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Article 28

Real Property--Easements--Law of Custom--Injunction (Gillies et al. v. Orienta Beach Club and Orienta Realty Corporation (Sup. Ct., Westchester Law Journal, Nov. 29, 1935))

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examination, where it appears that she already submitted herself to the examination of competent physicians whose testimony can be readily obtained and she waives the statutory privilege as to the testimony of said physicians acquired in attending a patient in a professional capacity.[7]

M. B. G.

REAL PROPERTY—EASEMENTS—LAW OF CUSTOM—INJUNCTION. —The complaint seeks to enjoin the defendants from interfering with the use by the plaintiffs (and others) of a certain beach, alleging a right in the nature of an easement in their favor as residents of the locality arising from the customary use of the land for a period of more than twenty years. The plaintiffs do not claim that the right is an appurtenant easement by express grant, implication, dedication or prescription or an easement in gross running to particular persons. Defendants moved to dismiss the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. This motion was granted on the theory that no such right of custom can be created in New York and that the doctrine of the English law of custom (predicated upon custom or use from time immemorial) is not recognized here. *Gillies et al.* v. *Orienta Beach Club and Orienta Realty Corporation* (Sup. Ct.), reported in the Westchester Law Journal, Nov. 29, 1935.

Custom is unwritten law established by common consent and uniform practice from time immemorial and is local having respect to inhabitants of a particular district.[1] It is deemed to have had its origin in a lost governmental act.[2] An easement, on the other hand, is an interest in another's land and must be founded upon an express or implied grant or upon prescription which presupposes a grant.[3] Rights in real property arising out of custom are not favored in our

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in part and retain it in part. The whole question turns upon the legal consequences of the plaintiff's act in calling one of the physicians as a witness. She then completely uncovered and made public what before was private and confidential. It amounted to a consent on her part that all who were present at the interview might speak freely as to what took place. The seal of confidence was removed entirely, not merely broken into two parts and one part removed and the other retained."

[7] Cowen v. Cowen, 125 Misc. 755, 211 N. Y. Supp. 840 (1925); Yelin v. Yelin, 142 Misc. 533, 255 N. Y. Supp. 708 (1931).

[1] Lindsay, Gracie & Co. v. Cusimano, 12 Fed. 504 (C. C. E. D. La. 1882); Albright v. Cortright, 64 N. J. L. 330, 45 Atl. 634 (1900).

[2] United States v. Arredondo, 31 U. S. 691 (1832).

[3] Canfield v. Ford, 28 Barb. 336 (N. Y. 1858); White v. Manhattan Ry., 139 N. Y. 19, 34 N. E. 887 (1893); Emerson v. Bergius, 76 Cal. 197, 18 Pac. 264 (1888).

country.[4] This is logically so since this is a new country and the records of our governmental acts have been comparatively well kept. Prescriptive right is based on the theory of a lost grant [5] which is almost as difficult to support logically in this, a new country, as a lost governmental act. Where a group of people is concerned, a more logical basis to establish the right would be dedication. In order to constitute a dedication there must be clear intent,[6] but there need not be a grantee in existence capable of taking the grant.[7] It is submitted that intent could be inferred from long user as easily as a lost grant or governmental act. It follows therefore, if the plaintiffs here had been organized as a village (capable of taking the grant), or if the claim had been based on dedication, there would have been grounds to overrule the motion to dismiss the complaint but with custom alleged as the sole basis of the right it is hard to find fault with the decision.

G. F. J.

REAL PROPERTY—ESTATES ON CONDITION—EVIDENCE.—The plaintiff's grandfather deeded property to the defendant on the express condition that a church be built thereon and devoted in perpetuity to divine worship. Right of re-entry was reserved in case of breach. After complying for a number of years with the grantor's wishes, the defendant leased the premises. While the lessee was in possession the interior of the church was remodeled. A dance floor was laid. A part of the new furnishings consisted of a pool table, a card table and a bowling alley. Beer and liquor were dispensed therein and on several occasions the premises were subleased for political rallies, boxing bouts and smokers. In an action in ejectment brought by the heirs of the grantor, *held,* plaintiff entitled to premises, as this was a conveyance on condition subsequent, and the court will take judicial notice that the use to which the premises were put was violative of the express condition in the deed. *Wagstaff* v. *Ingersoll* et al., 156 Misc. 24, 279 N. Y. Supp. 518 (Sup. Ct. 1935).

Whenever possible the law favors the settling of title and in the absence of a right to re-enter reserved in the deed, the courts will

[4] Post v. Pearsall, 22 Wend. 425 (N. Y. 1838); Graham v. Walker, 78 Conn. 130, 61 Atl. 98 (1905); Ackerman v. Shelp, 8 N. J. L. 125 (1825); Albright v. Cortright, 64 N. J. L. 330, 45 Atl. 634 (1900).

[5] Moore v. Day, 199 App. Div. 76, 191 N. Y. Supp. 731, *aff'd,* 235 N. Y. 554, 139 N. E. 732 (1921).

[6] Holdane v. Trustees of Village of Cold Spring, 21 N. Y. 474 (1860); N. Y. Cent. & Hud. River R. R. v. Village of Ossining, 207 N. Y. 648, 100 N. E. 1131 (1910); *In re* West 172d St., New York City, 171 App. Div. 242, 157 N. Y. Supp. 399 (1st Dept. 1916).

[7] City of Cincinnati v. White, 31 U. S. 431 (1832); Buffalo, L. & R. Ry. v. Hoyer, 214 N. Y. 236, 108 N. E. 455 (1915).