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Use Under Void Parol Grant Ripening into Easement by Prescription - Phillips v. Phillips

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Use Under Void Parol Grant Ripening Into Easement By Prescription

Phillips v. Phillips[1]

Theodore Phillips and his wife filed a bill of complaint against his mother, Mrs. Margaret Phillips, and his brother, Vernon Phillips, to enjoin the obstruction by defendants of a driveway on the adjoining land of the defendants, the use of which plaintiffs claimed by prescription. The defendants claimed that the use made of the driveway was permissive and not adverse, and the Chancellor granted the defendants' prayer for a directed verdict. From a decree dismissing the bill, the plaintiffs appeal.

Mrs. Phillips and her husband, since deceased, owned a tract of land improved by a dwelling, where they resided. In July, 1935, they conveyed Lot 20, carved out of the tract, to Theodore and his wife. In 1941, the remainder of the tract, Lot 18, was conveyed to Mrs. Phillips and her son, Vernon, as joint tenants. Prior to 1935, there was an existing driveway located on what became Lot 18, near the dividing line between Lot 18 and Lot 20. Theodore constructed a house and separate garage on Lot 20, and moved in during November, 1935. He testified that at the time of the conveyance of Lot 20, before the construction of the garage began, his mother suggested that he face the garage towards the existing driveway to save the expense of a new driveway. He suggested that perhaps someday she might sell the property and then the driveway would be closed to him. She replied:

> " 'Aw fiddlesticks, you know better than that. I'll never leave here until they carry me off the place. You can use that driveway and you can always use it and nobody will ever stop you from using it, so you go ahead and build your garage there.' "[2]

[1] 215 Md. 28, 135 A. 2d 849 (1957), conc. op. 37, 136 A. 2d 862.
[2] *Ibid*, 32.

He paved the driveway and used and maintained it at his own expense since 1935. For about 15 years, he used it to transport building materials used in his business, and to store them there, contrary to his mother's wishes. In December, 1955, Theodore received a letter from his mother directing him to vacate the driveway, as some day the property would belong to his brother Vernon, and she did not want any misunderstanding after she died. Neither she nor Vernon had ever before objected to his use of the driveway.

The Chancellor found that the use was open and notorious, continuous and uninterrupted, for more than 20 years, but had been neither adverse nor under a claim of right. The Court of Appeals held that on the facts of the case, the use was adverse and under a claim of right, and remanded the case for further proceedings. The Court said that while generally a permissive use can never ripen into an easement by prescription, this rule does not apply where there has been an attempt to grant an easement which is void because of the Statute of Frauds. In such cases it is a question of fact whether the oral grant is intended to convey an irrevocable right or a mere license. The Court pointed to the mother's statement as clearly indicating that Theodore's use would never be interfered with by her or anyone else. They also felt that the fact that he built the garage so that it faced the driveway, and paved and maintained it, was inconsistent with a belief on his part that permission could be withdrawn at any time.

This is the first Maryland case clearly holding that a use under a void attempt to grant an easement was adverse and not permissive, although the rule was stated with approval in two previous Maryland cases. In *Clark v. Henckel*,[3] a case where the parties attempted to create mutual cross easements in an alley, part of which was on plaintiff's land and part on defendant's, by oral agreement, the Court of Appeals recognized the rule that the use under an oral agreement to create an easement was adverse, but seemed to base their decision upon part performance of the agreement taking it out of the Statute of Frauds. In *Lichtenberg v. Sachs*,[4] plaintiff and his predecessors had been using a road over defendant's land for over 50 years, and the defendant claimed the use was permissive. The Court felt that there was no evidence that the use was ever permissive, but said:

[3] 26 A. 1039 (Md., 1893).
[4] 200 Md. 145, 88 A. 2d 450 (1952).

> "If they got any permission to use the Robinson property, they probably thought it was irrevocable. An oral permission, believed to be irrevocable but unenforceable by reason of the Statute of Frauds, may evidence a claim of right and indicate that user was adverse and not permissive."[5]

The rule applied in the *Phillips*[6] case seems to have been approved in every case where the issue has arisen.[7] As one writer has said:

> "The authorities appear to be unanimous in supporting the rule that the parol conveyance of an easement, though void under the statute of frauds, will, if followed by user for the period of prescription, establish a prescriptive title to the easement. At least no decision can be found which in any manner questions this proposition."[8]

The cases are also unanimous in emphasizing that it is not the invalid grant which is the basis of the title, but that the invalid grant evidences that the use was under a claim of right and not merely permissive.[9] Most cases state the rule as above — *i.e.*, use under an oral agreement, void because of the Statute of Frauds, is adverse and under a claim of right. However, many cases state the rule in terms of a presumption that the use is adverse where it is under an oral agreement. In the first place, most authorities agree that where there is use for the prescriptive period, in the absence of any agreement, it is presumed to be adverse

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[5] *Ibid*, 154.

