Law of Easements: Legal Issues and Practical Considerations, Other Methods of Creating Easements

by Kenneth W. Hart, August 2007

Scope: The following is an outline of the common ways that easements are created in Washington other than by express grant, but rather through various judicial doctrines, and in some cases, by private condemnation.

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I. Easement "Conveyances" Exempt from The Deed Recording Act

Ordinarily, any conveyance of an interest in real estate must not only be in writing (RCW 64.04.010) and in the form of a "deed" (RCW 64.04.020), but "a conveyance of real property" must be recorded to be protected against subsequent purchasers and mortgagees. RCW 65.08.070. A "conveyance" is defined very broadly, to include "every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be affected," etc. RCW 65.08.060.

However, as outlined below, there are a number of ways that easements are created other than by express grant, through various judicial doctrines, and in some cases, by private condemnation as authorized by statute. Under Washington common law, interests in real property acquired by prescription are beyond the reach of the recording act because title is founded in possession, not in any documented conveyance, transaction or transfer, between property owners. The property interest created is not derivative, therefore, but rather new, original title, valid and enforceable against a subsequent grantee of the disseseised former owner. *See Mugaas v. Smith*, 33 Wn.2d 429, 206 P.2d 332 (1949) (title obtained by adverse possession, though not evidenced by any instrument of record, is good against a subsequent grantee from the disseseised former owner).

In *Crescent Harbor Water Co., Inc. v. Lyseng*, 51 Wn. App. 337, 345-46, 753 P.2d 555 (1988), the plaintiffs brought a declaratory judgment action for a prescriptive easement. The defendant argued that he qualified as a bona fide purchaser of the property, and that as such, his title to the property was unencumbered by an unrecorded claim of implied or prescriptive easement. The court held, however, that an easement by prescription is not subject to recordation and would be of little value if it were extinguished by a transfer of the servient estate, and therefore, the bona fide purchaser doctrine does not apply to an easement by prescription. 51 Wn. App. at 339.[1]

II. Easements by Prescription

Easements by prescription are created by (1) actual use of another's land in a way one might use an easement, over a uniform route, which is (2) open and notorious (3) hostile, (4) continuous and (5) exclusive. *The Mountaineers v. Wymer*, 56 Wn.2d 721, 355 P.2d 341 (1960); *Gray v. McDonald*, 46 Wn.2d 574, 283 P.2d 135 (1955); *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942); *Downie v. City of Renton*, 167 Wash. 374, 9 P.2d 372 (1932), *rev'g* 162 Wash. 181 (1931).

A useful comparison can be made between the law of prescription and adverse possession. *See* Stoebuck, *The Law of Adverse Possession in Washington*, 35 Wash. L. Rev. 53 (1960), *but see Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). Though prescription and adverse possession developed differently, they are generally treated as parallel doctrines. *See* R. Cunningham, W. Stoebuck & D. Whitman, *The Law of Property* § 8.7 (2d ed. 1993); *Roediger v. Cullen*, 26 Wn.2d 690, 175 P.2d 669 (1946); *State ex rel. Shorett v. Blue Ridge Club*, 22 Wn.2d 487, 156 P.2d 667 (1945); *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942); and *Wasmund v. Harm*, 36 Wash. 170, 78 P. 777 (1904).

The principle distinction between the doctrines is that prescription involves the use of another's land that gives rise to easement rights, whereas adverse possession involves the possession of another's land that gives rise to a claim to title. Thus the term "prescription" and the phrase "adverse use" (or "user") are interchangeable, and the courts (although not always consistently) list the same required elements for prescription as for adverse possession, substituting the term

"use" in the former doctrine for "possession" in the latter. The 10-year statute of limitations on actions to recover land applies to prescription as well as to adverse possession. *Wasmund v. Harm*, 36 Wash. 170, 78 P. 777 (1904); RCW 4.16.020(1). However, the special 7-year statute for adverse possession, (RCW 7.28.070-color of title, good faith, payment of taxes), does not apply to prescription. There are other differences in the way the common elements of proof are applied in the two doctrines, which are discussed below.

A. Actual Use

To begin with, prescriptive use requires proof of some actual, physical use of another's land of a kind that one would make of an easement, for example by walking, driving or maintaining utility lines. The particular characteristics of the use will ultimately define the nature and scope as well as the location of the claimant's prescriptive easement rights. *See, e.g., Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942) (prescriptive roadway easement was only 20 feet wide based upon actual use, even though owner of servient tenement had fenced in a 48-foot strip); *Lee v. Lozier*, 88 Wn. App. 176, 945 P.2d 214 (1997) (a prescriptive easement for a boat dock may be gained by use that tends to be seasonal rather than year round, if the usage is such as would be normal for such an easement). Usually, a prescriptive easement will be on land appurtenant to that of the adverse user, but it is also possible to acquire a prescriptive easement over non-adjoining land, which is a so called easement in gross. *Long v. Leonard*, 191 Wash. 284, 71 P.2d 1 (1937).

The Washington Supreme Court has said that it is at least possible for the public to acquire an easement by prescription. *Gray v. McDonald*, 46 Wn.2d 574, 283 P.2d 135 (1955); *see also State ex rel. Shorett v. Blue Ridge Club*, 22 Wn.2d 487, 156 P.2d 667 (1945); *Roediger v. Cullen*, 26 Wn.2d 690, 175 P.2d 669 (1946). If so, then members of the public who do not own land appurtenant to the easement would have easements in gross. Also, the courts have frequently said that the usage must be over a "uniform route." *See, e.g., Gray v. McDonald*, 46 Wn.2d 574, 283 P.2d 135 (1955); *Roediger v. Cullen*, 26 Wn.2d 690, 175 P.2d 669 (1946); *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942); *Wasmund v. Harm*, 36 Wash. 170, 78 P. 777 (1904). However, it appears that no court has yet denied a prescriptive easement claim for want of proof of uniform use, which arguably leaves open the question whether one may acquire by prescription a "recreational easement," to roam or hike on another's land. *See* R. Cunningham, W. Stoebuck & D. Whitman, *The Law of Property* § 8.7 (2d ed. 1993).

B. Open and Notorious

Open and notorious means only that the use is such that it is reasonably discoverable by an owner. It does not require proof that the owner had actual knowledge, but only that a reasonably diligent owner who looked would discover the usage.[2] In most cases, such as roads or above-ground utility lines, no serious question exists as to whether the use was sufficiently notorious. Thus, if the usage is so open and notorious that an ordinarily vigilant owner would know of it, knowledge will be presumed. *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942); *Downie v. City of Renton*, 167 Wash. 374, 9 P.2d 372 (1932), *rev'g* 162 Wash. 181 (1931).

