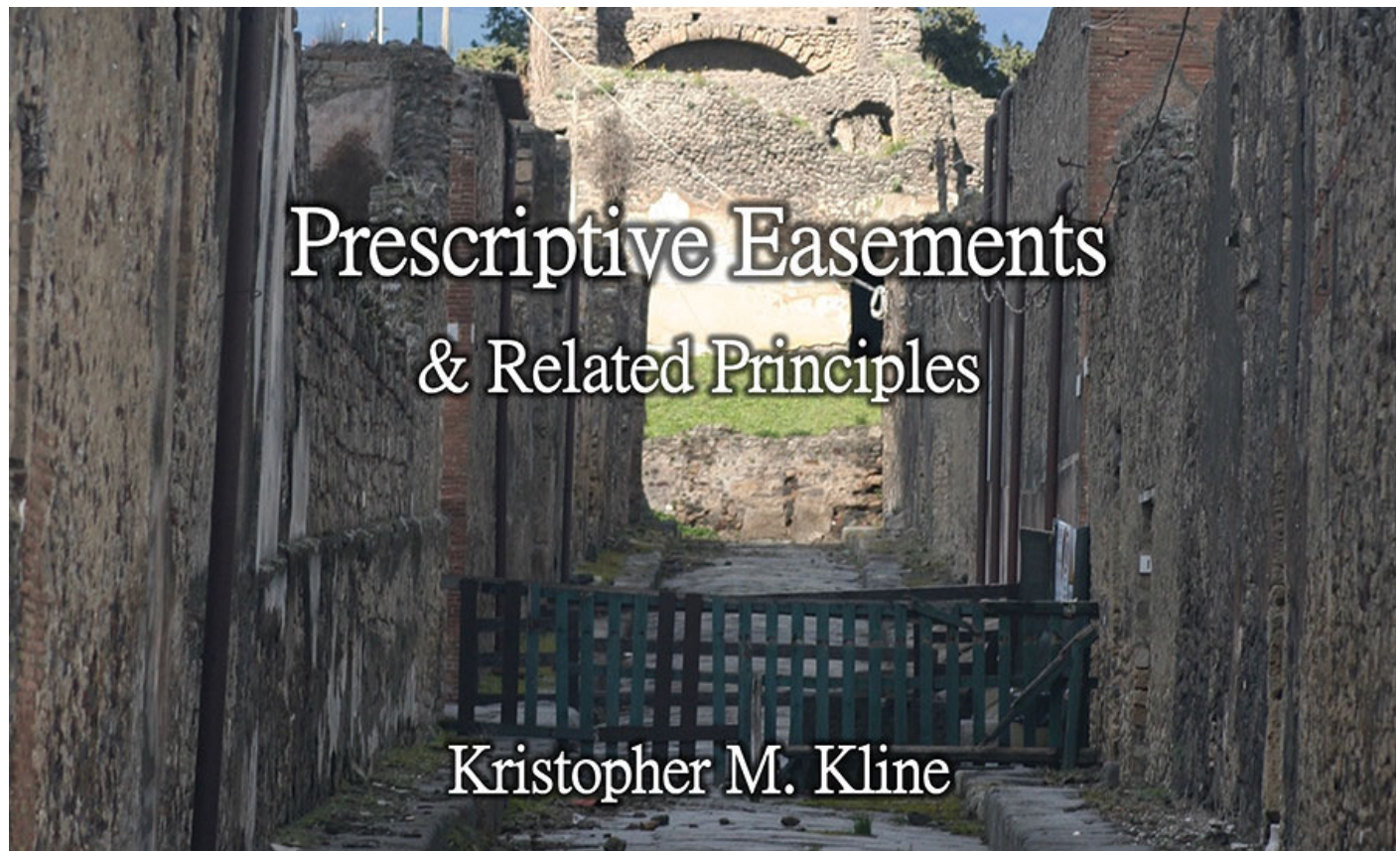


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Prescriptive Easements and Related Principles



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The following passages are excerpts from Kris Kline's latest book "Prescriptive Easements & Related Principles." (200 pages, softcover.) Note: The format of this book includes cites within the text rather than as footnotes. Copies of the book are available only from the author at www.2point.net.

