to the period of limitations.[7]

The use of another's land for the prescriptive period, in absence of evidence to the contrary, is said by the majority rule to raise a presumption that such use was adverse.[8] The Wyoming court in *Gustin v. Harting*[9] said, ". . . The actual and continuous use of an easement, as of right, for the period of limitation for bringing an action to dispossess the claimant, creates the presumption of a grant. . . ." The *Gustin* case concerned an action for damages for the destruction of a flume. The right of recovery

2. Consider, for example, the fiction of a lost grant. The old common law rule was that the use of right must have begun at some period beyond legal memory. In absence of statutes relating to incorporeal prescriptive rights, the courts decided that user beyond legal memory was presumed by a user for a period corresponding to the time fixed by the statutes of limitation of actions to recover land which was limited to the time of Richard I. When the statute of limitations was changed to twenty years this presumption was frequently defeated by proof that the user was after the time of Richard I though more than twenty years back. To avoid this, the courts created the device of presuming a lost grant, directing the juries to find that the easement had been created by a valid grant which had been lost thus destroying the effect of proof of the user within the time of legal memory. Since this presumption was a mere fiction it could not be rebutted by evidence that no grant had been made. Walsh, History of English and American Law § 75 (1926).
3. Cook, Legal Analysis in the Law of Prescriptive Easements, 15 So. Calif. L. Rev. 47 (1942).
4. 3 Wyo. 513, 27 Pac. 900, 906 (1891).
5. Gustin v. Harting, 20 Wyo. 1, 121 Pac. 522, 527 (1912).
6. Haines v. Galles, ... Wyo. ....., 303 P.2d 1004 (1956).
7. Wilson v. Waters, 192 Md. 221, 64 A.2d 135 (1949).
8. 1 Thompson, Real Property § 436 (perm. ed. 1939); 4 Tiffany, Real Property § 1196a (3d ed. 1939). For a collection of cases in each jurisdiction see annotation 170 A.L.R. 776 (1947).
9. 20 Wyo. 1, 121 Pac. 522, 527 (1912).

was maintained upon the theory of acquisition of a right of way by prescription. The flume had been built with permission of Amos Gustin, the prior owner of the land; and the succeeding owner made no immediate objection to such use. The court said, ". . . parol consent given without limitation or reservation must be regarded as absolute and as conferring a permanent right capable of ripening into prescriptive title."[10] The court concluded that the continued use for the period for which an action might have been brought to dispossess the plaintiff was under a claim of right, giving him a prescriptive right to maintain the flume. It was also pointed out that if the source of the plaintiff's right rested in parol consent of the landowner to the building of the flume, and remained merely permissive so as to be revocable at any time by the landowner, it could not ripen into title by prescription, for then the use would not be adverse. On the other hand, if the parol consent was given to use the land as if legally conveyed the use would be as of right, and if continued for the prescriptive period might develop into a prescriptive right.

Where a use is shown to have begun by permission it is generally presumed to have been permissive throughout, and such evidence would repel any presumption of a grant or adverse user which could arise from the use alone.[11] The *Gustin* case supports the position that consent which amounts to something more than a bare license may take on the character of a gift or grant; or the claimant may have entered upon the use relying on its having such a character. In such circumstances permission is not only ineffective in rebutting the presumption of adverse user or grant but affirmatively supports it.[12]

The defense of permission in the *Gustin* case, and at least one other Wyoming case[13] was unavailing anyway, because the cases fell under the doctrine of an irrevocable license. In other words, where permission has led the party to whom it was given to expend money upon the faith of it by making improvements, equity, not being able to restore the party to his original position, will not allow permission to be withdrawn in breach of such faith.[14]

The rationale behind the decision in *Kammerzell v. Anderson*,[15] is difficult to explain. Here, a double garage was located on the defendant's side of the property line. Access to the garage was provided by two concrete strips which straddled the boundary line from the street to the garage building. The driveway had been used by owners of the lots for over eighteen years. The exact origin of the use was not disclosed; however, it was held, without recitation of specific proof, that the use was a matter of

10. Id. at 531.
11. Fassold v. Schamburg, 350 Mo. 464, 166 S.W.2d 571 (1942).
12. Lichtenberg v. Sachs, 200 Md. 145, 88 A.2d 450 (1952).
13. Coumas v. Transcontinental Garage Inc., 68 Wyo. 99, 230 P.2d 748, 754, 41 A.L.R.2d 539 (1951).
14. Keystone Copper Mining Co. v. Miller, 63 Ariz. 544, 164 P.2d 603 (1945).
15. 69 Wyo. 252, 240 P.2d 893 (1952).

