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Property--Injunction--Right of Way--Adverse Possession--Statute of Frauds (Cobb v. Avery, 75 N.Y.S.2d 803 (Sup. Ct. 1947))

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It is extremely difficult to reconcile these decisions with the reasoning of the general rule, for there seems to be no adequate reason why the parties are not to be charged with providing for such contingencies when they contracted, as they were so charged in the principal case.[7] It is equally probable that they would and should foresee that there would be waste or loss in rent and profits in the event of non-occupancy as they would and should foresee the many other fact situations upon which the other actions were brought. On the other hand, if the rule is too stringent and there are valid reasons for relaxing it as to waste and percentage rents then there are comparable reasons for relaxing it in diverse situations such as that presented in the principal case.

M. F. B., JR.

PROPERTY—INJUNCTION—RIGHT OF WAY—ADVERSE POSSESSION—STATUTE OF FRAUDS.—Plaintiff and defendants own adjoining parcels of land. These two pieces of property were owned by one individual in 1891. Subsequently, he subdivided the parcel and sold the one now held by the plaintiff, retaining for himself the piece now owned by defendants. This original owner continued to live on the property, now defendants', for thirty years, during which time he never claimed any right to use the path or driveway in the rear of plaintiff's house. When he wished to use the path he asked the permission of plaintiff's predecessor in title, and an oral arrangement was made whereby he had the permission to use it as long as he did not interfere with the owner's use. This arrangement existed until the original owner conveyed the property to another predecessor of defendants' title, in 1923, who continued to use the plaintiff's path or driveway for the same purposes, without any claim of right or interest in the driveway. None of the deeds in defendants' chain of title contain any grant of, or reference to, this right of way now claimed by defendants.

Plaintiff erected a barricade across the land in dispute and the defendants tore the barricade down three times. Plaintiff now brings action against defendants for an injunction restraining defendants from using lands in the immediate rear of plaintiff's house as a right of way and for damages. *Held,* judgment for plaintiff, granting an injunction and recovery of damages for repair of barricade. *Cobb v. Avery,* — Misc. —, 75 N. Y. S. 2d 803 (Sup. Ct. 1947).

The defendants based their defense upon two premises. They claimed that they had acquired a right of way across the premises of

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[7] Yet the court arbitrarily said in the principal case that the result would be different if it had fallen into either of the exceptions. Congressional Amusement Corporation v. Weltman, 55 A. 2d 95, 96 (1947).

the plaintiff immediately in the rear of the plaintiff's house by grant and also by adverse possession. In turn, their claim to a right of way by adverse possession rested upon two assumptions: namely, a public acquisition of a right of way over the premises in question by prescription, and secondly, a private right of way in the defendants by prescription.

A right of way may be acquired by prescription where a user thereof for the prescriptive period is accompanied by the elements necessary to give an easement by prescription.[1] An easement by prescription is based upon the presumption that the right has been granted, but that the grant has been lost; and generally it may be acquired by the exclusive and uninterrupted use and enjoyment of the right for a period of time analogous to the time sufficient to acquire title to the soil by adverse possession.[2] In New York this period was reduced, in 1932, to fifteen years.[3]

The use and enjoyment which will give title by prescription to an easement or other incorporeal right is substantially the same in quality and characteristics as the adverse possession which will give title to real estate.[4] That is, it must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period and while the owner of the servient tenement is under no legal disability to assert his rights or to make a grant.[5]

A prescriptive right is not looked upon with favor by the law, and it is essential that *all* of the elements of use and enjoyment, stated above, concur in order to create an easement by prescription.[6]

It is generally stated that in order for a user to ripen into a prescriptive right it must not only be under a claim of right, but must also be with the knowledge and acquiescence of the owner of the servient tenement,[7] as such acquiescence is the foundation of the right by prescription, and anything which disproves acquiescence rebuts the presumption of a grant.[8]

It is not necessary, in the absence of a statute, for the party claiming an easement to make an express declaration of his claim, but it is not sufficient that the claim of right exists only in the mind