[6] 215 Md. 28, 135 A. 2d 849 (1957).

[7] See cases cited in 17A AM. JUR. 702, Easements, §86; 13 Ann. Cas. 925; 13 L. R. A. (N.S.) 991; and 4 TIFFANY, REAL PROPERTY (3rd ed., 1939) §1196.

[8] Note in 13 L. R. A. (N.S.) 991.

[9] The case frequently cited for this is Ashley v. Ashley, 4 Gray (70 Mass.) 197, 199 (1855), where Chief Justice Shaw said:

> "Here the question was whether the right of way could be established by twenty years' adverse, continued and uninterrupted enjoyment. The judge, against the objection of the defendant, held that this evidence was competent, not because a right of way can be created by a parol grant but to show that the plaintiff commenced the actual use of the way under a claim of right."

He then went on to say, p. 200:

> "This principle is, that possession under a claim of title, with or without deed, is adverse; and that principle applies as well in cases of easements, incorporeal hereditaments, and interests in land as to the title to land itself."

In Klein v. De Rosa, 137 Conn. 586, 79 A. 2d 773, 775 (1951), the court said:

> "Even in a case where the use began as the result of an ineffective or invalid grant, that fact does not negate its adverse character but tends rather to emphasize that it was made under a claim of right."

and under a claim of right.[10] But in many cases, where the evidence shows that use began under an oral agreement, the courts, instead of stating the rule in terms of void attempt to grant an easement, say that the use is still presumed to be under a claim of right, and the burden of proof is upon the party claiming that the use is permissive.[11] This approach is illustrated by a Kentucky case, *Talbott v. Thorn*,[12] where the court said:

> "And from the fact of the verbal agreement, and the user for 15 years, the presumption arises that the user was a matter of right; and the burden is upon the vendor to rebut this presumption, and to show that the user was, notwithstanding the grant, permissive only, which the appellant has failed to do in this case."[13]

This approach could theoretically make a difference in a close case, where the nature of the agreement was not clear. However, it is doubtful that there is any practical difference between the two approaches, as in almost all of the cases where use under an oral agreement has extended for the prescriptive period, the courts either hold that the agreement was an attempt to create an easement and not a mere revocable license, or that the presumption that the use was under a claim of right was not overcome. Under either approach the courts seem to require clear evidence that the use was under a mere license after the prescriptive period has run.[14]

If there are any difficulties in this area, they are in determining whether the oral agreement was an attempt to create an easement, or was a mere revocable license.

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[10] 17A AM. JUR. 692, Easements, §77. See also Condry v. Laurie, 184 Md. 317, 41 A. 2d 66 (1945); Lyle v. Holman, 238 S. W. 2d 157, 160 (Ky., 1951), where the court said:

> " 'Where the claimant has shown such long continued use, it will be presumed the use was under a claim of right, and the burden is upon the owner of the servient estate to show that the use was merely permissive'."

[11] Checketts v. Thompson, 65 Idaho 715, 152 P. 2d 585 (1944); Coventon v. Seufert, 23 Or. 548, 32 P. 508 (1893); Lechman v. Mills, 46 Wash. 624, 91 P. 11 (1907); Wortman v. Stafford, 217 Mich. 554, 187 N. W. 326 (1922).

[12] 91 Ky. 417, 16 S. W. 88 (1891).

[13] *Ibid*, 89.

[14] Auxier v. Horn, 213 S. W. 100 (Mo., 1919), is one of the few cases where the claim was made that the oral agreement was an attempt to create an easement, but the court held it a mere license, revocable after the prescriptive period had run. The claimant of the easement had originally been the grantor of the land over which he claimed the easement and had made the statement that he was sorry he had not retained an easement when he conveyed the land. In Condry v. Laurie, 184 Md. 317, 41 A. 2d 66 (1945), where the grantees were given a "license" to use a private road, it was held that the use was merely permissive, and no easement was obtained by more than 20 years use of the road.