C. Hostility

"Hostility" simply means that the use was without the owner's permission, or essentially, was trespass. Typically, the adverse user is not obliged to give the owner any express notice of a hostile claim, but rather, hostility is implied from the facts. *See The Mountaineers v. Wymer*, 56 Wn.2d 721, 355 P.2d 341 (1960); *Gray v. McDonald*, 46 Wn.2d 574, 283 P.2d 135 (1955); *Hughes v. Boyer*, 5 Wn.2d 81, 104 P.2d 760 (1940); *Wasmund v. Harm*, 36 Wash. 170, 78 P. 777 (1904). However, when permission was originally given by the owner, the adverse claimant will have to demonstrate facts or circumstances that amount to what is referred to in the law of adverse possession as an "ouster," to overcome the permissiveness of the use. *See* Stoebuck, *The Law of Adverse Possession in Washington*, 35 Wash. L. Rev. 53, 75-76 (1960); *Lee v. Lozier*, 88 Wn. App. 176, 184, 945 P.2d 214, 219 (1997). Verbal notice from the adverse user to the landowner would constitute an ouster, or ouster would be implied from the facts when the usage takes on a character that would reasonably inform the owner that the adverse user now claims a right of use. *See Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942).

An adverse user need not have either a subjective belief that he is the owner of the property he is using or a subjective intent to acquire a prescriptive easement. *Dunbar v. Heinrich*, 95 Wn.2d 20, 622 P.2d 812 (1980); *See also Brown v. Hubbard*, 42 Wn.2d 867, 259 P.2d 391 (1953). *Dunbar* was followed by *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984), in which the court expressly abandoned any requirement of good faith or subjective intent for adverse possession, overruling all the earlier decisions that might have imposed such a requirement.

One important issue regarding the hostility element upon which there is a little Washington authority involves the situation in which neighboring owners establish a mutual driveway by oral agreement. Because of the Statute of Frauds, an oral agreement does not create cross-easements by grant, but may arguably amount to an enforceable license, which would make the reciprocal usages permissive. The courts tend to disagree over whether usage under these circumstances is permissive or whether it has the requisite hostility to create prescriptive easements. R. Cunningham, W. Stoebuck & D. Whitman, *The Law of Property* § 8.7 (2d ed. 1993). In *Lechman v. Mills*, 46 Wash. 624, 91 P. 11 (1907), the court held that use under an attempted oral grant of easement is hostile and prescriptive. Similarly, if a neighbor uses an owner's land in the manner one would use an easement (for a boat dock in this particular case), under an oral agreement by the owner that the neighbor shall have an easement, and the agreement is not for an oral license, the use is "hostile." *Lee v. Lozier*, 88 Wn. App. 176, 945 P.2d 214 (1997) (citing a cross-driveway case, *Washburn v. Esser*, 9 Wn.App. 169, 511 P.2d 1387 (1973)). The reasoning to support this result is that the attempt to create an easement orally is a nullity, having no legal effect to create either an easement or a license.

1. Burden of Proving Hostility versus Permission

Like all of the other elements of adverse use, the burden of proving hostility is nominally on the adverse claimant. *E.g., Gray v. McDonald*, 46 Wn.2d 574, 283 P.2d 135 (1955); *Roediger v. Cullen*, 26 Wn.2d 690, 175 P.2d 669 (1946); *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942). However, this presents a practical problem because hostility simply means lack of permission, meaning the claimant is in the position of having to prove a negative. Some courts have solved this problem by holding that, if the claimant is able to prove all other elements of prescription, there is a presumption that the use was hostile or adverse. *See*

Long v. Leonard, 191 Wash. 284, 71 P.2d 1 (1937); *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942).

Whether the land in question is enclosed and developed or unenclosed and vacant also affects the burden of proof. In cases of enclosed or developed land, if the adverse claimant proves his use has been open and notorious, continuous, and exclusive, this creates a presumption that the use was hostile. This presumption can be rebutted by showing that the owner actually knew of or acquiesced in the adverse claimant's usage. Or, the usage may be so "open, notorious, visible, and uninterrupted that knowledge on [the owner's] part will be presumed," creating, in effect, a counter-presumption to overcome the presumption of permissive use. *The Mountaineers v. Wymer*, 56 Wn.2d 721, 355 P.2d 341 (1960); *State ex rel. Shorett v. Blue Ridge Club*, 22 Wn.2d 487, 156 P.2d 667 (1945); *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 23 P.3d 520 (2001) (public did not obtain prescriptive easement over vacant and unenclosed land where presumption of permissive use not overcome). *See also Todd v. Sterling*, 45 Wn.2d 40, 273 P.2d 245 (1954); and *Roediger v. Cullen*, 26 Wn.2d 690, 175 P.2d 669 (1946) (dictum). On the other hand, if the prescriptive use is of vacant and unenclosed land, the presumption is that the use was permissive. *Northwest Cities Gas Company v. Western Fuel Company*, 13 Wn.2d 75, 123 P.2d 771 (1942).[3]

Some general conclusions that can be drawn from the cases applying the vacant and unenclosed land doctrine are first, that hostility may be implied from the nature of the use without the adverse claimant having to make an express claim, but the usage must be more open and notorious than would otherwise be required if the land was enclosed or developed. As a consequence, proof of the element of hostility is to a considerable extent made to depend upon proof that the use was open and notorious, which is likely to be more difficult for the adverse claimant to show than would be the case if the land was developed, occupied land.

Obviously, if the owner of the land has actually given permission for its use, generally in the form of a license, the usage is not hostile. However, the court in *Huff v. Northern Pacific Railway Company*, 38 Wn.2d 103, 228 P.2d 121 (1951), held that an owner may not protect against adverse claims by foisting permission upon an adverse user. *Huff* involved a dispute between the adverse user of a roadway over a railroad. The railway company notified the claimant that the usage would be permitted while they were negotiating a possible solution to the dispute. The court held that the railroad could not thrust unsought permission on the adverse claimant once adverse use had begun. Thus, the use continued to be hostile, and ripened into a prescriptive easement. This holding poses a serious problem for owners who may be willing to permit another to use their property, but do not want a permissive use to become an easement right with the passage of time.[4]

2. Implied Permission and the Neighborly Accommodation Doctrine

Courts sometimes use the concept of neighborly accommodation to infer permissive use over unenclosed land to defeat a prescriptive easement claim. The analysis is factual, and the Washington Supreme Court has resisted committing to any one strict factual test as to whether it applies. In *Roediger v. Cullen*, the state court used the neighborly accommodation concept to reason that use of a pathway across several waterfront lots on Vashon Island was permissive, and no prescriptive easement was created. 26 Wn.2d 690, 175 P.2d 669 (1946). Several families had used and maintained a footpath that went across each lot; sometimes close to the front or back of the houses. No one ever asked permission to use the path, and the small community would all pitch in to maintain it.

