NEW MEXICO LAW REVIEW

Volume 9
Issue 2 *Summer 1979*

Summer 1979

Prescriptive Easement in New Mexico

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PRESCRIPTIVE EASEMENT IN NEW MEXICO

In *Garmond v. Kinney*,[1] the New Mexico Supreme Court held that an easement by prescription had not been acquired where land use was permissive and in common with that of the general public. This decision is the latest in a line of decisions which have recounted the elements necessary to establish an easement by prescription. The *Garmond* decision reflects a restriction of the elements upon which prescriptive easements will be granted. This comment will discuss the history and development of prescriptive easements in the common law and in New Mexico and will examine the requisite elements for their establishment.

THE FACTS IN *GARMOND v. KINNEY*

Stella Garmond and Beverly Flores, sisters, sued Edward Kinney seeking a prescriptive easement over land owned by Kinney Brick Company and used for mining clay. Garmond and Flores had acquired title to the land from their mother, Alcie Ingram Smith. In 1953 they subdivided the land into San Miguel Acres. Plaintiffs still own many of the 136 lots in the subdivision.

The subdivision was served by an access road off what is presently Highway 14. The road had been continuously used in its present location for over fifty years, first by Alcie Smith and then by plaintiffs. In 1953 the United States Forest Service granted Alcie Smith a Special Use Permit to use and improve the road. The permit's issuance was conditional upon Mrs. Smith's obtaining permission from Kinney Brick Company to use the road. This permission was granted to Mrs. Smith's son-in-law and agent. A letter was written by an agent of Kinney Brick Company to Mrs. Smith confirming the permission. The road was used by lot owners in San Miguel Acres, the Campfire Girls, and the general public in addition to the plaintiffs.

In 1975 Kinney Brick Company erected a fence across the road. Plaintiffs filed suit as a result of this action. The District Court of Bernalillo County found that the plaintiffs had established a prescriptive easement by use across the Kinney land. Defendant appealed.

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1. 91 N.M. 646, 579 P.2d 178 (1978).

The New Mexico Supreme Court held that a prescriptive easement had not been established because plaintiffs' use had been permissive.[2]

HISTORY OF PRESCRIPTIVE EASEMENTS IN THE COMMON LAW AND IN NEW MEXICO

The definition of prescription has been expressed in many different ways. Thompson defined it as "a mode of acquiring title to incorporeal hereditaments[3] by immemorial or long continued enjoyment."[4] Reeves has written that it is the enjoyment of an incorporeal hereditament for so long a time that "the memory of man runneth not to the contrary."[5] The New Mexico Supreme Court in *Hester v. Sawyers*[6] took the functional approach and defined prescription as "a mode of acquiring title to incorporeal hereditaments by continued use, possession or enjoyment had during the time and in the manner fixed by law."[7]

The word prescription is a derivative of *praescriptio* meaning "something written first, above, or before."[8] At Roman Law the praescriptio directed the trier of fact to dispose of any preliminary matters before coming to the main issue of a land dispute.

English common law on prescription developed in a manner similar to the *longa possessio* of Roman Law. The *longa possessio* was a doctrine used by the praetors as a base for acquiring real servitudes.[9] It is not clear whether the common law development was derived from the Roman doctrine or was a separate but parallel development. English judges began to apply prescription in the twelfth or thirteenth century. Bracton wrote before 1260 A.D. that a lapse of time could create rights, that prescriptive use must be *"nec vi nec clam nec precario,"*–open as of right–and that *longum tempus*–a long period of time–was necessary.[10]

2. The facts were found in the briefs and court record of Garmond v. Kinney as well as the opinion.

3. Those which consist of legal rights capable of being inherited but not of themselves tangible or visible. Black's Law Dictionary, 859 (4th ed. 1957).

4. G. Thompson, Commentaries on the Modern Law of Real Property, §335 at 150 (Repl. Vol. 2, 1961).

5. A. Reeves, A Treatise on the Law of Real Property, §154 at 193 (1909) (quoting Lomax, Dig. 614, 615).

6. 41 N.M. 497, 71 P.2d 646, 112 A.L.R. 536 (1937).

