EASEMENT:
TITLE BY PRESCRIPTION:
VESTED IN PETTIS COUNTY: Easement in real estate may not be acquired by adverse possession but may be acquired by prescription by continuous subjection of servient estate to uses for which the easement is intended for a period in excess of ten years. The unorganized public cannot obtain fishing rights by prescription. Right to take fish resides in owner of land occupied by water, except in cases where land and water are owned by different persons, then right exists in the owner of the water.

December 27, 1950

FILED
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Honorable William F. Brown
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Mr. Brown:

We are in receipt of your recent letter requesting an opinion of this department. Your letter is as follows:

> "I shall appreciate it if you will give me your official opinion with respect to the rights of the public and of the State of Missouri and of Pettis County relative to the following:
>
> "On the 17th day of October, 1936, Ernest E. Breisch and Margaret G. Breisch, husband and wife, executed the 'Easement and Dedication' of which the enclosed is a full copy. It is particularly called to your attention that the land upon which the easement was granted was described as being in the Northwestern part of the Northwest Quarter of the Southeast Quarter of Section 31, Township 44, Range 22.
>
> "For some reason unknown to me, the lake was not constructed on any part of the Northwest Quarter of the Southeast Quarter of Section 31, Township 44, Range 22, but a lake was constructed with the use of W.P.A. labor on the Northwest Quarter of the Northeast Quarter of Section 31, Township 44, Range 22, said last described land being also the property of Ernest E. Breisch and Margaret G. Breisch, husband and wife. There has never been recorded in this county any conveyance of an easement or dedication for a lake on the tract where the lake was in fact constructed.

"Mr. and Mrs. Breisch no longer own the land but by a series of conveyances the land now belongs to one Kerfoot. While the land still belonged to Mr. and Mrs. Breisch the State Conservation Commission stocked the lake with fish and many people from various parts of the county (and perhaps elsewhere) have in the past, without seeking any permission from any proprietor, made use of the lake for fishing and swimming.

"Of comparatively recent date Mr. Kerfoot has erected at the premises signs to the effect that the property is private property and directing people to 'keep out'. Mr. Kerfoot contends, first, that there was never any grant of an easement for the construction of the lake at the site where the lake was built, and second, that even if the public has any rights at all in and about the premises the rights of the public are confined to the removal of water from the reservoir when and if (but only when and if) the County Court of the County shall declare that a drought condition exists.

"It has been suggested that the Prosecuting Attorney owes to Mr. Kerfoot the aid of his office to prevent or to punish the repeated acts which Mr. Kerfoot contends are trespasses. On the other hand, those persons who are interested in the contrary view call attention to the wording of the dedication which tends to indicate a very broad dedication to the State of Missouri for the use and benefit of the public, and at another place in the deed of easement the dedication is to the County of Pettis for the use and benefit of the public.

"Specifically, will you give me your opinion in answer to the following:

"1. Does the fact that the lake in question was constructed with W.P.A. labor (and most likely as a part of the water conservation program) have the effect of imposing upon the land any easement or rights in favor of the county, the state or the public, even though the lake was not constructed on any land upon which an easement was granted by any deed now appearing of record.

"2. If your opinion is that the county, the state and the public have any rights in the premises, are the rights of the public confined to entering the property to remove water in the event a state of drought

> condition shall be declared to exist by the County Court, or are the rights of the public general to such extent that all members of the public may enter at will to fish, swim, etc."

We comment that examination of the facts stated in your original letter and your supplementary letter under date of December 11, 1950, and examination of the copy of the grant transmitted therewith show the following facts:

(1) There was a grant from the owners of the northwest quarter of the southeast quarter of Section 31, Township 44, Range 22 in Pettis County, Missouri, of an easement for the creation and maintenance of a lake on said property for reservoir purposes as a part of the water conservation program of the State of Missouri and the United States Government, said grant being to the County of Pettis for the use and benefit of the public.

(2) No lake was ever constructed on said northwest quarter of the southeast quarter of Section 31, but almost immediately after the date of the aforesaid grant the W.P.A. did construct a lake on the northwest quarter of the northeast quarter of said Section 31, which land was then owned by the same persons who owned the land as to which the easement hereinabove mentioned had been granted.