The court implied permissive use because if "'an owner could not allow his neighbor to pass and repass over a trail upon his open, unenclosed land without danger of having an adverse title successfully set up against him,'" neighborly courtesy would be defeated. *Roediger*, 26 Wn.2d at 707-08 (quoting *Clarke v. Clarke*, 66 Pac. 10 (1901):

The law should, and does encourage acts of neighborly courtesy; a landowner *who quietly acquiesces* in the use of a path, or road, across his uncultivated land, resulting in no injury to him, but in great convenience to his neighbor, ought not to be held to have thereby lost his rights. It is only when the use of the path or road is clearly adverse to the owner of the land, and not an enjoyment of neighborly courtesy, that the land owner is called upon "to go to law" to protect his rights.

Roediger, 26 Wn.2d at 709 (quoting, with emphasis added, *Weaver v. Pitts*, 133 S.E. 2 (1926)).

The court held that the use of the property was considered to be permissive at inception. *Roediger*, 26 Wn.2d at 713. The court considered that the use of the land in Roediger was similar to the "pioneer settling" in which the neighborly accommodation doctrine developed because the use of other's property by common consent was inevitable in a time of no public roads. Mutual use of the path was a mere "mutual privilege or license." *Roediger*, 26 Wn.2d at 713.

Since *Roediger*, however, the court seems to have backed away from a broad application of this doctrine. The court distinguished *Roediger* on its facts and declined to apply the neighborly accommodation doctrine in *Gray v. McDonald*, 46 Wn.2d 574, 579, 283 P.2d 135 (1955). Rather than a footpath in a rural area maintained by a small community, *Gray* dealt with property in a city between a platted city street and an alley. *Gray*, 46 Wn.2d at 579. The passage way was used by the general public, that is, strangers rather than neighbors, and "the acts of disseisin were apparent to the servient owner for many years, when he was able in law to assert and enforce his rights." *Gray*, 46 Wn.2d at 579.

Other cases in which the court has backed away from the neighborly accommodation doctrine include *Anderson v. Secret Harbor Farms, Inc.*, 47 Wn.2d 490, 496, 288 P.2d 252, 256 (1955) (the path was not maintained by both the owners of the property and the easement claimants, and there was testimony of past controversy regarding the path's use, so no presumption of permission); *Lingvall v. Bartmess*, 97 Wn. App. 245, 251, 964 P.2d 365, 370 (1998) (ongoing antagonistic relationship between parties negates claim of good will accommodation).

Another factor that affects whether the neighborly accommodation doctrine may be used to affect the burden of proof is whether the owner maintains a road or path and the easement claimant is merely a co-user of the road or path. In these cases, the presumption is that the use is permissive and that the owner is granting neighborly acquiescence or accommodation. *Cullier v. Coffin*, 57 Wn. 2d 624,627, 358 P.2d 958 (1961). If instead, however, the claimant made the road or path himself, this is persuasive evidence that the use is adverse rather than permissive. *Cullier*, 57 Wn.2d at 627.

D. Continuous Use

Prescriptive use must be continuous and uninterrupted, meaning that the usage be as continuous as would be normal if the adverse claimant had a rightful easement. The claimant must at least prove repeated use over the course of the period of the statute of limitations, but need not prove daily use or use on any particular schedule. R. Cunningham, W. Stoebuck & D. Whitman, *The Law of Property* § 8.7 (2d ed. 1993); *Granite Beach Holdings, LLC v. State*, 103 Wn. App. 186, 11 P.3d 847 (2000) (held use of roadway for "two or three times" during 20-year period was not "continuous" enough). "[I]solated" or "occasional" acts of trespass do not constitute "continuous" use. *Downie v. City of Renton*, 167 Wash. 374, 9 P.2d 372 (1932), *reversing* 162 Wash. 181 (1931) (holding that city's annual flooding of owner's land for a day or a few days is not continuous enough to establish prescriptive use.) In *Murray v. Bousquet*, 154 Wash. 42, 280 P. 935 (1929), the court held that seasonal use of high-mountain grazing lands that were snowed in during the winter was not continuous. Both of these decisions demonstrate the overlap between the elements of "notorious" and "continuous," because in both the court expressed doubt that the landowners could be deemed to have knowledge of such infrequent use of their property.

In order to interrupt the continuity of an adverse use, the owner should deliberately block the usage for some appreciable length of time during which the adverse claimant is attempting, or would ordinarily be expected to attempt, to make the use of the property, given its nature and location. A verbal protest is not enough. *See Huff v. Northern Pacific Railway*, 38 Wn.2d 103, 228 P.2d 121 (1951). In fact, by protesting, the owner will have clearly demonstrated that, at least from that point forward, the claimant did not have permission to use his land, and may thereby eliminate any presumption there otherwise might have been that the use was permissive. Thus, if the owner cannot otherwise stop the adverse use, his only recourse may be a lawsuit.

E. Exclusive Use

Another respect in which prescription differs from adverse possession is the application of the element of exclusive use. This is due to the inherent differences between easement rights and rights of possession. With the right of possession comes the right to exclude others for any reason or for no reason. However, an easement holder has only the right of use, and therefore, only the limited right to prevent others from interfering with his use of the easement. A corollary principle is that the owner of property subject to an easement has the right to make any use of his property so long as that use does not actually and unreasonably interfere with the use of the easement.

For example, in *Long v. Leonard*, the court held that although the landowner maintained gates that the adverse user could open, and the landowner shared the use of the roadway, this did not preclude a prescriptive claim. 191 Wash. 284, 71 P.2d 1 (1937): *See also*, R. Cunningham, W. Stoebuck & D. Whitman, *The Law of Property* § 8.1 (2d ed. 1993); *Gray v. McDonald*, 46 Wn.2d 574, 283 P.2d 135 (1955) (landowner apparently used roadway along with other persons); *Hendrickson v. Sund*, 105 Wash. 406, 177 P. 808 (1919); *See also Lingvall v. Bartmess*, 97 Wn. App. 245, 982 P.2d 690 (1999) (owner's occasional use of driveway used regularly by adverse claimant does not prevent "exclusive" use). It follows then, that use of another's land may be "exclusive" as well as prescriptive even if the owner also makes some use of the same area, provided the owner's use would not constitute a wrongful interference with an easement of the kind claimed by the prescriptive user.