neighborly accommodation and therefor permissive. The court referred to *Gustin v. Harting*,[16] to the effect that actual and continuous user as of right for the period of limitations creates the presumption of a grant. The explanation given by the court concerning the relation of the reference to the *Gustin* case with the decision in the principal case was that where facts are presented presumptions must give way. The previous statement indicates that the presumption of a grant is rebuttable,[17] but the court in fact decided that there was no adverse use as could be presumed from the period of use. It is not clear from the report what facts were presented to overcome the presumption of a grant since no light was thrown on the origin of the user. The question of whether the use of the driveway was under claim of right or merely an accommodation was treated as a fact question for the trial court to decide from the relationship of the parties and the surrounding circumstances. It should also be noted here that although the doctrine of an irrevocable license was not invoked in the instant case it did receive consideration. Some weight was apparently given to the fact that the plaintiffs had expended only twenty dollars in constructing their half of the driveway; and also to the fact that adequate space was available for them to construct a new driveway on their side of the established boundary line upon the expenditure of about two hundred dollars. The relatively small pecuniary loss involved was not considered to be of such gravity as would amount to a fraud on the Kammerzells if their right to use the driveway was revoked.

Where land is unenclosed the presumption of adverse use is overcome, or as it may be otherwise expressed, the presumption is of a permissive user, the theory being that the owner of unenclosed property cannot be expected to be in such close contact with the property that knowledge of the user can be imputed to him.[18] Such a presumption has been recognized in Wyoming in the case of *McIlquham v. Anthony Wilkinson Live Stock Co.*,[19] where the court indicated that the use of unenclosed private land for pasturing livestock was merely permissive, created no title, and might be terminated at any time.

In conclusion it appears that the following propositions can be stated concerning the state of the law on prescriptive easements in Wyoming today. First acquisition of easements by prescription is governed by the common law[20] under which adverse user of an easement, for a period corresponding to the period of limtation for bringing an action to dispossess the claimant, will create the presumption of a grant.[21] Second, the presumption of adverse user arising from use for the prescriptive period can

16. 20 Wyo. 1, 121 Pac. 522 (1912).
17. For cases illustrating the rule that a presumption of a grant is not rebuttable see 3 Powell on Real Property p. 455 (1952). Contra, Jessup v. Bard, 304 Ky. 521, 201 S.W.2d 564, 566 (1947).
18. See Allen v. First National Bank of Arvada, 120 Colo. 275, 208 P.2d 935, (1949).
19. 18 Wyo. 53, 104 Pac. 20 (1909).
20. Haines v. Galles, ...Wyo. ....., 303 P.2d 1004 (1956).
21. Gustin v. Harting, 20 Wyo. 1, 121 Pac. 522, 527 (1912).

be rebutted by evidence that the user was permissive at its inception.[22] Permission is used here in the sense that the parties concerned recognize that the owner of the servient tenement retains the right to terminate the user at his will. Third, that a presumption of a grant can also rest upon claim of right which is founded in oral permission to use the land as if legally conveyed;[23] that is to say permission by which the landowner indicates consent for a user for an unlimited period. Fourth, where permission by the landowner to use his property results in a substantial expenditure on improvements upon the faith of such permission and irrevocable license may be established.[24] The circumstances that will make it inequitable to revoke the permission will depend upon the particular case.[25]

The type of situation which appears most likely to raise a problem in this state today is that in which the question arises as to whether the use was merely a matter of neighborly accommodation or under an adverse claim, or as it may otherwise be expressed, whether among neighbors use alone is enough to indicate such an appropriation as to raise a presumption of adverse use, and thus establish correlatively the foundation for presumption of a lost grant. It should be remembered that the Wyoming court in a similar situation[26] treated the nature of the user as a question of fact for the trial court to decide from the relationship of the parties and the surrounding circumstances.

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SURVIVORSHIP IN THE PROCEEDS OF A SALE OF JOINTLY OWNED PROPERTY

So much property is owned by persons holding it in joint tenancy or tenancy by the entireties that it seems desirable to review some of the ways in which courts treat the survivorship feature when the property is sold. This discussion is concerned with the situation which presents itself when property[1] owned in either of these ways is sold voluntarily or involuntarily and the purchase price is not paid until after the death of one of the joint vendors. There are two possibilities as to whom the vendee owes the unpaid portion of the purchase price: (1) He owes it all to the surviving vendor, on the theory that the survivorship feature was retained as to the contract of sale; (2) He owes it half to the survivor and half to the estate of the deceased, on the theory that the sale terminated the joint tenancy or

22. Kammerzell v. Anderson, 69 Wyo. 252, 240 P.2d 893 (1952).
23. Gustin v. Harting, 20 Wyo. 1, 121 Pac. 522, 531 (1912).
24. Coumas v. Transcontinental Garage Inc., 68 Wyo. 99, 230 P.2d 748, 41 A.L.R.2d 539 (1951).
25. Ibid.
26. Kammerzell v. Anderson, 69 Wyo. 252, 240 P.2d 893 (1952).

1. For the purposes of this note it should be assumed that it will make no difference whether the property being discussed is real or personal. If that distinction is relevant, it will be noted.