7. *Id.* at 501, 71 P.2d at 649, 112 A.L.R. at 540 (1937) (quoting 1 Thompson on Real Property §372 (1924)).

8. Opala, *Praescriptio Temporus And its Relation to Prescriptive Easements in the Anglo-American Law,* 7 Tulsa L.J. 107, 112 (1971).

9. *Id.* Real servitudes allow the owner of an estate to enjoy the benefit and use of a neighboring estate. Black's Law Dictionary, 1535 (4th ed. 1957).

10. *Id.* at 113-15.

The time period used by English courts to establish an easement by prescription was fixed in the Statute of Westminster I in 1189.[11] If use could be traced back to the time of Richard I's Coronation, a prescriptive right was granted. The widely used phrase to support a claim of prescription was "excedit memoriam hominum," beyond human memory, or "time whereof the memory of man runneth or knoweth not to the contrary."[12]

As time passed, the prescriptive period lengthened and eventually became too long to prove. During the reign of Henry VIII the requisite period of time was fixed at sixty years.[13] Eventually this sixty-year period was found too burdensome and Blackstone created the fiction of the lost grant.[14] Prescriptive right was based on this "grant" and by 1623 the statutory period for the use had been reduced to twenty years. Use during this twenty-year period created a presumption that a grant, which had been lost and could not be produced as evidence, was the basis for a right by prescription.[15] In 1786 Lord Mansfield declared that a twenty-year period of use created "such decisive presumption of a right by grant or otherwise that, unless contradicted or explained, the jury ought to believe it."[16] Apparently the English courts were reluctant to admit they were making law and resorted to the fictional lost grant.[17] In 1832 the Prescription Act[18] fixed the time period at twenty years and listed requisites to a prescriptive right.[19]

In New Mexico, as well as other jurisdictions across the country, the fiction of the lost grant was accepted as the basis of a claim of easement by prescription. "The presumption of the grant of an easement, when indulged, is because the conduct of the other party, in submitting to the use for so long a time without objection, cannot be accounted for by any other hypothesis."[20] The legal fiction of the lost grant could not be rebutted by evidence that no grant was ever made.[21] Later, the trend was to abandon the fiction of the lost grant

11. 3 Edw. I ch. 39, Thompson §337 at 171 (Repl. Vol. 2, 1961).
12. Opala, *supra* note 8, at 115.
13. Reeves, *supra* note 5, §154 at 193.
14. Romans v. Nadler, 14 N.W.2d 482 (Minn. 1944).
15. Reeves, *supra* note 5, §154 at 194.
16. Commentary, *Interruption of Use: A Prescription For Prescription,* 25 U. Fla. L. Rev. 204, 206 (1972).
17. Simonton, *Fictional Lost Grant in Prescription—A Nocuous Archaism,* 35 W. Va. L.Q. 46, 50 (1928).
18. Reeves, *supra* note 5, §154 at 194.
19. *Id.*
20. Thompson, *supra* note 4, §337 at 176.
21. Vigil v. Baltzley, 79 N.M. 659, 448 P.2d 171 (1968); Sanchez v. Dale Bellamah Homes of New Mexico, Inc., 76 N.M. 526, 528-29, 417 P.2d 25, 27 (1966); Hester v. Sawyers, 41 N.M. 497, 503-05, 71 P.2d 646, 649-50, 112 A.L.R. 536 (1937).

and to treat the right as being acquired by statute in a way similar to acquisition of title by adverse possession.[22] Confusion exists not only as to the theory upon which prescription is based, but also as to the legal requisites and consequences of prescription. There is some doubt as to whether prescription exists as a separate common law doctrine, or whether it is dependent entirely upon statutes of limitation, and the extent to which it is a mere corollary to the doctrine of adverse possession.[23] This confusion appears in New Mexico as well as other jurisdictions, although the lost grant doctrine, and not the statute doctrine, was affirmed in recent case law.[24]