(3) There is no record of any conveyance of an easement to Pettis County for the creation and maintenance of the lake hereinabove mentioned and now existing.

(4) The Conservation Commission of the State of Missouri has stocked the lake with fish.

(5) The present owner of the land on which the lake is located denies that either Pettis County or any members of the public have any rights whatsoever in connection with this lake and denies the existence of any fishing rights vested in the public.

(6) The existing lake was constructed soon after October, 1936, and certainly much more than ten years ago.

(7) The practice of fishing and swimming in the lake by members of the public generally and apparently without asking permission from anyone has been common ever since the lake was constructed and certainly for more than ten years.

We are of the opinion that the fact that as shown by the grant of easement referred to above it was intended that the W.P.A. should construct a reservoir as a part of the water conservation program of

the United States Government and the State of Missouri for the County of Pettis for the use and benefit of the public, coupled with the fact that it did, shortly after the date of the aforesaid grant, create the existing reservoir, gives rise to a presumption, rebuttable only by evidence to the contrary, that the existing reservoir was created by the County of Pettis for the use and benefit of the public.

We are of the further opinion that the facts above deduced show that the waters of this lake have occupied the ground covered thereby continuously for a period of time considerably in excess of ten years. We are therefore of the opinion that Pettis County has used the land occupied by the waters of this lake for lake purposes continuously for a period in excess of ten years.

Taking into consideration the facts above set forth, we must consider the following questions:

(1) Has the County of Pettis in its capacity as trustee for the public acquired an easement for lake purposes in the land occupied by the lake either by adverse possession or by prescription?

(2) If it has acquired such easement either by adverse possession or prescription, does the county as trustee for the public own the water in he lake?

(3) Has the public, by reason of the fact that many persons have fished in the lake from time to time for a period far in excess of ten years, acquired title by prescription to fishing rights therein?

(4) If the county is the owner of the water in the lake for the use and benefit of the public, does that fact alone entitle the public to fish in the lake?

(5) If the public has a right to take the fish in the lake because the county as trustee for the public owns the water in the lake can the right of ingress and egress, for fishing purposes, to and from the lake over the land adjacent thereto be implied therefrom?

In connection with question No. 1 above, which is whether or not the county, in its capacity as trustee for the public, has acquired an easement for lake purposes in the land occupied by the lake either by adverse possession or by prescription, we first allude to the fact above stated that the land occupied by the lake has been so occupied for a period of time considerably in excess of ten years, and second, we quote the following from Section 1002 R.S.A. Mo. 1939:

> "No action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be commenced, had or maintained by any person, whether citizen, denizen, alien, resident or non-resident of this state, unless it appear that the plaintiff, his ancestor, predecessor, grantor or other person under whom he claims was seized or possessed of the premises in question, within ten years before the commencement of such action."

We are of the opinion that the above quoted section does not directly apply to the facts above stated in such a way as to give the county an adverse possession title to an easement for the use of the land occupied by the reservoir. We are of this opinion for two reasons, (1) this statute specifies actions for the recovery character is not classed as a hereditament but as an incorporeal hereditament and (2) for the reason that it seems to have long been the doctrine of the common law, adhered to by the decisions of the Supreme Court of Missouri, that an easement cannot be acquired by adverse possession for the reason that adverse possession must be exclusive possession of the land, whereas an easement in land is not necessarily dependent upon exclusive possession, the owner of the fee being entitled to use the land for purposes not connected with or inconsistent with the easement, and the owner of the easement being entitled to use the land only for the purposes of the easement. However, while title to an easement cannot be acquired by adverse possession, the Missouri decisions have held that it may be acquired by prescription. Title by prescription is based on the common law doctrine of "Lost Grant," in other words, because of the fact that the person who claims an easement has used the land for a long period of time without interruption by the owner of the fee, the law presumes that the owner or his predecessor in title has at some time in the past made a valid grant of the right claimed and that that grant has been lost. The Missouri decisions have held that, since title to easement may be acquired by prescription by the lapse of a long period of time without protest against the use of the land for the purposes of the easement by the owner of the fee, it is logical to fix the time required for the acquisition of such title by prescription in accordance with the time provided by the adverse possession statute, which, as indicated by the section quoted above, is ten years.