Likewise, use may be both prescriptive and exclusive even when there are a number of different adverse users, who will all acquire an easement in common. *See The Mountaineers v. Wymer*, 56 Wn.2d 721, 355 P.2d 341 (1960); *Gray v. McDonald*, 46 Wn.2d 574, 283 P.2d 135 (1955). A corporation may acquire a prescriptive easement through the usage of its employees or members. *See The Mountaineers v. Wymer*, supra (members of non-profit corporation); *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942) (corporate employees). The general public may acquire prescriptive easements for roads in two ways. First, adverse use by the public for 10 years will establish a public way by prescription. *King County v. Hagen*, 30 Wn.2d 847, 194 P.2d 357 (1948); *City of Snohomish v. Joslin*, 9 Wn. App. 495, 513 P.2d 293 (1973). Second, RCW 36.75.070 allows the public to acquire county roads outside incorporated cities by seven years' prescriptive use, when such roads "have been worked and kept up at the expense of the public." *Todd v. Kitsap County*, 101 Wn.2d 245, 676 P.2d 484 (1984), *See also Stofferan v. Okanogan County*, 76 Wash. 265, 136 P. 484 (1913).

F. Prescriptive Period - Tacking

"Tacking" occurs when, for example, the owner of parcel A, who has been making a prescriptive use upon parcel B, conveys parcel A to a grantee who continues that prescriptive use. As is the case with adverse possession claims, "tacking" among successive adverse claimants is possible in the law of prescription. Consequently, the prescriptive use of a succession of two or more users can be added ("tacked") together to determine the total period of adverse use. *See Hughes v. Boyer*, 5 Wn.2d 81, 104 P.2d 760 (1940); *Wasmund v. Harm,*, 36 Wash. 170, 78 P. 777 (1904); *Washburn v. Esser,*, 9 Wn. App. 169, 511 P.2d 1387 (1973).

III. Easements by Implication

Courts will sometimes imply that an easement exists even in the absence of a grant in a written instrument. Although proof of a conveyance of property is necessary to establish the existence of an easement under easement by implication doctrine, the easement is not implied from the language of the instrument of conveyance. Rather, the existence of the easement is implied from the facts and circumstances surrounding the conveyance. Consequently, the Statute of Frauds does not apply to the creation of easements by implication. *See* Comment, *The Implied Easement and Way of Necessity in Washington*, 26 Wash. L. Rev. 125 (1951).

A. Easements Implied from Prior Use

To establish an easement implied from prior use, or what is sometime simply referred to as an implied easement, the following elements of proof are required: 1) a landowner conveys part of his land and (2) retains part, usually an adjoining parcel; (3) before the conveyance, there was a usage existing between the parcel conveyed and the parcel retained that, had the two parts then been separately owned, could have been an easement appurtenant to one part; (4) this usage is reasonably necessary to the use of the part to which it would have been appurtenant; and (5) the usage is "apparent." *See Landberg v. Carlson*, 108 Wn. App. 749, 33 P.3d 406 (2001) (no implied easement between two parcels of land where they were never owned by same owner; no "unity of title"). *MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn. App. 188, 45 P.3d 570 (2002); *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 404 P.2d 770 (1965); *Adams v. Cullen*, 44 Wn.2d 502, 268 P.2d 451 (1954); *White v. Berg*, 19 Wn.2d 284, 142 P.2d 260 (1943); *Hubbard v. Grandquist*, 191 Wash. 442, 71 P.2d 410 (1937); *Berlin v. Robbins*, 180 Wash. 176, 38 P.2d 1047 (1934); *See also* R. Cunningham, W. Stoebuck & D. Whitman, *The Law of Property* § 8.4, n. 2 (2d ed. 1993).

Some courts include a sixth element, that the usage must have been "continuous." This only means the use must be continuous enough to have been the subject of an easement, which is already implicit in element 3 above. *E.g.*, *Adams v. Cullen*, 44 Wn.2d 502, 268 P.2d 451 (1954); *White v. Berg*, 19 Wn.2d 284, 142 P.2d 260 (1943); *Roberts v. Smith*, 41 Wn. App. 861, 707 P.2d 143 (1985); *McPhaden v. Scott*, 95 Wn. App. 431, 975 P.2d 1033 (1999) (use of roadway was not "continuous" where it had not been used for over 30 years).

When all of the required elements are present, an easement exists by implication in favor of the parcel that the usage serves. When the easement is appurtenant to the parcel that was conveyed, the easement is said to be an implied easement by ***grant***. When it is the grantor who seeks to establish an implied easement in favor of the parcel he retains, it is said to be an implied easement by ***reservation***. *Adams v. Cullen*, 44 Wn.2d 502, 268 P.2d 451 (1954).

The underlying rationale used by the courts to explain how easements arise by implication from prior usage, is that a "quasi-easement" existed between the two parcels of property before they were severed, which was transferred by implication in the conveyance. *White v. Berg*, 19 Wn.2d 284, 142 P.2d 260 (1943); *Berlin v. Robbins*, 180 Wash. 176, 38 P.2d 1047 (1934); *Bailey v. Hennessey*, 112 Wash. 45, 191 P. 863 (1920); *Adams v. Cullen*, 44 Wn.2d 502, 268 P.2d 451 (1954). Another way to look at it is that, the new easement is simply created, not expressly by grant in a deed, but by implication as a new easement. *See* Restatement of Property §§ 474, 476, Comment *i* (1944); R. Cunningham, W. Stoebuck & D. Whitman, *The Law of Property* § 8.4 (2d ed. 1993).

1. Necessity

In the law of implied easements, what constitutes "necessary" is often the critical issue. All that need be shown, however, is "reasonable" necessity. *Bushy v. Weldon*, 30 Wn.2d 266, 191 P.2d 302 (1948); *White v. Berg*, 19 Wn.2d 284, 142 P.2d 260 (1943); *Hubbard v. Grandquist*, 191 Wash. 442, 71 P.2d 410 (1937); *Berlin v. Robbins*, 180 Wash. 176, 38 P.2d 1047 (1934); *Bailey v. Hennessey*, 112 Wash. 45, 191 P. 863 (1920); *Roberts v. Smith*, 41 Wn. App. 861, 707 P.2d 143 (1985). The test of necessity is whether the party claiming the right can, at reasonable cost, on his own estate and without trespassing on his neighbors' property, create a substitute. *Adams v. Cullen*, 44 Wash.2d 502, 507, 268 P.2d 451 (1954). A fair statement of law would probably be that "necessary" does not mean strict necessity, but only that other possible routes of use would be substantially less convenient, that is, more expensive to develop and use.

The meaning of "necessary" in this context is well illustrated in *White v. Berg*, 19 Wn.2d 284, 142 P2d 200 (1943), a case involving an implied easement for a water pipeline, and *Bailey v. Hennessey*, 112 Wash 45, 191 P 868 (1920), which involved an easement of access to the rear alleyway entrance to a store building. In *White*, necessity for the implied easement was held to exist, even though it appeared water might have been obtained, but at greater expense, via a pipeline laid along another route. In *Bailey*, necessity was held to exist for the alleyway entrance, despite the fact that the claimant had a front street entrance that did not afford "convenient and comfortable" access for vehicles loading and unloading goods.