REQUISITE ELEMENTS FOR PRESCRIPTIVE EASEMENT IN NEW MEXICO

The leading decision concerning prescriptive easement in New Mexico is *Hester v. Sawyers,*[25] an action brought to establish an easement by prescription across an adjoining landowner's property. The appellant's land was fenced on three sides and had a road across it which appellee began to use when he purchased his tract. Later, the appellee erected a fence between the two properties and graded, maintained, and regularly used a new road parallel to the old. Appellee, as well as his tenants, visitors, and those who had business with him, used the new road without permission of appellant, and kept it graded and in good condition. When appellant obstructed the road with a fence, appellee brought suit.

The court found that permission existed to use the old road but not the new one. When appellee established, maintained, and used the new road continuously for more than ten years, his use was presumed hostile and adverse, and an easement by prescription was established.

The court identified the requisite elements of prescriptive easement. "The use necessary to acquire title by prescription must be open, uninterrupted, peaceable, notorious, adverse, under a claim of right, and continue for a period of ten years with the knowledge or imputed knowledge of the owner."[26] The statutory period for adverse possession was ten years and the court relied on that statute to

22. Maestas v. Maestas, 50 N.M. 276, 175 P.2d 1003 (1946); Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646, 112 A.L.R. 536 (1937).

23. Haines v. Galles, 76 Wyo. 411, 303 P.2d 1004 (1956).

24. Vigil v. Baltzley, 79 N.M. 659, 660-61, 448 P.2d 171, 172-73 (1968); Sanchez v. Dale Bellamah Homes of New Mexico, Inc., 76 N.M. 526, 528, 417 P.2d 25, 27 (1966); Castillo v. Tabet Lumber Co., 75 N.M. 492, 494, 406 P.2d 361, 362 (1965); Hester v. Sawyers, 41 N.M. 497, 503, 71 P.2d 646, 650, 112 A.L.R. 536, 541 (1937).

25. Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646, 112 A.L.R. 536 (1937).

26. *Id.* at 504, 71 P.2d at 651, 112 A.L.R. at 542.

determine the necessary period of time for a right by prescription to mature. The court displayed the confusion of the courts nationwide by relying on the statute on adverse possession without explaining the theory behind its use.

Two elements set out by the court in *Hester* have concerned the courts in subsequent cases. The problems addressed by the courts have centered on the elements of adverse use under a claim of right and notice to the owner of the servient estate. A discussion of the judicial decisions on these issues in an attempt to clarify their present meanings follows.

ADVERSE USE UNDER A CLAIM OF RIGHT

In *Hester* the court found that the owners of large bodies of private, unenclosed land had allowed persons to pass over them and that individual use of such a way or road could not create an easement by prescription. The court recognized that while a presumption of adverse use would be found for enclosed tracts of land, an exception would arise whenever an easement by prescription was claimed over large, unenclosed areas. In such instances permission would be presumed and would defeat a claim of easement by prescription because the use of the area would not be adverse and the user would not be making a claim of right.

In *Wilson v. Williams*[27] the court reaffirmed the *Hester* opinion. Wilson sued Williams to enjoin him from obstructing a road on Williams' property which Wilson claimed was public. Williams came into possession of his land by homestead. Before he acquired the property there had been continuous use of the road for thirty-five years by the public. The court held that the requisite period of use to establish an easement by prescription was determined by the statute of limitations for adverse possession. The court found that the prescriptive use had matured on the land long before it had become private land through homestead and a settler took the land subject to any easements already on it. The court also reaffirmed the holding in *Hester* that a presumption of adverse use did not arise when the land was open and unenclosed.

In *Mutz v. LeSage*[28] plaintiff sued for a declaratory judgment that an easement by prescription had been created over a road across defendant's fenced land. The court affirmed the decision below that defendant's land had been fenced since 1907 and a presumption of permissive use did not apply to enclosed lands. Plaintiff and his

27. 43 N.M. 173, 87 P.2d 683 (1939).
28. 61 N.M. 219, 297 P.2d 876 (1956).

father had used the road since 1920 and adverse use was presumed.