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[1] Olofson v. Malpede, 127 Misc. 813, 216 N. Y. Supp. 695 (Sup. Ct. 1926).
[2] Powlowski v. Mohawk Golf Club, 204 App. Div. 200, 198 N. Y. Supp. 30 (3d Dep't 1923), *reversing* 119 Misc. 139, 195 N. Y. Supp. 788 (Sup. Ct. 1922); Moore v. Day, 199 App. Div. 76, 191 N. Y. Supp. 731 (3d Dep't 1921), *aff'd*, 235 N. Y. 554, 139 N. E. 732 (1921).
[3] N. Y. CIV. PRAC. ACT §§ 34-37.
[4] Zbyszinsky v. Lopopolo, 112 Pa. Super. 68, 170 Atl. 362 (1934).
[5] See Note, 28 C. J. S., EASEMENTS § 10 (1941).
[6] Moore v. Day, 199 App. Div. 76, 191 N. Y. Supp. 731 (3d Dep't 1921), *aff'd*, 235 N. Y. 554, 139 N. E. 732 (1921).
[7] Abrams v. State, 13 N. Y. S. 2d 306 (Ct. Cl. 1939).
[8] Dartnell v. Bidwell, 115 Me. 227, 98 Atl. 743 (1916).

of the person claiming it. It must in some way be communicated or asserted in such a manner that the owner may know of it. This knowledge may be actual or it may be implied from a use which is so visible, open and notorious that such notice or knowledge will be presumed.[9] If such use is made of the easement as to constitute a claim of right, then the owner of the land is put on inquiry as to the character of the use. The owner in such case, is charged with notice irrespective of whether he had actual notice or not.[10]

Ordinarily, if a claimant uses the premises and the acts constituting the user are of such nature and frequency as to give notice to the landowner of the right being claimed against him, the user will be considered continuous. Nevertheless, there must be repeated acts of such character and at such intervals as will afford a sufficient indication to the owner that an easement is claimed.[11] Mere occasional acts of trespass do not satisfy the rule that the user must be continuous, even though they are repeated over a long period of time.[12]

In order to be adverse, the user must be exercised under a claim of right, and *not* as a mere privilege or license revocable at the pleasure of the owner of the land, and such claim must be known to the owner.[13] A permissive use of the land of another, that is, a use or license exercised in subordination to the other's claim and ownership, is not adverse, and cannot give an easement by prescription no matter how long it may be continued,[14] since a mere lapse of time under such circumstances raises no presumption of a grant. The owner may prohibit the use or discontinue it altogether at his pleasure, so long as it is merely permissive. Furthermore, the rule that precludes a permissive use from ripening into a right to continued enjoyment applies whether the permission, consent, or license is expressly given, or whether it is implied;[15] and it applies to use by a grantee of the original licensee, even though such grantee has no notice of the license.[16]

The fact that a user is permissive in its inception does not in itself prevent it from subsequently becoming adverse and ripening

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[9] Sewall v. FitzGibbon, 233 App. Div. 70, 251 N. Y. Supp. 599 (3d Dep't 1931).

[10] Redemeyer v. Carroll, 21 Cal. App. 2d 217, 68 P. 2d 739 (1937).

[11] Dartnell v. Bidwell, *supra* note 8.

[12] Downie v. City of Renton, 167 Wash. 374, 9 P. 2d 372, *reversing* 162 Wash. 181, 298 Pac. 454 (1931).

[13] Van Overbeek v. Batsleer, 191 N. Y. Supp. 49 (Sup. Ct. 1921).

[14] Pirman v. Confer, 273 N. Y. 357, 7 N. E. 2d 262, 111 A. L. R. 216, *modifying* 247 App. Div. 839, 286 N. Y. Supp. 457 (3d Dep't 1936), *reargument denied*, 274 N. Y. 570, 10 N. E. 2d 556 (1937), *motion granted*, 275 N. Y. 624, 11 N. E. 2d 788 (1937); *In re* Scott, 200 App. Div. 599, 193 N. Y. Supp. 403 (1st Dep't 1922).

[15] Moore v. Day, 199 App. Div. 76, 191 N. Y. Supp. 731 (3d Dep't 1921), *aff'd*, 235 N. Y. 554, 139 N. E. 732 (1921).

[16] Luce v. Carley, 24 Wend. 451, 35 Am. Dec. 637 (1840).

into an easement by prescription.[17] If a licensee renounces the authority under which he began the use and claims it as his own right, and that fact is brought to the knowledge of the licensor, after which the licensee continues the use under such adverse claim exclusively, continuously and uninterruptedly for the full prescriptive period, the right will become absolute.[18] Nevertheless, if a use begins as a permissive use it is presumed to continue as such, and in order to transform it into an adverse one there must be a distinct and positive assertion of a right hostile to the rights of the owner, and such assertion must be brought to the attention of the owner,[19] and the use continue for the full prescriptive period under the assertion of right, excluding the time under which the user was permissive. The rule is not affected by the fact that the privilege is claimed by successors in interest of the party to whom the permissive use was originally given.[20]