The usual test mentioned in the cases is what was the intention of the parties.[15] However, some of the cases seem to place more importance on the intent of the grantee in the void grant than that of the grantor,[16] and this is perhaps reasonable, as the important element is whether the use was under a claim of right. The two important factors taken into consideration by the courts in determining the intention of the parties are the language used and the nature of the use.[17] The cases go quite far in holding that certain language or acts indicated an intent to create an easement and not a mere revocable license. For example, in *Wells v. Parker*,[18] a trespass action, the plaintiff's predecessor had told the defendant: " 'You have a perfect right to use water from that well. I give you permission; . . .' "[19] Pursuant to this statement, the defendant had been crossing the plaintiff's land and taking water from a well there for longer than the prescriptive period. The court held that this language was sufficient for the jury to find an intention to grant an easement, which became perfected by prescription. In *Blaine v. Ray*,[20] the plaintiff brought suit to

[15] In Wells v. Parker, 74 N. H. 193, 66 A. 121, 122 (1907), the court said: "The intention in accordance with which the possession was given and received, though different from the legal effect of the transaction, is the important thing, . . ." In Jewett v. Hussey, 70 Me. 433, 436-7 (1879), the test was expressed this way: "The distinction is, whether I grant you a right over or upon my property to use as your own or as my own – as an enjoyment and privilege belonging to you or as belonging to me." In Arbuckle v. Ward, 29 Vt. 43, 53 (1856), the court based the distinction upon whether the permission was perpetual:

> "But the mere fact of showing that the use begun by permission of the landowner is not alone sufficient to defeat the prescription. For if the permission was a perpetual gift, or an unlimited gift or permission to use, and continued for fifteen years the right is perfected."

See also Lechman v. Mills, 46 Wash. 624, 91 P. 11 (1907); Outhwaite v. Foot, 240 Mich. 327, 215 N. W. 331 (1927).

[16] In Blaine v. Ray, 61 Vt. 566, 18 A. 189, 190 (1889), the court said: "It does not matter that the defendant and his grantors did not all, or any of them, know that the orator and his grantor claimed to own the right to take the water by gift." In Klein v. De Rosa, 137 Conn. 586, 79 A. 2d 773 (1951), the court emphasized the fact that the claimant of the easement believed she had a right and never sought permission from anyone.

[17] In Schmidt v. Brown, 226 Ill. 590, 80 N. E. 1071, 1073 (1907), it is said: "Whether the agreement is to operate as a license or as the basis for a claim of right depends primarily upon the language employed by the parties." In Stearns v. Janes, 12 Allen 582, 584 (94 Mass., 1866), the court said:

> "But the character of the use or occupation depends upon the language used and the manner of the enjoyment. If the language is such as to create only a license or a lease, the enjoyment is regarded as permissive, and not as of right, and no title is acquired by it."

[18] 74 N. H. 193, 66 A. 121 (1907).

[19] *Ibid*, 121.

[20] 61 Vt. 566, 18 A. 189 (1889).

restrain interference with his alleged easement to cross defendant's land and take water from defendant's well. The facts showed that the defendant's predecessor had informed the plaintiff's predecessor that he thought a supply of water could be procured by digging in a certain place, and if he would dig there and find water, he might have it and conduct it to his own land. The plaintiff's predecessor then asked if he might have a deed or written contract giving him the right to take the water, but this was refused. The plaintiff and his predecessor had been taking the water for longer than the prescriptive period, and the court held that he had an easement to conduct water from the defendant's land.[21]

There is no requirement of consideration for an oral agreement or permission to be construed as a void attempt to create an easement, and just as many cases as not are ones where there was no consideration.[22] Although the lack of consideration does not appear to be a factor influencing the courts to construe an oral agreement as a mere revocable license in cases where the use under it has continued for the prescriptive period, the presence of consideration will usually be mentioned as one of the factors indicating an intention to create an easement and not a revocable license.[23] In fact, it appears highly unlikely, where there is consideration paid for a use which has extended for the prescriptive period, that the courts will construe the oral agreement as a mere revocable license.

Other facts which the courts take into consideration in determining whether or not an oral agreement was an attempt to create an easement are those indicating what type of use was made of the claimed easement. Although many cases point to various acts of the adverse user as shedding light on the original intention of the parties in making the oral agreement,[24] some cases would place primary importance upon the subsequent acts of the user as indicating a claim of right irrespective of the original intention or lan-

[21] Morrison v. Fellman, 150 Misc. 772, 271 N. Y. S. 436 (1934), is another case where the plaintiff, who was the claimant of the easement, requested that it be put in writing, but was refused, and the court still held that the plaintiff had acquired an easement by prescription.

[22] See Stearns v. Janes, 12 Allen (94 Mass.) 582 (1866), where the court placed a parol gift and parol contract upon equal footing.