A subsequent case involved an agreement entered into by plaintiff and defendant for the common use of an alleyway between their properties.[29] Later the contract was deemed void because it lacked the signatures of their wives. Plaintiff's tenant erected a building which encroached upon the alleyway and defendant responded by blocking the alley. When plaintiff sued to enjoin defendant's action the court looked to the voided contract and held that a prescriptive easement had not been established because the easement at its inception had been permissive. The court held that "a prescriptive right cannot grow out of a strictly permissive use, no matter how long the use."[30]

In *Castillo v. Tabet Lumber Co.*[31] plaintiff used a road across defendant's property for over sixty years. When defendant barricaded the road plaintiff brought suit to establish an easement by prescription. The New Mexico Supreme Court affirmed the trial court's decision for plaintiff. Defendant's lot was not a large tract of open and unenclosed land and plaintiff's use was not presumed to be permissive. The court also found that plaintiff did not have to be the sole user of the road; others crossing defendant's lot for their own purposes did not defeat plaintiff's claim of easement by prescription.

In *Sanchez v. Dale Bellamah Homes of New Mexico, Inc.*[32] the plaintiff, Sanchez, owned a twenty-acre parcel of land south of Santa Fe. His access to the highway was across a vacant tract of land which was subsequently purchased by defendant, who developed the land and cut off Sanchez's access. The court found that a prescriptive easement had been established. It held that use was presumed to be adverse when there was no evidence as to how it began. Because the Bellemah tract was relatively small, and the road over it was only one-half mile long, the exception for open and unenclosed lands did not apply. In keeping with the majority of jurisdictions, the court held that "a prescriptive right is founded upon a presumption of a grant even though there may never have been one."[33] The court followed *Hester* and stated that the presumption of a grant was conclusive.

In *Vigil v. Baltzley*,[34] defendant locked gates and fences on his land barring plaintiff's various uses of herding cattle, hunting and fishing. The court found defendant's property enclosed and refused

29. 71 N.M. 454, 379 P.2d 443 (1963).
30. *Id.* at 458, 379 P.2d at 445.
31. 75 N.M. 492, 406 P.2d 361 (1965).
32. 76 N.M. 526, 417 P.2d 25 (1966).
33. *Id.* at 528, 417 P.2d at 26.
34. 79 N.M. 659, 448 P.2d 171 (1968).

to apply the exception of permission. It quoted from the *Castillo* opinion:

> In *Hester v. Sawyers*, supra (citations omitted) it was determined that title to an easement for a right of way could be acquired by prescription; that the right is obtained by use alone and is based upon a presumed grant, not upon statute; that under our law the period of use must be ten years, the same as the limitation period provided by law applicable to adverse possession of land; that the presumption of a grant of the right is conclusive upon the passage of ten years of open, uninterrupted, peaceable, notorious and adverse use under a claim of right with knowledge or imputed knowledge of the owner; that when such use is present for the requisite period the owner is charged with knowledge of it, and acquiescence is implied; and that the right may arise even though it was originally permissive, if it subsequently became adverse and the adverse use continued for a full ten years.[35]

The court found that an easement by prescription had been established and affirmed the judgment for plaintiff.

Garmond v. Kinney[36] is the latest decision by the New Mexico Supreme Court dealing with permissive use. Because Kinney Brick Company had given Alcie Smith permission to use the road across its land, the court held that the continuous use for the ten-year period was not adverse and under a claim of right and a prescriptive easement was not established.