If we pull up the very roots out of which easements grew (that is, the presumption that there must have been a grant for the use to persist over twenty years) we are immediately thrown on the necessity of judicially legislating our own conditions of 20 years of adverse possession. I have grave doubts whether we can keep the strands of our legal fabric from becoming very much tangled by simply saying that “all the elements involved and necessary to establish a prescriptive easement are elements of adverse possession.” **Big Cottonwood Tanner Ditch Co. v. Moyle, 174 P.2d 148 (Utah 1946)**

Introduction: What is a Prescriptive Easement?

The unfortunate truth is that easements — prescriptive or otherwise — have been treated as “poor relations” or insignificant side issues for centuries. This collective lapse has been perpetuated by land use professionals, the courts and the general public. My current book, *Prescriptive Easements & Related Principles*, unites my continued fascination with prescriptive rights with a growing interest in easements and other incorporeal servitudes. My intent is to reach beyond the more heavily documented area of adverse claims of fee title and, instead, focus on topics that have been marginalized in previous works.

Chapter 2: Actual Use & “Ancient Light”

Golf Balls

A recent Oregon decision chronicles an unusual dispute that highlights the difficulties of proving open and notorious use based on minimal entry onto the disputed parcel. In this case, the owners of a driving range attempted to prove a prescriptive right based on the poor aim of their customers.

Beers v. Brown: 204 Ore. App. 395; 129 P.3d 756 (2006) begins with various attempts by the neighbors to eliminate or minimize errant golf balls on their land — and occasionally through their windows. Among other developments, the driving range owners had constructed a 70-foot fence to deflect the unintentional bombardment. Despite these efforts, the spheres continued to fly, though their numbers temporarily decreased because of the barriers.

In 2000, the driving range was redesigned, with a corresponding increase in the volume of unwanted sporting equipment. This increase was sufficient that various parties visiting the neighbors were able to collect several hundred golf balls that ended up outside of the driving range property limits.

The owners of the golf course claimed a prescriptive right to launch golf balls onto the neighbors’ land. This claim ultimately failed in part due to the definitions that the Oregon court applied to the terms “open” and “notorious.”: We proceed by addressing the open or notorious requirement. To satisfy that requirement, a use must have been such that the servient owner had a “reasonable

opportunity to learn of its existence and nature.” ... “The purpose of the requirement that the use be open or notorious is to give the owner of the servient estate ample opportunity to protect against the establishment of prescriptive rights.” ... Thus, satisfying the requirement serves to notify the owner that the use will continue — and eventually ripen into a prescriptive easement — unless he or she takes action to stop it. The court concludes that the neighbors knew of the incursions, but they did not rise to the level that would put prudent owners on notice that their property rights were at risk.

Chapter 4: Private Prescriptive Easements

Prescriptive easements for private access can be created for a variety of specific purposes including automobile traffic, foot travel, horseback riding and maintenance. Prescriptive rights also may be created for private utilities, party walls, and (in some cases) limited parking. A few recent decisions delve into the interaction of prescriptive claims and condominium law.



Prescriptive easements exist outside the normal hierarchy of recorded deeds and other documents. They are not the same as easements implied by prior use, which are an extension of the intent of the parties implied from recorded deeds.

Common Law Requirements

At a minimum, most states require that the claimant of a prescriptive easement prove:

- Actual use of the land of another
- Claim of right
- Open and notorious use
- Continuous use
- Uninterrupted use
- Substantial identity of the location and scope of use
- Actionable behavior (i.e., without permission)
- A required duration

In addition to the items above, some jurisdictions impose additional requirements:

- Actual or constructive notice and apparent acquiescence of the servient estate owner
- Exclusive use
- Hostility

- Adverse use
- Color of title

Regardless of jurisdiction, all required elements from statute and common law must be fulfilled throughout the full limitation period. As with adverse possession, failure to prove any element will negate the claim. Courts will not recognize prescriptive rights based on fragmentary and incomplete evidence.

One of the difficulties inherent in dealing with prescriptive easement law is finding concise and applicable definitions of the many terms associated with the doctrine. Standard dictionary definitions may not be appropriate, because legal terms often acquire unique connotations that are only applied within the narrow parameters of a specific area of law.