2. Apparent Prior Use

The requirement that the pre-existing use be "apparent," such as a driveway or roadway, supports the conclusion that an easement implied from prior use was within the grantor's and grantee's contemplation. This is problematic when the usage is less visible, as for example in the case of

an underground pipeline or a utility. Most courts, however, have taken the position that an underground line is sufficiently apparent if parts of it or appliances connected to it are visible, thus allowing a way to trace the underground line. *Berlin v. Robbins*, 180 Wash. 176, 38 P.2d 1047 (1934), *see also* R. Cunningham, W. Stoebuck & D. Whitman, *The Law of Property* § 8.4 (2d ed. 1993).

White v. Berg, 19 Wn.2d 284, 142 P.2d 260 (1943), involved a pipeline, but the court said it was visible and emphasized that both the grantor and grantee actually knew of it and had discussed it. In *Fossum Orchards v. Pugsley*, the Court of Appeals held that an implied easement for an irrigation pipeline existed, even though the court failed to account for some of the elements of proof. 77 Wn. App. 447, 892 P.2d 1095 (1995). There was no evidence of when the pipeline was installed or whether it existed in a transfer of title from a common grantor, and the pipeline had been removed when the defendant acquired the servient tenement.[5]

Implied easements by reservation, that is, where the claim is that an easement exists in favor of the grantor rather than the grantee, present a conceptual problem. *See generally* R. Cunningham, W. Stoebuck & D. Whitman, *The Law of Property* § 8.4 (2d ed. 1993). When the grantor seeks to establish by implication an easement in his favor that was not expressly reserved in his deed, he does so in derogation of his own grant. Based upon the court's decision in *Adams v. Cullen*, 44 Wn.2d 502, 268 P.2d 451 (1954), an easement implied by reservation may be found to exist, but it appears that a higher degree of necessity is required than would be the case for an easement by implied grant. An easement for a driveway was held to exist in that case, though it appears it was not impossible, but only impractical and expensive, to build a driveway over another route.

B. Easements Implied from Necessity

"Easements implied from necessity" or "ways of necessity," are easements of passage. Where land is sold that has no outlet, the seller, by implication of law, grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser to have access to his property. *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 404 P.2d 770 (1965). The elements of proof are: (1) a landowner conveys part of his land and (2) retains part, usually an adjoining parcel; and (3) after the severance of the parcels, it is "necessary" to pass over one of them to reach a public street or road from the other. *Adams v. Cullen*, 44 Wash.2d 502, 505, 268 P.2d 451 (1954); *Fossum Orchards v. Pugsley*, 77 Wn. App. 447, 451, 892 P.2d 1095 (1995) (citations omitted); R. Cunningham, W. Stoebuck & D. Whitman, *The Law of Property* § 8.5 (2d ed. 1993); *See also* Comment, *The Implied Easement and Way of Necessity in Washington*, 26 Wash. L. Rev. 125, 130-33 (1951). Essentially, the difference between easements implied from necessity and easements implied from prior use is that, with the former there need be no pre-existing use. It is possible to have a circumstance where both doctrines apply, as in the case of land that will have no access after a severance unless a pre-existing roadway is kept open, which was the situation in *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 404 P.2d 770 (1965).

1. Unity of Title and Severance

An easement implied from necessity may exist only between parcels of land that were once one parcel and were then severed. The first factor, unity of title, is essential for the creation of an easement by necessity. The presence or absence of the second and third factors listed above is not necessarily conclusive. Rather, they are aids to determining the presumed intent of the parties as disclosed by the extent and character of the use, the nature of the property and the relation of the separated parts to each other. *Adams v. Cullen*, 44 Wn.2d 502, 505-06, 268 P.2d 451 (1954);

Fossum Orchards v. Pugsley, 77 Wn. App. 447, 451, 892 P.2d 1095 (1995); *Roberts v. Smith*, 41 Wn. App. 861, 865, 707 P.2d 143 (1985).

Hellberg v. Coffin Sheep Co., involved an interesting question of what conveyance means. A landlord had leased part of his land to a tenant, retaining the part that abutted the only public road, so that the tenant had no access to a road except over the landlord's retained land. A principal issue was whether a transfer by lease was a sufficient conveyance for an easement of necessity to arise in the tenant. The court concluded the first two elements were satisfied, and that the evidence substantiated the trial court's finding of "reasonable necessity" for use by the tenant of an existing road across the landlord's property. 66 Wn.2d at 669.

2. Necessity

As is the case with easements implied from prior use, in most easement of necessity cases the serious issue is what "necessity" means. Again, the test is whether the party claiming the right can, at a reasonable cost, on his own estate, and without trespassing on his neighbor's property, create a substitute. *Adams v. Cullen*, 44 Wn.2d 502, 507, 268 P.2d 451 (1954). Likewise, as with easements implied from prior use, "necessary" under this doctrine does not mean strict necessity, but only that other possible routes of use would be substantially less convenient, that is, more expensive to develop and use. *See Hellberg v. Coffin Sheep Company*, 66 Wn.2d 664, 404 P.2d 770 (1965) (access to navigable water may not prevent a court from finding the necessity element).

Since the easement of necessity arises, if at all, at the moment the two parcels are severed, the necessity that existed at that moment, and not at some prior or later time, is what defines the scope of the easement. However, once an easement of necessity is created, its use may gradually change as the uses of the dominant estate changes. Locating the route that the easement should follow is more difficult than with an easement implied from prior use because there is no previously established location. Usually, therefore, the owner of the servient estate is allowed to establish the route in the first instance and, if he fails to do so, the owner of the dominant estate may do so. If neither one chooses, or a dispute arises, the court will fix the route that is most suitable and convenient in the circumstances. *See* R. Cunningham, W. Stoebuck & D. Whitman, *The Law of Property* § 8.5 (2d ed. 1993).

In a case of first impression in Washington, the court held that, when the Federal Government retains an interior parcel after giving patents to all of the surrounding land, there is no implied easement from the interior parcel over any of the surrounding land. Otherwise, the court reasoned, there would be implied easements everywhere in the western United States, since all land title here originated with the Federal Government. *Granite Beach Holdings, LLC v. State ex rel. Dept. of Natural Resources*, 103 Wn. App. 186, 11 P.3d 847 (2000). Also, as the federal Supreme Court observed in *Leo Sheep Co. v. United States*, because the state has the power of eminent domain to condemn a roadway, the Government would have no "necessity" for an easement by implication. *Leo Sheep Co. v. United States*, 440 U.S. 668, 99 S. Ct. 1403, 59 L. Ed. 2d 677 (1979).