The court also concluded that the use of the road by the general public defeated an adverse claim, notwithstanding the *Castillo* decision which had held that use by others for their own purposes would not defeat a claim of prescriptive easement.[37] The court followed the decision in *Martinez v. Mundy*[38] which held that an easement by prescription could not be acquired "by usage 'common with and similar to that of the general public.' "[39] The *Garmond* court went on to find that "based on the evidence in the record, plaintiffs failed to show that they used the roadway adversely to Kinney's interest."[40]

NOTICE

New Mexico's approach to the notice requirement is similar to its treatment of notice for adverse possession. Either real or constructive

35. *Id.* at 660, 448 P.2d at 172.
36. 91 N.M. 646, 579 P.2d 178 (1978).
37. 75 N.M. 492, 406 P.2d 361 (1965).
38. 61 N.M. 87, 295 P.2d 209 (1956).
39. 91 N.M. at 647, 579 P.2d at 179.
40. *Id.*

notice will suffice to put the owner of the servient estate on guard to the use being made of his property. In *Southern Union Gas Co. v. Cantrell*[41] the prior owner of Cantrell's land granted a perpetual right to the Gas Company to construct and maintain a main gas transmission line for a consideration of $25.00. The written grant was lost and never recorded. Defendant took the land without notice of the easement. There was an absence of constructive notice since the easement was neither recorded nor visible. The court held that Cantrell, as a bona fide purchaser, took the land free of the easement. It stated that "it is to be seen that a user cannot be termed 'adverse' in the required sense when the one against whom the right is claimed . . . could never have protested the exercise of the right, because ignorant of the fact that any such right was claimed."[42] In *Castillo,*[43] the court said that "when such use is present for the requisite period the owner is charged with knowledge of it and acquiescence is implied . . . ."[44] In *Sanchez,*[45] the court charged the defendant with knowledge of the road across its property because a visual confirmation could have easily been made. Similarly, in *Vigil v. Baltzley,*[46] the court quoted *Sanchez* and held that "the owner is charged with knowledge of an open, adverse, notorious, peaceable, and uninterrupted use from which acquiesence is implied."[47]

Plaintiff sued for a declaratory judgment that he had established an easement by prescription over defendant's fenced lands in *Mutz v. LeSage.*[48] Defendant had fenced his lands after a road had been established across them, but plaintiff's use began subsequent to the construction of the fences. The court applied the presumption of adverse use and further held that the well-defined road was enough to charge defendant with notice.

In *Sedillo Title Guaranty, Inc. v. Wagner,*[49] the Wagners attempted to transfer plaintiff's original easement from the northerly to the southerly end of their tract. The Wagners had actual and constructive knowledge of the recorded easement when they purchased the land. The court held that "the location of an easement when once established cannot be changed by either party without the other's consent except under the authority of a grant or reservation to this ef-

41. 56 N.M. 184, 241 P.2d 1209 (1952).
42. *Id.* at 193, 241 P.2d at 1215.
43. 75 N.M. 492, 406 P.2d 361 (1965).
44. *Id.* at 494, 406 P.2d at 362.
45. 76 N.M. 526, 530, 417 P.2d 25, 28 (1966).
46. 79 N.M. 659, 448 P.2d 171 (1968).
47. *Id.* at 661, 448 P.2d at 173.
48. 61 N.M. 219, 297 P.2d 876 (1956).
49. 80 N.M. 429, 457 P.2d 361 (1969).

fect."[50] The court also held that " 'the owner of the servient tenement is charged with notice of facts which an inquiry would have disclosed.' "[51]

CONCLUSION

Prescriptive easement evolved through Roman and common law to the modern claim of title that exists today. It is a creature of both the courts and the legislatures and has the dubious distinction of being justified by the theory of a fictional lost grant. Its purpose is to legally recognize a long-established use even to the detriment of the owner in fee. Prescriptive easement increases the productivity and usefulness of the land and it is doubtful that the doctrine will ever be abolished.

In light of the fact that with every claim asserted a new fact pattern emerges, courts will continue to determine whether another easement by prescription has been established. *Garmond v. Kinney* is the latest decision in a series of opinions that have defined and redefined the elements necessary to establish an easement by prescription.

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50. *Id.* at 431, 457 P.2d at 363.

51. *Id.* (quoting from Sanchez v. Dale Bellamah Homes of New Mexico, Inc., 76 N.M. 526, 530, 417 P.2d 25, 28 (1966).