Neighboring Accommodation vs. Acquiescence

Courts walk a fine line when attempting to differentiate between neighboring accommodation and acquiescence. A recent Montana court decision invested considerable effort into defining the difference in **Lyndes v. Green: 325 P.3d 1225 (2014)**: Montana law recognizes that land use based upon “mere neighboring accommodation” is not adverse use and cannot ripen into a claim for a prescriptive easement.

However, it is well established that a landowner’s passive acquiescence to another’s use of his land is not evidence of permissive use...

Implied acquiescence is not the same as permission. On the contrary, possession has been held to be adverse where possession was with forbearance of the title holder who was aware of another’s possession and failed to prohibit it. Therefore, possession may be adverse even though the owner does not interfere with entry and the possessor understands there will be no future interference with his possession.

In 1949 the Minnesota court capsulized the crucial distinction between “acquiescence” and “permission” as it exists with regard to the law of adverse possession: “It must be apparent, therefore, that ‘acquiescence’ and ‘permission’ as used in the connection are not synonymous. ‘Acquiescence’ regardless of what it might mean otherwise, means, when used in this connection, passive conduct on the part of the owner of the servient estate consisting of failure on his part to assert his paramount rights against the invasion thereof by the adverse user. ‘Permission’ means more than mere acquiescence; it denotes the grant of a permission in fact or a license.”

Chapter 6: Existing Roads, Gates & Locks

Easement disputes where the claimant developed a new road or track over the lands of another can be comparatively straightforward when the claimant is the only party using the road. One basic

question in many jurisdictions (particularly over undeveloped and unenclosed lands) is whether the road is unimproved or improved. **See Chapter 4: Private Prescriptive Easements: Woodland Exception.**

Where both claimant and defendant are using the same road, additional questions arise that will affect presumptions of adverse/permissive use and determinations of open and notorious use. In these cases, the court often will attempt to place the dispute into one of several categories:



- Improved roads constructed by the landowners on their own land that subsequently are used by the claimant
- Existing roads of unknown origin that cross private land and are used by both dominant and servient owners
- Existing roads crossing multiple tracts claimed as public prescriptive ways
- Roads built by a unit of government despite the lack of an easement or other authorization or right.

In all settings listed above, the presence or absence of gates, locks and cattle guards can play a key role in determining whether the use will be determined adverse or permissive. In addition, the level of road maintenance will be considered along with the identity of the individual(s) responsible for maintenance and repair.

Chapter 8: Water & Profits a Prendre

Some prescriptive claims fall outside of the more typical easements for access — private or public — and are not associated with utility lines. In those more typical instances, the easements generally are bound to a discrete location and a limited use that does not eliminate the rights of the servient owner. This chapter considers prescriptive easement claims that — in some cases — severely impair the rights of the servient owner and may encumber a large portion of the servient tract.

Categories of Disputes Relating to Water

Several problems can arise when water rights and prescription are central to a dispute. Prescriptive rights may in some situations and jurisdictions be perfected:

- to flood an area associated with a mill dam
- to divert a watercourse, thus depriving others of the benefits of riparian ownership
- to transport water via acequias or irrigation ditches
- for the use of the water itself in those areas of the country where prior appropriation

principles apply.

Prescription by Submergence

The New York court recognizes that raising the level of a dam and the resulting additional submergence of neighboring tracts can create a separate prescriptive period for the increased burden imposed by the additional flooding. **Baldwin v. Calkins: 10 Wend. 167 (1833)** describes the construction of a dam and the subsequent inundation of a portion of the neighboring tract. Ten years later, the top of the dam was raised, resulting in additional flooding. The court concluded that after the then-current 20-year prescriptive period had passed on the original flooding, the claimant is entitled to the right defined by the original dam construction but not to the additional area inundated by the later improvements to the dam.