The propositions which we have hereinabove stated are supported by the Missouri decisions in the case of Boyce v. Missouri Pacific Ry. Co. 168 Mo. 583, 68 S.W. 920, and also in the much later case of Riggs v. Springfield, 344 Mo. 420, which last cited case cites

the Boyce case with approval. In the Boyce case, supra, it was decided by the Court that a railroad company, which had constructed its railroad across a tract of land without any kind of a grant or verbal permission whatever from the owner of the fee and had maintained its railway track on said land far in excess of ten years, had acquired title to an easement for railroad purposes by prescription. The following is a quotation from the Boyce case, supra:

> "It is with this in mind that the first contention of the plaintiff, that the statute of limitations does not apply to easements, must be considered.
>
> "Originally in England, easements were said to lie wholly in grant. Easements are incorporeal hereditaments, and statutes of limitation were held to apply only to actions for the recovery of land. Afterwards the fiction of a 'lost grant' was adopted by the courts. That is, the courts presumed from the long possession and exercise of right by the defendant, with the acquiescence of the owner, that there must have been, originally a grant by the owner to the claimant, which had become lost. 'It was called a lost grant, not to indicate that the fact of the existence of the grant originally was of importance, but to avoid the rule of pleading requiring profert.' (Railroad v. McFarlan, 43 N.J.L. 605.) It was considered the duty of the court to enforce the fiction, 'not, however, because either the court or the jury believe the presumed grant to have been actually made, but because public policy and convenience require that long-continued possession shall not be disturbed.' (Jones on Easements, sec. 161, p. 138.) Pollocak, B., in the recent case of Bass v. Gregory, 25 Q.B.D. 481, decided in 1890, said the fiction of 'lost grant' has been adopted by almost all civilized nations for the furtherance of justice and the sake of peace. Formerly it was held to apply only to cases where the defendant claimed a right to possession by prescription, that is that his right began at a period beyond the 'time whereof the memory of man runneth not to the contrary.' Lately in England and in most of the United States the rule has been adopted that the period for acquiring an easement in lands corresponds to the local statute of limitations as to land.

> For it was said, 'It would be irrational to hold that an easement may not be acquired by the same lapse of time required to confer title to the land by adverse possession.' (Jones on Easements, sec. 160, p. 134, and cases cited in notes.) And this is the doctrine ably announced by Ellison, J., speaking for the Kansas City Court of Appeals, in House v. Montgomery, 19 Mo. App. l.c. 179, after an exhaustive review of modern authorities.
>
> "Hence, while statutes of limitation do not directly apply to actions in which easements or other incorporeal hereditaments are involved, still by judicial construction an adverse user of an easement for the period specified in the statute barring actions for the recovery of lands, is now by analogy held to be a conclusive judicial presumption of a prescriptive right, by a lost grant. (Jones on Easements, secs. 161, 172, and cases cited; 10 Am. and Eng. Ency. Law (2 Ed.), p. 426, and cas. cit.) It is the accepted rule however, that, 'the user, to perfect title by prescription to an easement, must be exercised by the owner of the dominant tenement and must be open, peaceable, continuous, and as of right.' (Railroad v. Bloomington, 167 Ills. 9; Conyers v. Scott, 94 Ky. 123; Swan v. Munch, 65 Minn. 500; Hoyt v. Carter, 16 Barb. 212 Bushey v. Santiff, 86 Hun 384; Costello v. Harris, 162 Pa. St. 397.)
>
> "This doctrine was recognized by this court in Pitzman v. Boyce, 111 Mo. 387, and it was there said, 'And such adverse user for the statutory period will give origin to the rebuttable legal presumption of a grant, even though the use in its inception was a trespass.' * * *"

We are of the opinion that the doctrine enunciated in the portion of the opinion above quoted is applicable to the facts set forth in your letter and we are therefore of the opinion that in view of the fact that the land in question has been occupied by the county for reservoir purposes for more than ten years the county has acquired title by prescription to an easement for that purpose.

We are of the further opinion that since the lake was constructed for the county by the W.P.A. for the use and benefit of the public and, since the county has acquired title by prescription to an easement in the land occupied by the lake for lake purposes,

the county, as trustee for the public, owns the lake and the water therein.