C. Statutory Way of Necessity

The common law way of necessity just discussed above should not be confused with Washington's special statutory way of necessity, which provides for private condemnation under RCW Chapter 8.24. Because private parties do not ordinarily have condemnation rights, that

right is specifically provided for in the state constitution (Wash. Const. art. I, § 16), which has been held not to conflict with the United States Constitution. *uddock v. Bloedel Donovan Lumber Mills*, 28 F.2d 684 (9th Cir. 1928); *State ex rel. Mountain Timber Co. v. Superior Court*, 77 Wash. 585, 137 P. 994 (1914).

The statute provides in part that:

An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its ***proper use and enjoyment*** to have and maintain a private way of necessity or to construct and maintain any drain, flume or ditch, on, across, over or through the land of such other, for agricultural, domestic or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch, as the case may be.

(Emphasis added) RCW 8.24.010. The procedure for condemnation "shall be the same as that provided for the condemnation of private property by railroad companies," and the condemner must pay compensation. RCW 8.24.030.

The principal difference between this procedure and the common law easement implied from necessity is that, under the statute, there need not have been a unity of title and severance. The selection of the route is governed by specific criteria set out in RCW 8.24.025, including for example, that the "least-productive" land is to be used if it is necessary to cross agricultural land. In construing the statute, the Washington Supreme Court has been rather strict in fixing the scope of the easement. For instance, the court has refused to allow a condemner to take a roadway any wider than that strictly required to gain access to his land. *See Brown v. McAnally*, 97 Wn.2d 360, 644 P.2d 1153 (1982).

The court is required to consider alternate routes to the landlocked parcel. *Sorenson v. Czinger*, 70 Wn. App. 270, 852 P.2d 1124 (1993). However, the court may not consider an alternate route that will not provide access to that portion of the landlocked property that the condemnor desires to use. In *Sorenson v. Czinger*, the condemnee proposed an alternate route that, among other problems, would only have provided access to the eastern portion of a landlocked parcel, whereas it was the western portion that was usable as a building site and the property was divided by a cliff. *Id*.

If the property involved already has an existing easement, whether by grant, by implication or otherwise, condemnation under the statute is not available, provided the existing easement already provides adequate access. *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 404 P.2d 770 (1965) (dictum); *Roberts v. Smith*, 41 Wn. App. 861, 707 P.2d 143 (1985). The existing alternative access route must be a legally enforceable easement, however, not merely a revocable license. *Brown v. McAnally*, 97 Wn.2d 360, 644 P.2d 1153 (1982). The condemnor has the burden of proving both reasonable necessity and the absence of another feasible route. *Sorenson v. Czinger*, 70 Wn. App. 270, 852 P.2d 1124 (1993). Private condemnation may not, moreover, be used to condemn state land. *Granite Beach Holdings, LLC v. State ex rel. Dept. of Natural Resources*, 103 Wn. App. 186, 11 P.3d 847 (2000).

On account of the "proper use and enjoyment" language used in the statute, the condemner of a roadway need not show that his land is totally landlocked, but only that he has a "reasonable" necessity to condemn a way of access to it. *See State ex rel. Huntoon v. Superior Court*, 145

Wash. 307, 260 P. 527 (1927) (when existing access to public road was only over a lake, condemner did not have "reasonable" access). In *Beeson v. Phillips*, 41 Wn. App. 183, 702 P.2d 1244 (1985), the court liberally interpreted "reasonable" necessity when it allowed the plaintiffs to condemn a roadway to the upper part of their land, despite the fact that they had access to a lower part, but the two parts were separated by a steep bluff.

As with public condemnation, the affected property owner in a private condemnation action is entitled to be compensated for the land taken or damaged. RCW 8.24.030. In addition, in an action for the condemnation of land for a private way of necessity, the statute provides that "reasonable attorneys' fees and expert witness cost may be allowed by the court to reimburse the condemnee." RCW 8.24.030. Even if the condemnation action is later abandoned and no taking occurs, the condemnor is still obligated to pay the condemnee's legal fees. *Beckman v. Wilcox*, 96 Wn. App. 355, 979 P.2d 890 (1999), *rev. denied*, 139 Wn.2d 1017 (2000). Thus, the private condemnation statute is a remedy of last resort for the landowner who has no other reasonable means of access.

IV. Litigation

A. Ejectment and Quieting Title

Disputes between owners and adverse users of real property are resolved in an action to quiet title and/or for ejectment. Quiet title and ejectment claims can be brought in the same suit. *O'Neal Land Co. v. Judge*, 196 Wash. 224, 82 P.2d 535 (1938). Jurisdiction lies in the superior court of the county where the real property is situated. RCW 7.29.010.

The type of action chosen depends upon which party brings suit. An owner seeking to prevent an adverse usage of his property would bring an action for ejectment, and probably for quiet title as well, to remove the "cloud" from his title by seeking a determination that someone else's claim, or potential claim, to an easement is not valid. A "cloud" on title is not limited to actual encumbrances, but can include anything that casts doubt on ownership. *See, e.g., Robinson v. Khan*, 89 Wn. App. 418, 948 P.2d 1347 (1998) (recorded personal services contract created on plaintiff's title).

The adverse claimant, on the other hand, would use a quiet title action to establish his right of use.[6] Depending on the circumstances, the parties might be able to cure some clouds on title themselves, informally and without litigation, working directly with a title company. For example, affidavits can sometimes be used to establish (or clarify) the description or location of an easement. Also, a quitclaim deed can be used to relinquish an easement or potential easement.

1. Statutory Basis - RCW 7.28

RCW 7.28.010 provides that:

Any person having a valid and subsisting interest in real property and a right to the possession therefore, may recover the same by an action in the Superior Court of the proper county…and may have judgment in such action quieting or removing a cloud from Plaintiff's title.

As noted earlier, this statute applies to prescription claims, as well as to adverse possession, and bars the owner from bringing an action to clear his title unless he does so within ten years of the commencement of the prescriptive use. *See generally* Chapter 7.28 RCW.

2. Service by Publication

Quiet title actions will often involve the claims and/or potential claims of heirs, known or unknown. For this reason, it is important to review the requirements and procedures that allow for service by publication and to follow them closely. "If the defendant be absent or a nonresident of this state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons…" then service may be accomplished by publication. RCW 7.28.010. RCW 4.28.100(5) similarly provides that "when the subject of the action is real…property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly, or partly, in excluding the defendant from any interest or lien therein" then service may be made by publication.