New Hampshire courts link rights associated with a dam to the Lost Grant Theory in **Burnham v. Kempton: 44 N.H. 78 (1862)**. In this case, the dam had existed from 1764 to the date of litigation — a span of almost a century. Judge Sargent includes dam maintenance within the range of action that can create a prescriptive right: To us it seems that twenty years' maintenance of a dam in a particular mode is evidence of a grant or right so to maintain it, and twenty years' use of the water in a particular way is evidence of a right thus to use the water. Sargent also points out that the evidence that proves the right also sets its limits. In this case, the quantity of water — and power provided—to drive a grist mill was determined by the needs of the mills then in existence.

Chapter 10: Abandonment & Prescription

Abandonment of an existing easement is not synonymous with interrupted use or lack of continuity during the prescriptive period — i.e., before the easement has been perfected.

The Alaska decision **Swift v. Kniffen: 706 P.2d 296 (1985)** demonstrates the difficulty in selecting appropriate terminology. In this instance, the court considers the effects of extreme weather conditions on both continuity of use and possible abandonment: The fact that the road was sometimes unplowed and impassable for weeks at a time does not signify either abandonment or interrupted use. First, to establish abandonment the period of non-use must indicate that the adverse user had ceased his use and claim. Failure to plow and use a road for a few weeks in winter in Fairbanks does not demonstrate that the Swifts no longer intended to use the road...

In this case, the court uses the term 'abandoned' to describe the cessation of adverse use rather than in reference to an existing right.

Traditional principles of common law abandonment are applicable both to private record and prescriptive easements. However, they often are deemed inappropriate when extinguishing an established public way. In some states, public prescriptive easements provide a notable exception

to this rule due to their unique origins. As will be seen below, several courts have concluded that common law abandonment is applicable to public ways created by prescription.

Interruption & Permission are Not Abandonment

The common law elements for creation of prescriptive easements tend to foster confusion when considering the termination of an existing prescriptive right. Once all requirements have been met, the prescriptive easement exists. Any claim of abandonment then must be decided based on rules of abandonment proved by actions that occurred after the right was perfected.

This distinction is highlighted in the Colorado decision **Westpac v. Residences at Little Nell: 284 P.3d 131 (2011)**: The test for use during the prescriptive period required to establish an easement is not equivalent to whether an established easement has been abandoned. “Common law abandonment must be established by clear, unequivocal, and decisive evidence of affirmative acts on the part of the owner of the easement manifesting an intention to abandon the easement.” As occurred in this instance, parties often argue interruption or lack of continuous use after the limitation period is fulfilled and the easement has been perfected. This court follows the widely held rule that once a prescriptive easement has been perfected, the intent to abandon is not established by brief interruptions or short periods of non-use.

This decision also affirms that prescriptive easements can be extinguished by the Doctrine of Merger, although the facts of this case precluded the application of the doctrine. See further discussion of the Doctrine of Merger in **Chapter 12**.

In the Montana decision **Renner v. Nemitz: 33 P.3d 255 (2001)**, the court concludes that permissive use is immaterial when considering a claim of abandonment of a private prescriptive way. Permissive use is a major consideration before the prescriptive right is perfected, but is irrelevant after its creation is complete.

Clearly, the claimant does not understand the difference between creation and abandonment of prescriptive easements. The case cited by the claimant (**Morrison v. Higbee 204 Mont. 515 (1983)**) does not mention abandonment. Rather, it concludes only that the easement never existed at all because initial permission defeated its creation.

In correcting yet another misunderstanding, the Connecticut decision **Boccanfuso v. Conner: 873 A.2d 208 (2005)** emphasizes the difference between abandonment of an easement and its extinguishment by prescription: First, it is clear that abandonment by the dominant estate owner and adverse use by the servient estate owner are separate and distinct methods by which an easement may be extinguished. Abandonment must be proved by actions of the owner of the dominant estate. Adverse acts by the servient party, regardless of how well it establishes intent to extinguish the easement, are not evidence of intent of the dominant party. Further discussion of

adverse use by the servient owner is found in Chapter 11.

There is no quick and simple way to look at a potential easement and determine the source of the right. Comprehensive research combined with a clear understanding of the relevant statutory and common law principles is key to making an appropriate determination. Documents—both recorded and unrecorded—should be analyzed, and all relevant actions by the parties should be considered in light of appropriate legal principles.

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