[23] Balestra v. Button, 54 Cal. App. 2d 192, 128 P. 2d 816 (1942); Checketts v. Thompson, 65 Idaho 715, 152 P. 2d 585 (1944); Lechman v. Mills, 46 Wash. 624, 91 P. 11 (1907); McKinzie v. Elliott, 134 Ill. 156, 24 N. E. 965 (1890); Wortman v. Stafford, 217 Mich. 554, 187 N. W. 326 (1922).

[24] This is the approach of the Court of Appeals in Phillips v. Phillips, 215 Md. 28, 135 A. 2d 849 (1957).

guage of the parties.[25] This is reasonable, since the basis of the doctrine is not that the use for the prescriptive period renders an invalid grant valid, but that the invalid grant is merely an indication of use under claim of right and not mere revocable permission.[26] Some specific factors mentioned by the courts as indicating whether use was under a claim of right and whether the intention of the original agreement was to grant an easement or a mere license are: whether the user publicly claimed an easement;[27] whether or not an annual rent was paid for the use;[28] whether the right of way was specifically defined;[29] whether or not the claimed right of way was fenced;[30] whether the user ever sought any permission subsequent to the agreement;[31] whether the user spent money and labor upon the claimed easement;[32] and generally, whether the grantee has used the claimed easement "as if it were legally conveyed."[33] It might be said that the same factors, indicating whether or not use was adverse and under a claim of right in cases where the use did not have its inception in an oral agreement, are applicable in cases where the use began under such agreement, either to show the nature of the agreement or to show whether or not the use is under a claim of right irrespective of the language of the agreement.

Where there has been use under a void oral agreement for the prescriptive period, the courts have been very reluctant to call it permissive under a mere revocable license. Perhaps this is used as a way to get around the rule that mere licenses are revocable, even where money and labor has been spent by the licensor, which is the

[25] In Coventon v. Seufert, 23 Ore. 548, 32 P. 508, 510 (1893), the court seems to express this idea:

> "It is no objection to granting an easement by prescription that the same was originally granted or bargained by parol. That the use began by permission does not affect the prescriptive right, if it has been used and exercised for the requisite period, under a claim of right, . . . If the use of a way is under a parol consent given by the owner of the servient tenement to use it as if it were legally conveyed it is a use as of right. . . . The plaintiffs have used the ditch as if it had been legally conveyed to them, — that is, they have exercised such acts of ownership over it as a man would over his own property; and the court must presume, in the absence of any evidence to the contrary, that the settlement was a parol consent or transfer . . . of the right to use the ditch, and hence it was a use as of right."

[26] *Supra*, n. 9.
[27] Wortman v. Stafford, 217 Mich. 554, 187 N. W. 326 (1922).
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] Klein v. De Rosa, 137 Conn. 586, 79 A. 2d 773 (1951).
[32] Checketts v. Thompson, 65 Idaho 715, 152 P. 2d 585 (1944).
[33] Stearns v. Janes, 12 Allen (94 Mass.) 582 (1866).

majority rule in this country.[34] However, even if it seems far fetched to call these oral agreements attempts to create easements which fail because of the Statute of Frauds, especially in those cases where an agreement in writing was asked for and refused,[35] yet the vast majority of cases, where there has been open and continuous use for the prescriptive period under such an oral agreement, have refused to hold that the use was merely permissive and revocable.

JOHN C. ELDRIDGE

[34] Some cases have confused the rule that use under a void parol grant is under a claim of right and may ripen into an easement by prescription, with the minority rule in this country that where the licensee has spent money or labor in the exercise of his license, the licensor is estopped from revoking it. In Gyra v. Windler, 40 Colo. 366, 91 P. 36, 37 (1907), where there was a claimed parol gift to use a right of way, which continued for the prescriptive period, the court said:

> "The following appears to be the rule in such cases: 'But though a right of way cannot be gained by the parol agreement of him who creates it, yet where, under such agreement, the owner of the dominant estate used the way thus created for 20 years, and the same was acquiesced in by the owner of the servient estate, it was held to be such an exercise of the way, under a claim of right, as to gain thereby a prescriptive right to the same'."

Then, the court, without apparently realizing it is announcing two different rules, states, p. 38:

> "While a parol license to enter upon real estate is generally revocable at the pleasure of the licensor, it is settled that such license cannot be revoked when the licensee, on the faith of the license, with the knowledge of the licensor, has expended his money and labor in carrying out the object of the license. This is on the principle of estoppel'."

[35] Blaine v. Ray, 61 Vt. 566, 18 A. 189 (1889); Morrison v. Fellman, 150 Misc. 772, 271 N. Y. S. 436 (1934).