In the principal case, it was established by a fair preponderance of evidence that the defendants' predecessors in title had for over fifteen years traveled across the plaintiff's strip of land for the purpose of drawing coal, wood and furniture to the defendants' house. This use of the alleged right of way was with the consent of the plaintiff's predecessors in title and defendants did not establish a right of way by prescription, no matter how long it was used, because the permissive character of the use was not repudiated.[21]

Where a landowner opens up a way on his own land for his own use and convenience, the mere use thereof by another, under circumstances which do not injure the road nor interfere with the owner's use of it, will not in the absence of circumstances indicating a claim of right be considered as adverse, and will not ripen into a prescriptive right no matter how long continued.[22]

Insofar as public acquisition by prescription is concerned, there was not such a continuous use by the public of these lands in the immediate rear of plaintiff's premises to warrant a finding that the public in general acquired a right of way over it. While several persons walked across this strip of land for the purpose of going to and from the trade center of the village, it was so used by the defendants' predecessors in title with the express permission and consent of the plaintiff's predecessors in title. It was not used by the public in general and the use by the various persons was not of such a nature as to establish a right of way by prescription. An unorganized

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[17] Sallan Jewelry Co. v. Bird, 240 Mich. 346, 215 N. W. 349 (1927).
[18] Jensen v. Gerrard, 85 Utah 481, 39 P. 2d 1070 (1935).
[19] Moore v. Day, *supra* note 15.
[20] Redemeyer v. Carroll, *supra* note 10.
[21] Moore v. Day, *supra* note 15.
[22] Sewall v. FitzGibbons, 233 App. Div. 70, 73, 251 N. Y. Supp. 599 (3d Dep't 1931); Sebring v. Fitzgerald, 142 Misc. 474, 254 N. Y. Supp. 679 (Sup. Ct. 1931).

public cannot acquire a right of way by prescription,[23] and defendants did not acquire a right of way by prescription because they used it in common with the public.[24]

Defendants in the principal case also sought to establish a grant of a right of way across the plaintiff's premises but failed to prove a valid written conveyance of the alleged easement so as to satisfy the Statute of Frauds.[25] The clause "together with the appurtenances and all the estate and rights of the parties of the first part in and to said premises" in the defendants' deed and the deeds of their predecessors in title, was not a grant of the right of way. Except for necessities, "appurtenances" include only such things as are contained within the boundaries of the land demised.[26] Nor can a permanent interest in land, even by way of easement, be created by or under a parol license.[27]

The burden of proving all the facts necessary to constitute adverse possession is upon the one who asserts it,[28] and the defendants failed to do so on either of the grounds claimed.

As to the propriety of the remedy sought by plaintiff, it has been held in *Sadlier v. City of New York*,[29] that in a suit to restrain a continuous trespass, which the facts in the principal case have been held to constitute, the court should grant all the relief that the nature of the action and facts demand.

This decision follows the established pattern of law both in New York and elsewhere in reference to right of ways by prescription or grant.

M. M.

SERVICE OF CIVIL PROCESS ON SUNDAY.—Petitioners, who were personally served with process on Sunday in a civil action, appeared specially to quash the summons and the return of service indorsed upon it, contending the court lacked personal jurisdiction, as the service on Sunday was void. Motion to quash was denied and petitioners seek a writ to prohibit the civil action. A statute provides, with a few enumerated uncommon exceptions into which petitioners do not fall, that service of civil process on Sunday is void. *Held*, writ of prohibition granted. *State ex rel. Staley, et al. v. Hereford, Judge, et al.*, — W. Va. —, 45 S. E. 2d 738 (1947).

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[23] See Note, 28 C. J. S., EASEMENTS § 8 (1941).

[24] JONES, TREATISE ON THE LAW OF EASEMENT § 274 (1st ed. 1898).

[25] N. Y. REAL PROP. LAW § 242.

[26] Van Roo v. Van Roo, 268 App. Div. 170, 49 N. Y. S. 2d 220 (4th Dep't 1944).

[27] Selden v. Delaware & Hudson Canal Co., 29 N. Y. 634 (1864).

[28] Sewall v. FitzGibbon, *supra* note 22.

[29] 104 App. Div. 82, 93 N. Y. Supp. 579 (2d Dep't 1905), *aff'd*, 185 N. Y. 408, 78 N. E. 272 (1906).