3. Description of Property

RCW 7.28.120 requires the plaintiff to describe the property "with such certainty as to enable the possession thereof to be delivered if a recovery be had," and accordingly, the complaint should always include a complete legal description. *See City of Centralia v. Miller*, 31 Wn.2d 417, 197 P.2d 244 (1948) (property description enabling anyone of reasonable intelligence to locate it is sufficient), and *Silverstone v. Harn*, 66 Wash. 440, 120 P. 109 (1912) (quiet title complaint is not sufficient where it did not contain property description).

4. Proper Parties

Before commencing suit, a form of title insurance policy known as a litigation guaranty should be obtained to ensure that all parties with interest of record in the property at issue are joined in the action, so as to bind them to any judgment entered by the court.

"Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same…" RCW 7.28.010. Therefore, proper plaintiffs in a quiet title action would include the beneficial owner of property held in trust by another. *Anderson v. Blossom*, 63 Wn.2d 330, 387 P.2d 507 (1963). This would include parties who claim an interest in property previously dedicated by non-related entities to the public. *Nelson v. Pacific County*, 36 Wn. App. 17, 671 P.2d 785 (1983), *rev. denied*, 100 Wn.2d 1037 (1984). A trustee may bring an action to quiet title, *Ritchie v. Trumbull*, 89 Wash. 389, 154 P. 816 (1916), as can the beneficiary of a resulting trust. *Lew You Ying v. Kay*, 174 Wash. 83, 24 P.2d 596 (1933). A party claiming an interest in real property through homestead may bring a quiet title action against a purchaser at an execution sale, *Domke v. Beck*, 18 Wn.2d 568, 139 P.2d 1017 (1943), or the purchaser at a judicial sale. *Sandberg v. Murphy*, 134 Wash. 685, 236 P. 106 (1925).

The holder of a mortgage, however, does not have a possessory interest, and therefore, may not recover possession in a quiet title or ejectment action. RCW 7.28.230 provides that a mortgage of real property is not to be deemed a conveyance "so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and the sale according to law." *See Norlin v. Montgomery*, 59 Wn.2d 268, 367 P.2d 621 (1961), *overruled on other grounds by Kendrick v. Davis*, 75 Wn.2d 456, 452 P.2d 222 (1969).

B. Extinguishment of Easement as Affirmative Defense to Quiet Title and Ejectment Claims

A defendant in a quiet title or ejectment action must plead the nature of his or her estate or right to usage or possession. RCW 7.28.130; CR 8(c). In pertinent part, the statute provides that "[t]he defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof unless the same be pleaded in the answer." For one claiming the right to an easement, possible bases include prescription, implied easement, and the statutory right of private condemnation of a way of necessity. Affirmative defenses available to the owner of the property might include the neighborly accommodation doctrine discussed above, or one or more of the various theories of extinguishment discussed below.

1. Extinguishment by Adverse Possession

An easement, whether originally established by express grant or prescription, can be extinguished through adverse use by the owner of the servient estate. *Howell v. King County*, 16 Wn.2d 557, 559-60, 134 P.2d 80 (1943); *Lewis v. City of Seattle*, 174 Wash. 219, 223-25, 24 P.2d 427 (1933), *aff''d*, 27 P.2d 1119 (1933). The same principals that govern acquisition of title by adverse possession and acquisition of an easement by prescription would apply to the fee owner's claim. *City of Edmonds v. Williams*, 54 Wn. App. 632, 634, 774 P.2d 1241 (1989); *Burkhard v. Bowen*, 32 Wn.2d 613, 203 P.2d 361 (1949). In other words, the land owner can adversely dispossess an adverse user. However, since the fee owner already has the right of possession, he already has the right to use that portion of his property that is subject to an easement in any way he wishes so long as his use does not interfere with the use of the easement. Therefore, the fee owner will obviously have to show much more that mere possession and use to satisfy the hostility element of prescription.

For example, the owner of property subject to a walking path was found to have extinguished the easement by adverse possession in *Slak v. Porter*, 875 P.2d 515 (Or. Ct. App. 1994), where the servient owner blocked the entrance to the easement with a fence, and over the years had landscaped the easement with trees and shrubs. The court found this to be consistent with the assertion of ownership, thus establishing the exclusivity element of adverse possession. *Slak*, 875 P.2d at 519. In *Shelton v. Boydstun Beach Association*, 641 P.2d 1005 (Idaho Ct. App. 1982), the court held that the construction of a retaining wall, the erection of fences, and the planting of grass and flowers by the owner of the servient estate was wholly inconsistent with an easement for boating, bathing, driving and parking.

A caveat to this analysis, which only applies to easements by express grant, is a line of cases that indicate that, where no occasion has yet arisen for the use of an easement, any use made of the property by the fee owner is not adverse, unless it is clearly inconsistent with the future use of the property for easement purposes. *City of Edmonds v. Williams*, 54 Wn. App. 632, 636, 774 P.2d 1241 (1989); *Beebe v. Swerda*, 58 Wn. App. 375, 793 P.2d 442 (1990); and *Thompson v. Smith*, 59 Wn.2d 397, 367 P.2d 798 (1962). The implication is that the owner of the servient estate cannot begin counting time toward extinguishing the easement by adverse possession until some attempt to use the easement has been made.

In *City of Edmonds*, the court reasoned that not only was there no attempt to use the easement by the owner of the dominant tenement, but that construction and maintenance of a fence "is not a sufficiently inconsistent use of the easement area to constitute adverse possession." 54 Wn. App. at 636. This is dicta, however, because *City of Edmonds v. Williams*, was decided on the basis that adverse possession cannot run against the state. 54 Wn. App. at 634-35. In *Thompson*, the owner of the property over which there was an unused road easement constructed a concrete pad for parking. *Thompson*, 59 Wn.2d at 407. The court reasoned that because the easement was not being used, there was no interference with the use of the dominant estate's easement. But, "if and when such a roadway is put in, the slab, if it is an interference, would have to be removed." *Thompson*, 59 Wn.2d at 409. Although this logic seems to support an argument that adverse possession of an easement does not begin until the easement is in use, the land owner in *Thompson* was not claiming adverse use at all, but rather was only claiming the right to use his property as he wished until such time as a roadway was developed.