We shall next consider our above question No. 3 which is, "Has the public by reason of the fact that many persons have fished in the lake from time to time for a period far in excess of ten years, acquired title by prescription to the fishing rights therein?" While we find no Missouri decisions on this subject, we are of the opinion that the public has not acquired that right by prescription. The following is a quotation from the opinion of the Supreme Court of Connecticut in the case of Turner v. Selectmen of Hebron, 61 Conn. 175, l.c. 187:

> "Nor could the unorganized public, as such, acquire the right of fishing there either by grant or prescription. A deed or devise to the unorganized public by that name would be void for uncertainty. And there can be no prescription where there can be no grant. Mervin v. Wheeler, 41 Conn., 23; Pearsall v. Post, 22 Wend. 425; Washburn on Easements, 119; Rogers v. Brenton, 10 Q. Bench, 26. Doubtless any member, or each member, of the unorganized public might obtain the right of fishing in that pond in either of the ways mentioned. There is no suggestion of any grant. The right which the committee say was exercised by all the members of the great unorganized public was 'to fish in the pond at all seasons of the year, in boats during the spring, summer and fall, and through the ice in the winter.' If the right so exercised had been completely acquired by long use it would be a right in the nature of a profit a prendre in alieno solo, and must have belonged to each member in gross. The facts show that the right was not exercised as appurtenant to a freehold. Such a right is a mere personal one; it cannot be assigned and it does not descend to heirs."

The above case is cited in support of the proposition that the unorganized public cannot obtain title by prescription to fishing rights by Jones on Easements, Section 79, page 62. We are of the opinion that the unorganized public cannot obtain title by prescription to fishing rights, although an individual might acquire such title by continuous exercise of the practice of fishing for a period of ten years.

We have hereinabove expressed the opinion that the County of Pettis in its capacity as trustee for the public is the owner of the water in the lake. Since that is true, we are of the further opinion that members of the public, as beneficiaries of the trust, have the right to take the fish in the lake. In this connection we quote Section 60 of Jones on Easements, page 46, as follows:

> "The right to take fish in any water not navigable prima facie belongs to the owner of the soil over which the water flows or stands; for the ownership of the soil in ordinary cases carries with it the ownership of the water. But when the ownership of the water is in one person and the ownership of the soil under the water is in another the right of fishing in the water belongs to the former, for he owns the element in which alone the fish can exist. (Underscoring ours.)
>
> "The mere fact that one owns land along the shore of a pond which belongs to another gives him no right to fish in the pond.
>
> "A custom to take fish in alieno solo is not a good custom.
>
> "The right of fishing in navigable waters is common to all, except when an exclusive right has been acquired by grant or prescription.
>
> "But the owner of the soil which is flowed by the water of a pond has no right to fish in such water, when he has released all easements, privileges, and rights in the pond except the right to use a certain quantity of water from it for a mill. Such a release cuts off the right to fish and the releasor cannot thereafter claim such right as incident to his ownership of the soil under the pond."

However, we are of the further opinion that, although the members of the public, as beneficiaries of the county's trusteeship, have the right to fish because of the ownership of the water in the lake by the county, they do not have the right of ingress and egress to and from the lake, for the purpose of fishing, for the reason that the county's ownership of the lake, as trustee for the public, is for reservoir purposes and, while there is, incident to the ownership of the water, the right to take the fish out of the lake, nevertheless the county's easement in the land acquired by prescription was limited to the purposes

for which the lake was constructed and was acquired by reason of the occupancy of the land by the waters of the lake for the time necessary for the acquisition of title by prescription and also by the exercise of the right of ingress and egress over the land not occupied by the water when necessary for the use of the lake for the intended reservoir purposes and, since the fishing rights of the public exist only as an incident to the county's ownership of the lake and are not and could not have been acquired by prescription, neither has the public, nor could it have acquired title by prescription to an easement for ingress and egress to and from the lake over land not occupied by the water for the purpose of fishing.

CONCLUSION

We are accordingly of the opinion that the County of Pettis, in its capacity as trustee for the public, owns the lake with all rights incident to that ownership, including fishing rights therein and has acquired title by prescription to an easement in said land covered by the lake for lake purposes and that members of the public, as beneficiaries of the trust, have equitable title to the lake and to the aforesaid easement and also to the fishing rights, but have no right of ingress or egress for fishing purposes over the land not occupied by the lake, although they do have the implied right of ingress and egress if necessary for reservoir purposes.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General