Nevertheless, both *Thompson* and *City of Edmonds* are cited by *Beebe v. Swerda*, to support the proposition that "[t]he owner of a servient estate has the right to use his land for purposes not inconsistent with its ultimate use for reserved easement purposes during a period of nonuse." *Beebe*, 58 Wn. App. at 384. This use "is not adverse to the owner of the dominant estate," and did not extinguish the easement by adverse possession. *Beebe*, 58 Wn. App. at 384. Note, however, contrary authority such as *Timberlane Homeowners Ass'n, Inc. v. Brame*, 79 Wn. App. 303, 901 P.2d 1074 (1995). *Timberlane Homeowners Ass'n, Inc.*, concluded that *Thompson* and *City of Edmonds* only involved whether a party's actions were sufficiently inconsistent with the use of an easement to prove adverse possession not whether the elements of adverse possession were satisfied. Another case, *Barnhart v. Gold Run, Inc.*, distinguished *Thompson* on its facts and said that because in *Barnhart* a residence and other permanent structures, not just a mere concrete slab, were built in the easement and existed for the requisite period, adverse possession was established and the easement was extinguished. *Barnhart v. Gold Run, Inc.*, 68 Wn. App. 417, 423 n. 2, 843 P.2d 545 (1993).

2. Extinguishment by Abandonment or Estoppel

Other principles that have been applied to extinguish easements created by express grant should, at least in theory, apply as well to prescriptive and implied easements. For example, an easement may be abandoned. Absent an express declaration of abandonment, mere nonuse does not in and of itself constitute abandonment, but nonuse does constitute relevant evidence, which may justify a finding of abandonment. Restatement of Property, §504, *Comment d* (1944). And, an easement will be extinguished where the intention to make no use of it is clearly evidenced by the parties, usually an affirmative act by the owner of the dominant tenement to permanently not use the easement. *Schumacher v. Brand*, 72 Wash. 543, 130 P. 1145 (1913); *McCue v. Bellingham Bay Water Company*, 5 Wash. 156, 31 P. 461 (1892); *See also Abbott v. Thompson*, 641 P.2d 652 (Or. Ct. App. 1982); Annot., 25 A.L.R.2d. §10 at 1293 (1952).

Where an alley way through the lots of the parties was never constructed or used, after 20 years of occupancy of the lots with no reference being made to the right-of-way, a presumption of abandonment arose, which the court found had not been rebutted in *Hunter v. West*, 90 S.E. 130 (N.C. 1916). Similarly, in *Hickerson v. Bender*, 500 N.W.2d 169 (Minn. Ct. App. 1993), more than 20 years of nonuse of an ingress-egress easement, with no objection to numerous obstructive improvements being placed on the easement, was held sufficient evidence of abandonment. In *Comeau v. Manzelli*, 182 N.E.2d 487 (Mass. 1962), abandonment was found

where a right-of-way was not used for over 20 years and the way was made impassible by trees and iron posts.

Also, if the owner of an easement, by his nonuse and its accompanying circumstances, has misled the owner of the property to believe the easement does not exist and into materially changing his position on that assumption, the easement owner may be estopped from asserting rights in the easement. *See, e.g., Goo Leong Shee v. Young Hung*, 36 Haw. 132 (Haw. 1942).

3. Extinguishment by Express Release

An easement may also be terminated if its then holder or holders execute a proper instrument releasing the easement to the grantor or his successor. Since an easement is an interest in land that normally is created by an instrument in deed form, it must be released in the same manner. This is true even if the easement was acquired in a non-documentary way by implication or prescription, for, once acquired, it is as much an interest in land as if it had been acquired by a written instrument. *Gray v. McDonald*, 46 Wn.2d 574, 579, 283 P.2d 135 (1955).

4. Extinguishment by Merger

An easement is extinguished by merger when servient and dominant tenements come into common ownership. Coast Storage Co. v. Schwartz, 55 Wn.2d 848, 351 P.2d 520 (1960). This is considered a merger of the easement into title. The policy behind merger is that an owner, whose title encompasses all the rights included within the easement, simply cannot own the same rights twice. The easement is not revived if the owner in whom it has been "merged" later conveys the land to another, unless upon express grant contained in the deed. *See Radovich v. Nuzhat*, 104 Wn. App. 800, 16 P.3d 687 (2001) (even if former easement was extinguished by merger, a new easement may be created by conveyance that expressly creates such easement). *See also* W. Stoebuck & D. Whitman, *The Law of Property* § 8.12 (3d ed. 2000).

Footnotes

[1] Similarly, an easement implied from prior usage or an easement implied from necessity, both of which are discussed below, need not be recorded to have priority over subsequent interests. *See* 4 American Law of Property § 17.8 (A. J. Casner ed. 1952).

[2] In several decisions, however, the court has said that the owner must have "knowledge" of the adverse use. *Huff v. Northern Pac. Ry. Co.*, 38 Wn.2d 103, 228 P.2d 121 (1951); *State ex rel. Shorett v. Blue Ridge Club*, 22 Wn.2d 487, 156 P.2d 667 (1945); *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942); *Hughes v. Boyer*, 5 Wn.2d 81, 104 P.2d 760 (1940); *Downie v. City of Renton*, 167 Wash. 374, 9 P.2d 372 (1932), *rev'g* 162 Wash. 181, 298 P. 454 (1931); *See also Murray v. Bousquet*, 154 Wash. 42, 280 P. 935 (1929) (adverse possession case). One commentator has noted that the court does "not really mean it" when it requires actual knowledge because either the knowledge did not actually matter to the outcome of the cases, or the court presumed knowledge if the usage was "so open and notorious that an ordinarily vigilant owner would know of it. . ." *Washington Practice*, Vol. 17, Chapter 2, § 2.7 (2003).

[3] Dicta in a couple of Washington decisions, which do not appear to involve vacant land, also speak of a presumption that the use of another's land is permissive. *Mood v. Banchero*, 67 Wn.2d 835, 410 P.2d 776 (1966); *Gray v. McDonald*, 46 Wn.2d 574, 283 P.2d 135 (1955); *Kunkel v. Fisher*, 106 Wn. App. 599, 23 P.3d 1128 (2001).

[4] The following hypothetical situation is used by the author in *Washington Practice*, Vo.l 1, Chapter 2, § 2.7 *Easements by Prescription* to illustrate this problem: "[S]ay, the owners of a shopping center who know that persons living in the vicinity frequently drive through the center as a shortcut. If a posted sign giving permission will not break the hostility of use, what practical way is there to avert the danger of prescriptive easements? Lawsuits against a large number of persons, many of whom are not identifiable, are not practical. Nor is it practical physically to bar entrance with log chains or the like, for this could not be done on business days, and blockage on holidays, when no one wants to drive through, would not likely break the continuity of the usage."

[5] Complicating matters, however, is the 1928 case of *Ashton v. Buell*, 149 Wash. 494, 271 P. 591 (1928). In that case, the court concluded that a pre-existing sidewalk, perfectly visible on the surface, was not "apparent" because by casual observation without a survey it could not be determined that it lay upon the alleged servient tenement.

[6] As discussed in Section I, title acquired by prescription is not subject to Washington's recording act. However, if the adverse user wins a court judgment declaring his title, then a certified copy of that judgment should be recorded to begin a new chain of recorded paper title.